

OSSE
Office of Dispute Resolution
June 30, 2023

Parent on Behalf of Student,	CORRECTED
Petitioner,	HEARING OFFICER’S
v.	DETERMINATION ¹
District of Columbia Public Schools (Local Education Agency “LEA”)	Hearing Date: June 14, 2023
Respondent.	Counsel for Each Party listed in Appendix A
Case # 2023-0055	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Date Issued: June 22, 2023	

¹ This Corrected HOD is issued to correct typographical or grammatical errors only. No substantive changes have been made. The original HOD issuance date, June 22, 2023, and the applicable appeal date, remain unchanged. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of developmental delay ("DD"). Student attends a DCPS school ("School A"). Student attended School A during school year ("SY") 2021-2022 and SY 2022-2023.

On March 31, 2023, Student's parent ("Petitioner") filed a due process complaint ("DPC") alleging that DCPS failed to provide Student with a dedicated aide consistent with Student's individualized educational program ("IEP"), thus denying Student a free appropriate public education ("FAPE").

Petitioner seeks as relief an order directing DCPS to fund compensatory education and related transportation expenses for the denials of FAPE alleged, to ensure that compensatory education providers are paid promptly, and for DCPS to immediately provide Student with a dedicated aide.

DCPS's Response to the Complaint:

DCPS filed a response to the DPC on April 14, 2023. In its response, DCPS stated, inter alia, the following:

DCPS asserts that Student has not been denied a FAPE; therefore, the request for relief is unwarranted and the complaint should be dismissed with prejudice.

Student is eligible for a dedicated aide per Student's current IEP. Student has been referred to DCPS Central Office ("C.O.") for a dedicated aide. Unfortunately, due to a lack of dedicated aides in the District of Columbia, DCPS's C.O. has been unable to identify a dedicated aide for Student. C.O. has and is routinely working to secure an aide for Student. In the meantime, School A has worked to support Student with as much one-on-one time as possible, as Student is always in a classroom with a minimal number of other students and at least three adults/teachers. School A is also working on rearranging teacher schedules so that a school-based employee can assist Student full-time with one-on-one support that a dedicated aide would provide until C.O. can secure an aide for Student.

While Student's IEP does include a dedicated aide, any lack of one-on-one support has not affected or negatively impacted Student's academics or ability to access the curriculum. School A has and will provide as much one-on-one support to Student as possible until C.O. secures an aide for Student. Student has been afforded a FAPE, and any failure to provide an aide was or is de minimis or has been remedied with continued support throughout the school year.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on April 28, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint (“DPC”) was filed on March 31, 2023. The 45-day period began on May 1, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) was initially due] on June 14, 2023. The parties were unavailable on the hearing dates offered by the Hearing Officer. Petitioner filed an unopposed motion to continue the hearing and extend the HOD due date. The HOD is now due on June 22, 2023.

The undersigned independent hearing officer (“IHO”) conducted a pre-hearing conference on May 4, 2023, and issued a pre-hearing order ("PHO") on May 10, 2023, outlining, inter alia, the issue to be adjudicated.

ISSUE: ²

The issue adjudicated is:

Did DCPS deny Student a FAPE by failing to implement Student’s February 18, 2022, June 16, 2022, and February 10, 2023, IEPs by not providing Student with a dedicated aide?

DUE PROCESS HEARING:

The Due Process Hearing was convened on June 14, 2023. The hearing was conducted via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 20 and Respondent’s Exhibits 1 through 62) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B.⁴

² At the outset of the due process hearing, the IHO reviewed the single issue to be adjudicated from the revised PHO. The IHO revised that issue into three separate issues. The parties agreed to the issue stated herein as to be adjudicated.

³ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁴ Petitioners presented two witnesses: (1) Student’s mother (Petitioner), and (2) an educational advocate who testified as an expert witness. Respondent presented three witnesses, two of whom testified as expert witnesses: (1) the DCPS School A Assistant Principal, (2) Student's School A Special Education teacher and Case Manager, and (3) DCPS's C.O.'s Paraprofessional Support Specialist. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

SUMMARY OF DECISION:

Petitioner held the burdens of production and persuasion on the issue adjudicated. Based on the evidence adduced, the IHO concluded that Petitioner sustained the burden of persuasion by a preponderance of the evidence. The Hearing Officer granted Petitioner compensatory education.

FINDINGS OF FACT:⁵

1. Student resides with Student's parent, Petitioner, in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of DD. (Parent's testimony, Petitioner's Exhibit 10)
2. Student was evaluated and determined eligible under IDEA Part C in December of 2020. DCPS determined Student eligible under IDEA Part B on March 15, 2021, and developed Student's initial individualized educational program ("IEP"). The IEP prescribed 5 hours per week of specialized instruction in general education and the following related services: 240 minutes per month of speech-language pathology ("SLP") and 60 minutes per month of physical therapy ("PT"). The IEP did not prescribe a dedicated aide. (Petitioner's Exhibits 4, 11)
3. Student began attending School A during SY 2021-2022. On October 27, 2021, School A amended Student's IEP to change the present levels of performance ("PLOP"), annual goals, baselines, anticipated dates of achievement, add new specialized instruction and the least restrictive environment ("LRE") statement. The IEP prescribed 1 hour per week of specialized instruction in general education, 4 hours per week of specialized instruction outside general education, and the following related services: 240 minutes per month of SLP and 60 minutes per month of PT. The IEP did not prescribe a dedicated aide. (Petitioner's Exhibit 5)
4. At the beginning of school year ("SY") 2021-2022, Student was in a classroom at School A titled "10/6 inclusion classroom." There are typically 16 students total in this classroom and, at most, six students with IEPs. This classroom is staffed with three adults, including one general education teacher and one special education teacher. In December 2021, Student was moved to a general education classroom at Student's parent's request and remained in the general education classroom through the end of SY 2021-2022. (Witness 4's testimony)
5. DCPS conducted a comprehensive occupational therapy ("OT") evaluation in October

⁵ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the IHO may only cite one exhibit.

2021, with an evaluation report dated December 9, 2021. The evaluator conducted a teacher interview. Student's general education teacher shared the following with the evaluator: Student could sit on the carpet for 20-30 seconds during morning meeting and 1 to 2 minutes if there was a video playing. However, Student tended to roam the classroom, climb on top of tables, knock toys off shelves, and scream and yell in the classroom. Student was not potty trained at the time and could not state when Student needed to go to the bathroom. Student needed assistance with most tasks, including removing Student's coat or backpack. Student did not participate in whole group activities and most often engaged in solitary activity rather than engaging with peers. Student was, at times, aggressive and did not recognize social cues. Although modeling, redirection, and verbal cues were used, Student often did not respond to these interventions. The teacher expressed that Student would benefit from a dedicated aide. (Petitioner's Exhibit 12)

6. On December 16, 2021, DCPS created an evaluation summary report documenting many of Student's challenges: "[Student] requires frequent redirection to sit down and stay within a designated area. [Student] can repeat words and identify some pictures during small group sessions. [Student] can feed [] self, using [] hands and a spoon. [Student] requires some adult support to take off [] coat and hang up [] backpack. [Student] is not fully potty-trained yet, and does not verbally express when Student needs to go to the bathroom. [Student's] limited balance and coordination impacts [Student's] safety when descending the stairs which can impact [Student's] ability to access [the] educational environment." (Petitioner's Exhibit 13)
7. On February 18, 2022, DCPS conducted an annual Student IEP review. The IEP prescribed 5 hours per week of specialized instruction in general education, 5 hours per week of specialized instruction outside general education, and the following related services outside general education: 240 minutes per month of SLP, 60 minutes per month of PT, and 120 minutes per month of OT. The IEP also prescribed 60 minutes per month each of OT and SLP inside general education and consultative services for SLP and OT. The IEP prescribed the services of the dedicated aide for 6.5 hours per day in general education to begin on March 9, 2022. The anticipated achievement date for Student's IEP goals was February 17, 2023. (Petitioner's Exhibit 6)
8. The February 18, 2022, IEP noted the following: Student presents with delayed expressive and receptive language skills which impact Student's ability to effectively communicate basic wants and needs. Student would benefit from visual supports and verbal modeling to aid Student's ability to communicate with adults and peers. Student continues to have difficulty with motor speech and expressive and receptive language skills as demonstrated by Student's difficulty expressing basic wants and needs (e.g., needing to use the bathroom, requesting a mask break, requesting a desired toy, or requesting assistance). Direct speech therapy has been implemented to support Student's verbal language output with slow progress. Therefore, the IEP team considered a dynamic voice output communication device to assist communication. (Petitioner's Exhibit 6)
9. Student's IEP progress report noted that during the third and fourth quarters of SY 2021-

2022, Student made progress demonstrating age-appropriate peer interactions, structured play, and progressed in related service goals. However, Student made no progress in transitioning from one activity to the next with prompting and no progress in Student's toileting goals. (Respondent's Exhibit 44)

10. On June 14, 2022, a staff member from DCPS's C.O. ("the observer") conducted a classroom observation of Student at School A to determine "the appropriateness of the assignment for a dedicated aide request." Student was in the general education setting for the observation. The observer noted the following from her observation:

Student was initially engaged in play activity alone in one area of the classroom, and other students were engaged in a different activity in another. Student did not seek interaction with peers and stayed in the same area most of the time. The classroom teacher interacted with Student on several occasions. She later prompted all students to put away their toys and come to the center of the classroom. Student did not follow directions, and the teacher verbally prompted Student to put the toys away but instead Student moved to another part of the classroom and continued to play. The teacher prompted Student a second time, Student then put the toys away and walked to the center of the classroom to join the other students. Student needed two verbal prompts to follow through with the teacher's requests.

Once Student was at the center, Student sat down independently in a small cube seat. Student's teacher noted that since the chair had been used, Student's engaged in whole group activities most of the time rather than getting up and walking around the room, as Student previously did. Student later engaged in lunch activity without incident. Student joined in the center circle activities with other students, and the teacher involved Student on several occasions by calling Student's name and reinforcing ■ interactions through verbal praise.

After the activities ended, the class was prompted to get lunch and return to the center. Student required prompts and guidance to get Student's lunch and return to the center. Student sat down, and a staff member helped Student to open Student's lunch. Student sat in place the entire 20-minute lunchtime. Student's teacher then prompted the students to pick up and go back to the front center carpet area. Student went to the carpet center area but did not pick up Student's lunch when leaving the table. Student interacted with two other students nearby, lightly pushing and playing with them. Student then sat back down, and the teacher picked up Student's lunch at the table.

When all students were prompted to use the bathroom, Student needed some assistance. After the bathroom break, all the students were called individually to get in line, and Student complied. The teacher shared with the observer that she had to hold Student's hand because there were times when Student would run away. All students then transitioned to play at the playground for recess. Student was in the general education setting and, throughout the day, tended to isolate from both peer and staff interactions. The observer noted that Student was copying peer behaviors and becoming more curious about them and their interactions. The observer noted that the teacher and aide did an excellent job creating opportunities for Student to interact and engage with peers and participate in activities.

(Witness 3's testimony, Respondent's Exhibit 48)

11. The observer recommended that the School A staff contact DCPS's C.O. regarding a placement for Student in a self-contained special education program. She also recommended a formal psychological evaluation to better determine what services and programming would be appropriate for Student. She recommended that the assistive technology ("AT") request be reviewed for the use of a device and subsequent training of staff and parents on the device selected. She listed a variety of strategies that she recommended as being essential to be used in the classroom for Student to access the curriculum appropriately, including, but not limited to, a visual class schedule, and a staff schedule to work with students with more significant needs. (Witness 3's testimony, Respondent's Exhibit 48)
12. On June 16, 2022, DCPS amended Student's IEP to add AT, specifically a dynamic voice output communication device. Student continued to be eligible for dedicated aid. The anticipated achievement date for Student's IEP goals remained February 17, 2023. (Petitioner's Exhibit 7)
13. Petitioner obtained an AT evaluation, dated August 19, 2022, from the Hospital for Sick Children ("HSC") Pediatric Center. The evaluation noted that Student could not meet functional communication needs with natural speech and required augmentative and alternative communication ("AAC") resources and strategies to communicate wants and needs with others. The evaluation noted Student's strong receptive language skills and vocabulary and ruled out "Med-Tech" AT devices. The evaluator suggested "No-Tech" and "Low-Tech" options be used and that a speech-generating device be tried. She noted that Student would always need an AAC device. (Petitioner's Exhibit 14)
14. DCPS conducted a psychological evaluation dated September 2, 2022. The evaluator interviewed Student's general education teacher and noted the following teacher comments: Student struggled with following directions and classroom norms and had poor impulse control. Student was easily distracted and often exhibited disruptive behaviors such as yelling and defiance. She stated that Student was a "runner" and needed 100% support outside a contained environment. Based upon the teacher's feedback, the evaluator concluded that Student met the criteria for autism spectrum disorder ("ASD") classification. The evaluator noted the difference in rating scales administered to Student's teacher and parent, and concluded the continuation of the DD classification was appropriate. The evaluator made recommendations, including Student's continued participation in specialized instruction and therapeutic services. However, she did not recommend either that Student's placement in a general education setting continue or that it be changed to a self-contained setting. (Petitioner's Exhibit 15)
15. Student returned to the 10/6 inclusion classroom at the start of SY 2022-2023 and has remained in that classroom. During most of SY 2022-2023, there have been only nine students in Student's 10/6 classroom, resulting in a 3 to 1 student to adult ratio. (Witness 2's testimony, Witness 4's testimony)

16. Student's IEP progress report noted that during the first quarter of SY 2022-2023, Student was progressing in goals in adaptive/daily living skills and cognitive skills, and some SLP and OT goals. Student mastered one physical and health goal. Some SLP and OT goals had yet to be introduced. (Respondent's Exhibit 45)
17. On November 28, 2022, the observer from DCPS's C.O. conducted a second classroom observation of Student at School A to determine "the appropriateness of the assignment for a dedicated aide." The observer reviewed the following as a part of her observation: the dedicated aide procedural checklist form, IEP dated February 28, 2022, and the psychological evaluation dated September 2, 2022. At the time of the observation, there was a general education and special education teacher in the classroom and nine students. The observer noted that throughout the observation, Student needed redirection and prompting to follow directions but did not display any disruptive behaviors. Student complied with the teacher's requests after the first or second request. (Witness 3's testimony, Respondent's Exhibit 51)
18. The observer created a report with recommendations dated December 9, 2022, in which she stated the following: "[Student] would benefit from a smaller classroom setting – (reduced class size and reduced sound and movement can assist with reducing overstimulating behaviors). A small setting with appropriate interventions would allow [Student] to make considerable progress in all areas: academics, behaviors, as well as with daily, adaptive, and life skills. A dedicated aide is the most restrictive intervention, especially when a student is as young as [Student]. "Student is currently in a general education setting where [Student] is displaying behaviors of eloping, tantrums, and impulsivity. The current interventions demonstrated to be beneficial, but it would be best for [Student] to be in a setting that continually integrates sensory opportunities and interventions and strategies specific for students with similar needs throughout the school day; additional interventions include sensory opportunities, visuals, token boards, social stories, first then, behavior charts, etc." The observer included a list of possible effects, including unnecessary dependence on the aide resulting in Student's hesitation to participate in activities without prompting. (Witness 3's testimony, Respondent's Exhibit 51)
19. School A convened an IEP meeting on December 16, 2022, to review the psychological evaluation and the results from the DCPS observation regarding the dedicated aide. Petitioner participated in the meeting. Student's special education teacher participated and shared that Student's teachers saw fewer tantrums from Student and that Student was using physical cues to signal when Student needed support from staff. The special education teacher noted the DCPS observation report recommendation for a small self-contained classroom for Student. The team members noted an opening in the self-contained classroom at School A and agreed that Student's move to that classroom was appropriate. (Respondent's Exhibit 52)
20. On January 12, 2023, School A conducted an annual review of Student's IEP. Petitioner participated in the meeting. The resulting IEP prescribed 5 hours per week of specialized instruction in general education, 10 hours per week of specialized

instruction outside general education, and the following related services outside general education: 240 minutes per month of SLP, 60 minutes per month of PT, 120 minutes per month of OT. The IEP also prescribed 60 minutes per month each of OT and SLP inside general education and consultative services for SLP and OT. The IEP prescribed the services of the dedicated aide for 6.5 hours per day in general education to begin on March 9, 2022, and end on February 17, 2023. (Petitioner's Exhibit 8)

21. Student's IEP progress report noted that during the second quarter of SY 2022-2023, Student was progressing in all IEP goals except a few that had just been introduced. (Respondent's Exhibit 46)
22. On February 10, 2023, DCPS amended Student's IEP to correct the service dates for Student's dedicated aide to begin January 12, 2023, and end January 11, 2024. (Petitioner's Exhibit 9)
23. School A applied several times to DCPS's C.O. for a dedicated aide to be assigned to Student. Based upon the feedback from C.O. School A was informed that Student would not qualify for a dedicated aide. (Witness 2's testimony)
24. DCPS's C.O. is responsible for approving and hiring dedicated aides. Typically, DCPS will only hire a dedicated aide if the aide is recommended and approved by DCPS C.O. However, there are occasions when a dedicated aide is assigned to a Student without the C.O.'s approval. When a dedicated aide is placed on a student's IEP, any school staff member can serve as the dedicated aide. C.O. has recently faced challenges hiring and retaining dedicated aides, so a dedicated aide was not assigned to Student until April 24, 2023. The C.O. is still making efforts to hire a dedicated aide for Student. (Witness 3's testimony)
25. During SY 2022-2023, Student was making steady progress and had reached some of Student's IEP goals. Student's classroom teachers have seen fewer behavioral concerns. From December 2022 until April 2023, nine students have been in Student's classroom, resulting in a student-to-adult ratio of 3 to 1. A long-term substitute has been in Student's classroom since the fall of 2022, and the 3 to 1 student-to-staff ratio has been in effect since then. The long-term substitute was assigned to be Student's dedicated as of April 24, 2023. (Witness 2's testimony)
26. On May 3, 2023, School A convened an annual review of Student's IEP. Petitioner participated in the meeting. The IEP prescribed 5 hours per week of specialized instruction in general education, 10 hours per week of specialized instruction outside general education, and the following related services outside general education: 240 minutes per month of SLP, 60 minutes per month of PT, and 180 minutes per month of OT. The IEP also prescribed 60 minutes per month of OT and 90 minutes of SLP inside general education and consultative services for SLP and OT. The IEP prescribed the services of the dedicated aide for 6.5 hours per day in general education to begin on May 3, 2023, and end on May 2, 2024. (Petitioner's Exhibit 10)
27. This IEP notes the following regarding Student's need for adult prompting and

redirection:

“[Student] is currently a Pre-K4 student. In class, [Student] can sustain attention and participate in group activities for approximately 3-4 minutes. [Student] requires constant adult redirection to re-engage in small and whole group activities. [Student] is most focused and engaged in music and movement activities.”

“[Student] has made a lot of progress in toileting. [Student] now wears underwear to school and can urinate in the toilet. [Student] sometimes needs adult assistance to adjust [Student’s] clothing before using the bathroom. [Student] takes scheduled bathroom breaks. [Student] inconsistently verbally expresses the need to use the bathroom between scheduled breaks. Sometimes [Student] will walk towards the bathroom without saying "pee pee" or "bathroom."

"During transitions from preferred to non-preferred activities, [Student] requires max verbal, tactile cues to stop [Student's preferred activity."

28. The May 3, 2023, IEP meeting notes reflect the following: “The team determined specialized instruction hours would remain the same. The team increased time in the general education setting for SLP. OT hours have shifted for outside general education, as noted above. Petitioner's advocate inquired about what a small group structure looks like. The special education teacher shared that it is no more than three students, and often 1:1. Student will continue to have access to the AT device. [Staff member] continues to act as student’s dedicated aide.” (Respondent’s Exhibit 58)
29. During SY 2022-2023, Student was making steady progress and had reached some of Student’s IEP goals. Student’s classroom teachers have seen fewer behavioral concerns. From December 2022 until April 2023, nine students have been in Student's classroom, resulting in a student-to-teacher ratio of 3 to 1. A long-term substitute has been in Student's classroom since the fall of 2022, and the 3 to 1 student-to-staff ratio has been in effect since then. The long-term substitute was assigned to be Student's dedicated as of April 24, 2023. (Witness 2’s testimony, Witness 4’s testimony, Respondent’s Exhibit 43, 44, 45, 47, 52)
30. Student’s IEP progress report noted that during the third quarter of SY 2022-2023, Student was progressing in two of the three adaptive/daily living skills and had mastered the third goal. Student was progressing with all other IEP goals except a single OT goal that had just been introduced. (Respondent’s Exhibit 47)
31. Petitioner's educational advocate opined that had Student been provided the support of a dedicated aide from February 18, 2022, to June 14, 2023, Student would have been able to make more significant progress in academic, social-emotional, communicative, and fine and gross motor growth, helping Student to navigate social and behavioral situations, helping Student develop more advanced fine and gross motor skills. The advocate proposed the following as compensatory for the alleged denials of FAPE: 216 hours of independent tutoring, transportation to and from the tutor, 24 classes of recreational

therapy, 48 hours of OT, 8 hours of SLP, 48 hours of PT, reimbursement to Petitioner for private services Petitioner engaged and the AT device Petitioner purchased, school staff training on the use of Student's AT device, and reservation of further compensatory pending cost of training. (Witness 1's testimony, Petitioner's Exhibit 19)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved;
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of persuasion on the issue adjudicated. ⁶ The burden of persuasion shall be met by a preponderance of the evidence.

⁶ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement, provided that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Did DCPS deny Student a FAPE by failing to implement Student's February 18, 2022, June 16, 2022, and February 10, 2023, IEPs by not providing Student with a dedicated aide?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL 2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006)

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202) upra, 137 S. Ct. 988.

Pursuant to 34 C.F.R. § 300.324 (b) (1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual

goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

Pursuant to 34 C.F.R. § 300.323, at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

In reviewing a claim of failure to implement an IEP, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant" or, in other words, whether the deviations from the IEP's stated requirements were "material." *See Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir.) Sept. 11, 2007). Where an LEA's failure to implement is material (not merely de minimus), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. *See Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

Petitioner asserts that Student's well-documented challenges and potential for success led the IEP team to add dedicated aide services to Student's IEPs beginning on February 18, 2022. Petitioner further asserts that although the IEP team has consistently affirmed Student's need for this support in subsequent IEPs, Student has not received the dedicated aide services to which Student is entitled. Petitioner asserts Student has not made the level of progress that Student could have if the aide had been provided.

On the other hand, DCPS asserts that a dearth of dedicated aide availability has resulted in the delay in securing an aide. Student has been provided a dedicated aide as of April 24, 2023, a result of School A restaffing, while DCPS continues its search to hire a dedicated aide for Student. DCPS also asserts that any harm to Student from failing to provide a dedicated aide has been de minimus, given the low student-to-staff ratio and other supports Student has been provided at School A.

The evidence demonstrates that Student made steady progress relative to IEP goals and mastered some. Student's IEP progress reports for SY 2021-2022 and SY 2022-2023 note that Student made progress demonstrating age-appropriate peer interactions, structured play, and progress in related service goals. Although Student made no progress in Student's toileting goals and transitioning from one activity to the next with prompting during SY 2021-2022, Student has since achieved these goals. Student's special education teacher and the School A

sassistant principal both credibly testified that Student's classroom teachers have seen fewer behavioral concerns and Student has and is making steady progress on Student's IEP goals.

Both Petitioner and DCPS have made arguments regarding the harm, or lack thereof, to Student that resulted from DCPS's failure to implement Student's IEP by providing a dedicated aide from February 18, 2022, to April 24, 2023. However, a denial of FAPE when an IEP has not been implemented is not dependent upon a student suffering educational harm. Rather, as noted above, the proportion of services mandated by the IEP compared to the services provided is the crucial measure for determining whether there has been a material failure to implement the IEP.

Based on the proposal submitted by her educational advocate, Petitioner asserts that DCPS's failure to provide Student with a dedicated aide resulted in over 1600 hours of missed services. The evidence demonstrates that although Student's February 18, 2022, IEP prescribed a dedicated aide for 6.5 hours per day, the IEP prescribed a dedicated aide only in the general education setting. Student was to be in the special education setting for one hour per day and during related services of approximately two hours per week. The IHO concludes, therefore, that from February 18, 2022, to the end of SY 2021-2022 and from the start of SY 2022-2023 until January 11, 2023, Student was due a dedicated aide for approximately 5 hours per day, rather than the entire school day.

The IHO concludes, therefore, that Student missed approximately 400 hours of dedicated aide during SY 2021-2022 and approximately 400 hours of dedicated aide services from the start of SY 2022-2023 until January 11, 2023, for a total of 800 hours.

The evidence demonstrates that although the January 12, 2023, IEP prescribed a dedicated aide for 6.5 hours per day, the IEP prescribed a dedicated aide only in the general education setting. Student was to be in the special education setting for 2 hours per day and during related services of approximately 2 hours per week. The IHO concludes that as of January 12, 2023, Student was due a dedicated aide approximately 4 hours per day rather than the entire school day.

The IHO concludes that Student missed approximately 240 hours of dedicated aide services from January 12, 2023, until April 24, 2023, for a total of approximately 1040 (800+240) hours of dedicated aide services between the date Student's IEP mandated the services and when a dedicated aide was provided.

The evidence demonstrates that the IEP team at School A added dedicated aide services to Student's IEP in February 2022, and School A then made several requests to DCPS's C.O. for the aide to be hired and assigned. As a result of School A's requests, a DCPS's C.O. observer conducted two observations of Student in June 2022 and again in November 2022. In both instances, the observer recommended that Student be placed in a self-contained special education setting. Although the evidence demonstrates that at the start of SY 2022-2023 and since Student has been in School A's "16/3 inclusion" classroom, Student has not been moved to a self-contained special education classroom despite the DCPS C.O.'s observer's recommendation and the IEP team's determination that it would be appropriate.

Instead, Student's IEP team has continued to mandate a dedicated aide on Student's IEP. DCPS's witness from C.O. testified that despite her two observations, her recommendations were not the reasons Student has yet to be assigned a dedicated aide, and DCPS' C.O. is still trying to hire a dedicated aide for Student.

The fact that DCPS neither provided Student the change of placement that its C.O. observer recommended for Student nor provided Student the dedicated aide services that the IEP team concluded Student warranted, despite School A's repeated requests, was far from de minimus. Student was denied approximately 1040 hours of dedicated aide services, which was material and resulted in a denial of FAPE to Student.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The IHO has concluded that School A denied Student a FAPE in failing to provide Student a dedicated aide from February 18, 2022, to April 24, 2023.

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

When a hearing officer finds denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education.... [A]n award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Petitioner has requested the compensatory education included in the advocate's proposal. Petitioner's educational advocate overstated the number of hours and the period that dedicated aide services were missed. There was also insufficient evidence of any missed related services to support the award of any compensatory related services or reimbursement to Petitioner for any private services she obtained. There was credible testimony to support the award of tutoring and recreational therapy services to compensate for any academic, adaptive, and daily living skills that resulted from the lack of a dedicated aide. Consequently, in the order below, IHO directs DCPS to fund the compensatory services enumerated.

ORDER:

1. DCPS shall, within 15 business days of the date of this order, provide Petitioner authorization to obtain 216 hours of independent tutoring at the OSSE approved rate and 24 classes of recreational therapy not to exceed a total cost of \$2040.
2. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.

Hearing Officer

Date: June 22, 2023

Copies to: Counsel for Petitioners
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 ODR [\[hearing.office@dc.gov\]](mailto:hearing.office@dc.gov)