

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
March 16, 2015

---

STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: March 13, 2015
Petitioner,	)	
	)	Hearing Officer: John Straus
v.	)	
	)	
District of Columbia Public Schools (“DCPS”)	)	
	)	
	)	
Respondent.	)	
	)	

---

**HEARING OFFICER DETERMINATION**

**Background**

The Petitioner, who is the Student’s mother, filed a due process complaint notice on December 15, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that DCPS failed to develop an Individualized Education Program (“IEP”) on June 6, 2014 and October 6, 2014 that is reasonably calculated to provide educational benefit; specifically, the IEP does not provide the student with a dedicated aide and the IEP does not provide the student with fifteen hours of specialized instruction outside the general education setting. The Petitioner requested the Hearing Officer to order DCPS to amend the IEP to provide an individual aide and increase the hours of service to five hours of specialized instruction in Reading, five hours of specialized instruction in Math and five hours of specialized instruction in Written Language. DCPS responded that on October 14, 2014, the IEP team agreed to consider the provision of a dedicated aide and has contacted the parent on four occasions in December 2014 to convene an IEP team meeting to discuss increasing the hours of specialized instruction.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education

---

<sup>1</sup> Personal identification information is provided in Appendix A.

## Hearing Officer Determination

Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

### **Procedural History**

The due process complaint was filed on December 15, 2014. Neither the Petitioner nor the Respondent waived the resolution meeting. The resolution meeting took place on January 5, 2015, at which time the parties agreed to keep the resolution period open. The 30-day resolution period ended on January 14, 2015, the 45-day timeline to issue a final decision began on January 15, 2015 and the final decision was initially due by February 28, 2015. *See* 34 C.F.R. §§ 300.510 and .515.

The due process hearing took place on February 24, 2015. The Petitioner had presented three witnesses by 4:00 P.M. and, due to time constraints during the due process hearing, the parties were not able to present their entire case in chief. The parties agreed to reconvene the due process hearing on March 3, 2015. On February 24, 2015, the Petitioner filed a Joint Motion to Continue the case. The Chief Hearing Officer granted the Motion to Continue on February 27, 2015. A second day was scheduled on March 3, 2015. The final decision due date was extended for 13 calendar days from February 28, 2015 to March 13, 2015.

The due process hearing was a closed hearing.

Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in person on February 24, 2015 and via telephone on March 3, 2015. The Petitioner presented three witnesses: the Petitioner, a Compensatory Education Plan Developer, and an Educational Advocate. DCPS presented a Social Worker, Special Education Teacher, and a Least Restrictive Environment (“LRE”) Team member.

The Petitioner’s Disclosure Statement, filed and served on February 19, 2015, consisted of a witness list of five (5) witnesses and documents P-01 through P-66 which were admitted in to evidence without objection. The Respondent’s Disclosure Statement, filed and served on February 19, 2015, consisted of a witness list of six (6) witnesses and documents R-1 through R-22 which were admitted into evidence without objection.

The Petitioner withdrew issue number two at the outset of the hearing.<sup>2</sup> Therefore, the sole issue to be determined in this Hearing Officer Determination is whether DCPS denied the student a FAPE by failing to develop an IEP on June 6, 2014 and October 6, 2014 that is reasonably calculated to provide educational benefit; specifically, the IEP does not provide the student with a dedicated aide and the IEP does not provide the student with fifteen hours of specialized instruction outside the general education setting. For relief, the Petitioner requested the Hearing Officer order

---

<sup>2</sup> Issue number two in the Due Process Complaint states, “Whether the Respondent denied the Student a FAPE by failing to evaluate the Student in all areas of suspected disability and to determine the student’s special education and related services needs; specifically DCPS failed to conduct a psychiatric assessment as recommended in the Social Work assessment and the Functional Behavioral Assessment and as requested by the Petitioner; and an informal speech and language assessment as recommended by the Least Restrictive Environment (“LRE”) assessment.”

## Hearing Officer Determination

DCPS to amend the IEP to provide an individual aide and increase the hours of service to five hours of specialized instruction in Reading, five hours of specialized instruction in Math and five hours of specialized instruction in Written Language.

On March 3, 2015, both parties presented their cases in chief; however, the parties did not have time to present closing arguments. The parties agreed on the record to present oral arguments on March 5, 2015. However, the District of Columbia closed on that day due to a snow emergency. The parties agreed to provide written closing argument by 11:59 P.M. on March 6, 2015. DCPS submitted its closing argument in a timely manner; however, the Petitioner did not. DCPS objected to any consideration by the Hearing Officer of the Petitioner's closing argument. The Petitioner responded that the 21 minute delay is not prejudicial to DCPS. The Hearing Officer agrees with DCPS because allowing the Petitioner to submit a late closing argument is inequitable. Therefore, the Hearing Officer gives no consideration to the Petitioner's closing argument.

### **Findings of Fact**<sup>3</sup>

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is a \_\_\_\_\_ resident of the District of Columbia who attended Elementary School A since he was four years old. He is currently in second grade. The Student has resided with the Petitioner who is the Student's grandmother since the Student's mother was deceased.<sup>4</sup>
2. On February 20, 2014, the IEP team met. The team noted the Student has had 12 referrals to the office and is below basic in Reading. The team determined the Student is a student with an Emotional Disturbance under the IDEA and would reconvene to develop an IEP. The team also determined the Student also require another Functional Behavioral Assessment ("FBA").<sup>5</sup>
3. On March 12, 2014, the IEP team met again and developed an IEP for the Student that includes five hours per week of specialized instruction outside the general education setting, 120 minutes of occupational therapy per month in the general education setting and 120 minutes of behavior support services per month in the general education setting. The team further determined the Student requires transportation services to get to school. The Petitioner requested the team consider providing the student with a dedicated aide. The Petitioner was told that the team would discuss the need for a dedicated aide at the next meeting after certain things are tried in the classroom.<sup>6</sup>

---

<sup>3</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>4</sup> P-48, Petitioner

<sup>5</sup> P-40, P-51, P-54, R-6, R-16, Social Worker

<sup>6</sup> P-39, P-42, P-52, P-55, R-15, Petitioner, Social Worker

## Hearing Officer Determination

4. A FBA was completed for the Student on April 23, 2015. The assessment included classroom observations on March 18, 24, and 26, 2014, and states the Student exhibits verbally and physically aggressive behaviors. The behaviors are at times intentional and other times difficult to control, occur in all settings and can occur without prompts and tend to occur when the Student is asked to complete a task that he does not want to do such as work on subjects he is not proficient in such as Math and Reading.<sup>7</sup>
5. On April 29, 2014, the Student was recommended to serve a seven day suspension for engaging in reckless behavior.<sup>8</sup>
6. On May 7, 2014, the IEP team convened and developed a Behavior Intervention Plan (“BIP”).<sup>9</sup> The BIP was implemented at Elementary School A.<sup>10</sup>
7. On June 6, 2014, the IEP team met and reviewed the BIP and the General Education Teacher stated that at times the Student desires to achieve goals and other times the Student doesn’t seem to care. The General Education Teacher further noted that the Student is below Kindergarten level in Reading. The Special Education Teacher stated that he gets more work out of the Student in a one to one setting. The Petitioner asked why the Student’s IEP provides only five hours of specialized instruction per week. The Special Education Teacher stated that the Student requires more support rather than specialized instruction such as a dedicated aide. The team agreed the Student would benefit from a dedicated aide. The Social Worker stated the team will reconvene on October 6, 2014. The Petitioner agreed to table the discussion until the 2014-2015 school year. The LEA representative did not request an observation to determine whether the Student requires a dedicated aide after the meeting even though DCPS requires such an observation.<sup>11</sup>
8. On October 6, 2014, the IEP team met. The team agreed the Student requires a dedicated aide and “put in the paperwork for a dedicated aid and meet in three weeks.”<sup>12</sup>
9. On October 20, 2014, the Student was suspended for two days for making a verbal, written or physical threat to a person.<sup>13</sup>
10. On November 4, 2014, the Petitioner asked the Special Education Teacher about the status of the IEP team’s request for a dedicated aide.<sup>14</sup>

---

<sup>7</sup> P-45, P-46, R-14, Social Worker

<sup>8</sup> P-24

<sup>9</sup> P-47, R-13

<sup>10</sup> P-31, P-32

<sup>11</sup> P-38, Petitioner, Social Worker

<sup>12</sup> P-41, R-11, Educational Advocate, Social Worker

<sup>13</sup> P-25

<sup>14</sup> P-16, P-17

## Hearing Officer Determination

11. On November 13, 2014, the Student was suspended for one day for interfering with school authorities or participating in a major disruption of the school's operation.<sup>15</sup> On November 19, 2014, the Student was suspended for one day for fighting.<sup>16</sup>
12. On November 26, 2015, the Student was observed by a member of LRE Team. LRE team members are DCPS Office of Special Education personnel that provide support to schools. The observer did not recommend a dedicated aide be assigned to the Student.<sup>17</sup>
13. On December 9, 2014, the Student was suspended for two days for engaging in reckless behavior.<sup>18</sup>
14. The Student was placed in a timeout room at Elementary School at least 42 times between August 27, 2014 and December 17, 2014 for an unknown period on time. No instruction was provided to the Student while in the timeout room.<sup>19</sup> Additionally, the Student was temporarily removed from his classroom for an unknown period of time on August 27, September 2, 19, 22, 23, 25 and 30, October 2 and 7 twice, and November 7, 13 and 18, 2014.<sup>20</sup>
15. On January 5, 2015, the IEP team convened. The team determined the Student requires 20 hours per week of specialized instruction outside the general education setting and 240 minutes per month of Behavior Support Services outside the general education setting. The Support Team Member stated that the Student would be placed in a Behavioral and Education Support ("BES") classroom at another school. The Petitioner expressed concern about the Student's transition to a new school and separation from his nondisabled peers. The team reviewed the dedicated aide justification report and the Petitioner disagreed with the recommendation to not provide the Student with a dedicated aide. DCPS offered the Petitioner 200 hours of tutoring and 25 hours of behavioral support services as compensatory education.<sup>21</sup>
16. DCPS assigned the Student a dedicated aide on or about the first day in February, 2015. The Special Education Teacher does not know why a dedicated aide was assigned to the Student. The dedicated aide is not trained in behavior management and the Special Education Teacher has intervened when the Student has behavioral incidents. The dedicated aide has been filling out data sheets that track the Student's behavior in school. The Student's target behaviors in his BIP have not decreased since the dedicated aide was assigned to the Student. The Student is not keeping up with his peers academically in class<sup>22</sup>

---

<sup>15</sup> P-26

<sup>16</sup> P-27

<sup>17</sup> R-9

<sup>18</sup> P-28, P-29

<sup>19</sup> P-30

<sup>20</sup> P-23

<sup>21</sup> P-43, P-44, R-5, R-7, Petitioner, Educational Advocate, Special Education Teacher

<sup>22</sup> Special Education Teacher

## Hearing Officer Determination

17. The special education program at Elementary School A cannot provide more than ten hours per week outside the general education setting.<sup>23</sup> There are between 10 to 12 Elementary School based BES programs in the District of Columbia.<sup>24</sup>
18. The Petitioner does not want a change in the Student's location of services. The Petitioner requests 350 hours of specialized tutoring and 150 hours of counseling or behavioral support as compensatory education as a result of the Student's suspensions and being placed in the time out room.<sup>25</sup>

### **Conclusions of Law**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

#### **DCPS failed to develop an IEP on June 6, 2014 and October 6, 2014 that is reasonably calculated to provide educational benefit**

The leading standard of what constitutes FAPE under the IDEA came from the U.S. Supreme Court case, *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (1982). *Rowley* established a two-part test that determines whether a district has complied with the IDEA as follows:

1. Has the state complied with the procedures set forth in the IDEA?
2. Is the IEP, developed through the IDEA's procedures, reasonably calculated to enable the child to receive educational benefits?

In *Rowley*, The Supreme Court held that when this two-part test is satisfied, the state has complied with the obligation imposed by Congress, and the courts can require no more; however, the contours of an appropriate education must be decided on a case-by-case basis, in light of an individualized consideration of the unique needs of each eligible student.

In this case, the Student's initial IEP was developed by the IEP team on March 12, 2014. The IEP team did meet on June 6, 2014 and October 6, 2014 as stated in the complaint; however, there were no changes made to the Student's IEP. The March 12, 2014 IEP team did note that the Student was having some behavioral difficulties resulting in office referrals and determined the Student would receive five hours per week of specialized instruction. The Petitioner did request that the Student received a dedicated aide at the March 12, 2014 IEP meeting. However, she was informed that the team would discuss this at the next meeting.

---

<sup>23</sup> Special Education Teacher

<sup>24</sup> LRE Team member

<sup>25</sup> Petitioner, Compensatory Education Plan Developer, P-64

## Hearing Officer Determination

Under *Rowley*, the IEP team is not obligated to provide the Student with a dedicated aide or more hours of specialized instruction just because the Petitioner made a request. The *Rowley* Court made it clear that the IDEA does not require districts to provide students with disabilities with the best possible education. Referring to the minimal level of benefits that an appropriate educational program must confer, the Supreme Court termed the state's obligation as being the provision of a "basic floor of opportunity."<sup>26</sup>

Prior to the June 6, 2014 IEP team meeting, the Student was suspended for a seven day period. A FBA was conducted and the IEP team developed a BIP on May 7, 2014; however, there is nothing in the record that indicates team discussed providing a dedicated aide at that meeting. At the June 6, 2014 meeting, the Petitioner requested the Student receive more hours of specialized instruction. Her request was denied; however, the Special Education Teacher suggested that the Student receive the services of a dedicated aide instead. The team agreed to table the discussion regarding the dedicated aide because there were only ten school days left in the school year. The IEP team reconvened on October 6, 2014; thirty-nine school days after the June 6, 2015 meeting. The team did not have any new information; however, the IEP team made a referral to the support team to conduct another observation to determine whether the Student requires a dedicated aide pursuant to DCPS policy.

Even though the school year was ending, the team should have made a referral following the June 6, 2014 meeting because the failure of an IEP team to address a child's educational needs will likely result in a denial of FAPE. *Forest Grove Sch. Dist. v. T. A.*, 52 IDELR 151 (U.S. 2009). Pursuant to 34 C.F.R. § 300.321(a)(4), the IEP team must include a representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities is knowledgeable about the general education curriculum; and is knowledgeable about the availability of resources of the public agency. This is the role of the Local Education Agency Representative. The Local Education Agency representative's failure to make a referral to the support team after the June 6, 2015 IEP team meeting pursuant to DCPS policy is a failure to comply with the procedural requirements set forth in the IDEA under *Rowley*.

Under *Rowley*, a child's educational benefit must be more than *de minimus*. One of the leading cases interpreting *Rowley's* "some educational benefit" to mean more than "*de minimus*" is *Polk v. Central Susquehanna Intermediate Unit 16*, 441 IDELR 130 (3d Cir. 1988), *cert. denied*, 111 LRP 3226, 488 U.S. 1030 (1989).<sup>27</sup> During the period after the October 6, 2015 IEP

---

<sup>26</sup> According to an analogy from the 6th U.S. Circuit Court of Appeals, FAPE does not require a "Cadillac." Rather, it requires a "Chevrolet." The 6th Circuit observed that: "The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA." *Doe v. Board of Educ. of Tullahoma City Sch.*, 20 IDELR 617 (6th Cir. 1993), *cert. denied*, 111 LRP 3215, 511 U.S. 1108 (1994).

<sup>27</sup> In *Polk*, the 3d Circuit held that the IDEA "calls for more than a trivial educational benefit" and requires an IEP to provide "significant learning" and confer "meaningful educational benefit." *See also R.P. v. Alamo Heights Indep. Sch. Dist.*, 60 IDELR 60 (5th Cir. 2012); and *K.E. v. Independent Sch. Dist. No. 15*, 57 IDELR 61 (8th Cir. 2011).

## Hearing Officer Determination

team meeting and until the winter break beginning on December 19, 2014, or 47 school days, the Student was suspended out of school four times for a total of six days and was placed in a timeout room at least 42 times and removed from his classroom at least five times for an unknown period of time. The Student did not receive educational benefit during this period and this constituted a more than *de minimus* deprivation of FAPE. Moreover, DCPS' actions in this case indicate agreement with the Petitioner that the IEP does not provide educational benefit because the IEP team met after this instant complaint was filed on January 5, 2015 and determined the hours of specialized instruction should be increased to twenty hours per week of specialized instruction outside the general education setting. The team also determined the Student should be placed in a BES program.

What is relevant in making a placement determination will differ greatly depending on the individual needs of the particular student. *See Letter to Anonymous*, 21 IDELR 674 (OSEP 1994). The Petitioner requests the Student receive fifteen hours of specialized instruction per week and the location of services remain the same. However, Elementary School A cannot provide more than ten hours of specialized instruction per week outside the general education setting, so any increase in specialized instruction in excess of ten hours would require a change in location of services. Therefore, if the hours of specialized instruction increased to more than ten hours per week, the Student's location of services would need to change in order for the IEP to be implemented. The Hearing Officer agrees with DCPS the Student does require 20 hours per week of specialized instruction outside of the general education setting because his behaviors impact his educational performance and those behaviors would be managed in a more restrictive setting.

At the January 5, 2015 IEP meeting, DCPS did not agree to provide a dedicated aide in the Student's IEP. However, DCPS did provide the Student with a dedicated aide on or about the first day in February. The behaviors exhibited by the Student have not decrease since the aide has been working with the Student. Therefore, Hearing Officer finds that although the Student does require an aide in his current location of services at Elementary School A, he does not require an aide in the BES program.

Despite the IDEA's strong preference for mainstreaming, the regular education setting may not be appropriate for all students with disabilities. The IDEA requires that each student be educated in the regular education setting to the maximum extent appropriate. This also means that in some instances, removal from the regular educational environment is appropriate. 34 C.F.R. § 300.114(a)(2). The IDEA requires that the placement be based on the child's IEP; allow for the implementation of the IEP; be as close as possible to the child's home; and is, to the extent appropriate, in the age-appropriate general education setting. 34 C.F.R. §§ 300.114 and .116. There are between 10 to 12 Elementary School based BES programs in the District of Columbia. Although the Student should be placed in a BES program; he should be placed as close to his home as possible.

### **Compensatory Education**

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.

## Hearing Officer Determination

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 v. District of Columbia*, 401 F.3d 522 & 524.

In this case, the Student was denied a FAPE during the first five months of the 2014-2015 school year until the Petitioner was offered a FAPE at the resolution meeting. Therefore, the hearing officer awards the Petitioner compensatory services to redress the lack of FAPE.

### **ORDER**

- (1) Within ten school days, DCPS shall determine the closest Elementary School based BES program to the Student's home which has available space for the Student and notify the Petitioner, through counsel, of the location of services;
- (2) DCPS shall fund 200 hours of tutoring services and 25 hours of behavioral support services to be provided by a provider of the Petitioner's choosing; and
- (3) No further relief is granted.

**IT IS SO ORDERED.**

### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: March 13, 2015

*/s/ John Straus*  
Hearing Officer