

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

Student Hearing Office
810 First Street, N.E...
Washington, DC 20002

OSSE
Student Hearing Office
November 13, 2013

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

Case No: 2013-0498

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a student who has been determined to be eligible for services as a Student with autism.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on August 30, 2013 in regard to the Student. This Hearing Officer was appointed to preside over this case on September 3, 2013.

A Response was filed by the District denying this contention on September 9, 2013. This Response was timely filed. A resolution meeting was held on September 12, 2013. This meeting was timely pursuant to the applicable regulations. The resolution period ended on September 29, 2013.

On October 8, 2013, this Hearing Officer held a prehearing conference. Adry Polo, Esq., counsel for Petitioner, appeared. Lynette Collins, Esq., counsel for Respondent, appeared. A prehearing conference order issued on October 11, 2013, outlining the summarizing the rules to be applied in this hearing and identifying the issue in the case.

A hearing date followed on November 1, 2013. This was a closed proceeding. Petitioner was represented by Adry Polo, Esq. Respondent was represented by Lynette Collins, Esq. Petitioner entered into evidence exhibits 1-15; Respondent entered into evidence exhibits 1-5. Petitioner presented as witnesses: Petitioner; Witness A, a home health aide; Witness B, an educational advocate; Witness C, a former health care manager. Respondent presented as witnesses: Witness D, a program coordinator; Witness E, a special education teacher.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Complaint involves claims implicating 34 CFR 300.507(a). The Complaint alleges that DCPS failed to provide the Student with a 1:1 aide for the 2012-2013 school year. As relief, Petitioner seeks an order directing DCPS to include a 1:1 aide in the Student’s classroom for the remainder of the 2013-2014 school year.

ISSUE

As identified in the Prehearing Conference Summary and Order, the issue to be determined are as follows:

Did the Student require a dedicated aide to make educational progress during the 2012-2013 school year? Did DCPS fail to provide the Student with a dedicated aide at the April 17, 2012 and March, 2013 IEP meetings for the 2012-2013 school year? If so, did DCPS deny the Student a FAPE for the 2012-2013 school year?

FINDINGS OF FACT

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 6 year old who is eligible for services as a student with autism. (P-1-1)
2. The Student has been diagnosed with autism spectrum disorder, sleep disorder, a feeding disorder and has behavioral issues. (Testimony of Petitioner)
3. The Student has difficulty with overall communication. She has difficulty answering questions and expressing herself. The Student's significant delays in expressive and receptive language skills make following directions and instruction in class difficult. (P-1-4-7)
4. The Student is unable to write numbers or letters independently. (P-8-3)
5. The Student is minimally capable of identifying letters, and cannot write her name. (Testimony of Witness B; Testimony of Witness E)
6. The Student has weaknesses in beginning math skills involving number identification. She will sometimes lose focus and requires redirection in math. (P-1-3)
7. The Student is able to count numbers with 1:1 correspondence and trace her name. She needs verbal prompts to be able to count to 10. (Testimony of Witness E)

8. The Student's writing is pre-literate and is not legible at all. (Testimony of Witness B)
9. The Student has engaged in challenging behaviors in educational settings, including getting out of her seat, pushing over furniture and eloping. (P-13-1-5; Testimony of Petitioner)
10. The Student has difficulty with focus. The Student requires constant redirection. After being redirected, she may only be on task for a minute. She needs someone beside her to direct her to tasks. (Testimony of Witness B; Testimony of Witness C; P-1-4-7)
11. Redirection can takes the form of verbal cues. She needs frequent verbal prompts throughout the day. These verbal cues are to follow instruction and attend to activities. (R-3-1; P-1-6; Testimony of Witness E)
12. The Student continues to need quite a bit of redirection even in a 1:1 setting. (Testimony of Witness B; P-1-7)
13. The Student's behavioral difficulties in the classroom are compounded by her attendance record. (P-1-6)
14. The Student navigates in school with adult supervision. (P-1-9)
15. The Student needs a multi-modal approach, a token economy system, tangible reinforcers, movement breaks, sensory breaks, directions restated and repeated, and information broken down and modeled. (P-1-8)
16. The Student needs to have an aide available to her throughout the school day to facilitate social interactions, support behavior management, help with transitions and to ensure success with academics. (P-5-5, P-6-2, P-7-1)

17. The Student needs “hand over hand” assistance to write her first name and to thread the zipper on her coat. (P-1-10)

18. In addition to prompts, repetition and modeling are needed to help her ability to comprehend and follow through on directions. (P-1-7)

19. The Student requires individualized, adapted instructions that are delivered to her in a small group or 1-1 setting in order for her to be more successful in academics. (P-1-3)

20. She needs concepts broken down, requires prompting and support to participate appropriately, and needs special education teaching strategies to help her with her behavioral issues. (P-1-3)

21. For the 2010-2011 school year, when the Student turned 3, the Student went School A. She had a great deal of difficulty with transitions, behavioral limits, and commands. She was not yet toilet trained, and was dependent on adults for her self-care needs. She would often throw herself on the floor or scream in protest. She was verbal, but had a limited vocabulary. She would use one word at a time. She had a very poor attention span. Her speech and language levels were deficient in every respect. She had difficulty with play. (P-3-3-6)

22. The IEP dated April 21, 2011 recommended that the Student receive 24.4 hours of specialized instruction outside of general education, with related services of speech and language therapy 60 minutes per week, physical therapy 30 minutes per week, and occupational therapy 60 minutes per week. A dedicated aide was recommended on this IEP. (3-11)

23. The team decided she needed this aide because she could not focus, her attention span was low, her achievement level was low, she was not toilet trained, and her speech was limited. (Testimony of Petitioner)

24. For the 2011-2012 school year, the Student went to School B. (Testimony of Petitioner; P-2-1)

25. At School B, the Student could not use the bathroom without the aide, could not listen to instructions and commands, and had significant speech and language issues. (Testimony of Petitioner)

26. The Student was learning coping skills through the services of her dedicated aide. (Testimony of Petitioner)

27. During the 2011-2012 year, the Student would sometimes elope from class. She had tantrums but they did not last as long as in the previous year. (Testimony of Petitioner)

28. During the 2011-2012 school year, the Student had difficulty with behavior. There were difficulties in turn taking, sorting, and initiating social greetings. Prompting and modeling were necessary to address these difficulties. She would often get up out of her seat or get up and pace during activities. She would exhibit negative behaviors such as kicking, screaming, trying to move away from the group. She had poor attention to tasks. (P-2-2, 5-6, 10)

29. Accordingly, a goal was written in the IEP to insure that the Student would be able to sit in her seat for 15 minutes without exhibiting such negative behaviors. (P-2-2, 5-6)

30. During the 2011-2012 school year at School B, she missed at least two months of school because of dental surgeries, sleep issues, asthma issues, feeding issues, and other concerns. In December, 2011, for a dental issue, Student was admitted to hospital two days and missed one week. In or about January, 2012, Student had outpatient procedure and missed a week and a half. (Testimony of Petitioner)

31. School staff were told about these absences, and medical documentation was provided in connection to these absences. (Testimony of Petitioner)

32. An IEP team met in April, 2012, to review the Student's program. (Testimony of Petitioner; P-2-1)

33. At this meeting, the Student's teacher said that the Student's attention span was still low, that she was wandering off, needed redirection and also needed physical prompts. The IEP indicates that the highest priority is getting the Student's behavioral skills in place. (Testimony of Petitioner; P-2-2)

34. The IEP dated April 17, 2012 recommended 25 hours of special education outside general education, speech and language therapy 4 hours per month, physical therapy for 30 minutes per week, and occupational therapy for 60 minutes per week. The IEP does not indicate that the Student had yet made any strides in reading, math or writing. (P-2-11)

35. Classroom accommodations included assisted reading of comprehension passages, interpretation of oral directions, a location with minimal distractions, preferential seating, small group testing, repetition of directions, simplification of oral directions, and signed and or taped responses. No dedicated aide was required by this IEP. (P-2-11)

36. For the 2012-2013 school year, the Student went to School C. This was the Student's kindergarten year. She was placed in a self-contained autism classroom with 5 other students, 2 aides, and 1 Medicaid aide. The Student received intensive ABA, discrete trial instruction, visual supports, and with reinforcement systems in place. (Testimony of Witness D)

37. The Student received behavioral interventions including a token board and rewards through a preference assessment. (Testimony of Witness D)

38. At School C, the Student was engaged for part of the time. However, she had tantrums, especially when transitioning and during non-preferred activities. The Student also walked out of the classroom sometimes. (Testimony of Witness D; Testimony of Petitioner)

39. The Student's tantrums were addressed through visual supports, going on a walk, or being removed from class. (Testimony of Witness D)

40. The Student's academics were coming along slowly. This was partly attributable to her inconsistent attendance. (Testimony of Witness D)

41. The parent observed the Student during the 2012-2013 school year. When the parent observed the Student, she Student was in the hallway. The Student was out of the classroom on other occasions as well. (Testimony of Petitioner; Testimony of Witness C)

42. A meeting was held between school staff and the Petitioner in November, 2012. (Testimony of Petitioner)

43. At this meeting were Teacher A, the Student's teacher, Witness C; Counselor A, a counselor at School C; and a vice principal at School C. Counselor A and Witness C recommended an aide. The group talked about the Student's absences, tantrums, needs, sensory issues, and problems with redirection. The parent requested transportation and a dedicated aide. No aide was provided. There was no justification provided to Petitioner for not giving the Student an aide. (Testimony of Petitioner; Testimony of Witness C)

44. Behaviors became more disruptive during the 2012-2013 school year. (P-5-1)

45. By March, 2013, there was a clear uptick in the severity and length of the Student's tantrums. (P-1-6)

46. The Student did not want to attend school during the middle of the 2012-2013 school year. She began reporting wetting and soiling accidents. (P-5-1)

47. Another IEP meeting was held in March, 2013. (P-1-1)

48. At the IEP meeting in March, there was a general discussion about the Student's absences and her goals. The parties discussed how she was able to sit longer in sessions, but had not made much progress in terms of letters or numbers. The parent sought an aide but the District did not agree. (Testimony of Petitioner)

49. Petitioner asked if she could provide her own aide for the Student. The team agreed with this request. (Testimony of Petitioner; Testimony of Witness D)

50. The IEP dated March 12, 2013 recommends specialized instruction for 25 hours per week outside general education, with related services of speech and language therapy 2 hours per month, physical therapy 30 minutes per week, and occupational therapy 240 minutes per month. (P-1-12, 14)

51. The IEP also recommends assisted reading of comprehension passages, interpretation of oral directions, reading of individual testing, a location with minimal distractions, preferential seating, small group testing, repetition of directions, simplification of oral directions, and signed and or taped responses. (P-1-12, 14)

52. The parent then arranged for Witness A to be the aide. Witness A was briefly the Student's aide, but this arrangement was terminated. (Testimony of Petitioner; Testimony of Witness A; Testimony of Witness D)

53. When Witness A was in the classroom with the Student, the student would "run around." (Testimony of Witness A)

54. The Student was frequently absent during the 2012-2013 school year. She had two surgeries and other medical issues. She missed more than 2 months of school during 2012-2013. (Testimony of Petitioner)

55. By the end of 2012-2013 school year, the Student did not know the letters in her name and could not count from 1-5. (Testimony of Petitioner)

56. The Student made limited progress in some of her math goals for 2012-2013. The Student progressed in matching a written number to a quantity. (R-5-1)

57. For the 2012-2013 school year, the Student's difficulties with focus hurt her progress in identifying numbers and in labelling all uppercase letters. (P-11-15-16)

58. Over the summer of 2013, the Student had significant behavioral issues during speech and language therapy at the National Speech Therapy Center, Inc. Behaviors included screaming, kicking, and knocking over furniture. (P-13-1-5)

59. For the 2013-2014 school year, the Student attends School D. (Testimony of Petitioner)

60. She is in a high functioning autism classroom in School D, with 1 teacher and 2 paraprofessionals. The paraprofessionals provide behavioral strategies for the students and help students with inclusion. (Testimony of Witness D)

61. At School D, the Student can have tantrums that last for up to 10 minutes. (Testimony of Witness D)

62. Staff at School D, and the Petitioner, have seen some growth in the Student for the 2013-2014 school year. (Testimony of Petitioner)

63. The Student can now read from 6-10 words through the Edmark reading program. The Student has responded very well to that particular program. (Testimony of Witness E)

64. The Student has missed school frequently during the 2013-2014 school year. (Testimony of Witness E)

65. The school staff need to use “hand over hand” over hand instruction in writing for the Student. (Testimony of Witness E)

66. The Student has not made progress in math for 2013-2014. (Testimony of Witness E)

67. I found all the witnesses credible to an extent in this proceeding. I found Petitioner believable on many issues, but I found that her explanations as to why the Student missed so much time during school to be questionable. I credit the Petitioner when she indicated that the Student’s medical issues caused her to miss school. However, to this IHO, the Petitioner did not adequately explain why the Student missed so much time at school. I found Witness D believable on many issues, but I found that her characterization of the Student’s behavioral issues were somewhat lacking in credibility. In particular, Witness D’s testimony was inconsistent with written reports indicating that the Student’s behavioral issues spiked during the 2012-2013 school year.

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:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Schaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in

Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes “no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children.” Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

Petitioner claims that the Student should have received a dedicated aide as part of her April, 2012 IEP. In this connection, the question is whether the IEP was appropriately designed at the time of creation so as to convey a meaningful benefit. S.S. ex rel. Shank v. Howard Road Academy, 585 F.Supp.2d 56, 66 (D.D.C. 2008)(warning against “Monday Morning Quarterbacking,” i.e. reviewing IEPs based on prospective evidence).

At the time of the April, 2012 IEP, the Student was experiencing behavioral difficulties. There were difficulties in turn taking, sorting, initiating social greetings, and transitions. The

Student had poor attention to task. She would often get up out of her seat or get up and pace during activities. She would exhibit negative behaviors such as kicking, screaming, trying to move away from the group. The IEP indicates that “(o)f highest priority is getting [the Student’s] behavioral skills in place.” (P-2-2)

The Student was also experiencing academic difficulties. The IEP suggests that the Student had no skills in letter identification, number identification, or writing at the time. The IEP also indicates that the Student had great difficulty in expressive and receptive language at the time.

Given the continued behavioral difficulties combined with her academic issues, it would have a reasonable course for Respondent to increase the Student’s supports. Instead, Respondent decreased the Student’s supports by eliminating the dedicated aide. It is noted that Respondent also did not endeavor to create an FBA or BIP at this time to address behavioral issues.

Compare Riverside Unified School District, 49 IDELR 83 (California State Educational Agency, November 2, 2007)(autistic student had made significant progress in academic areas prior to removal of aide).

Respondent argues that the Student’s difficulties in school during 2011-2012 were a function of the Student’s lengthy, unexcused absences. Respondent therefore posits, in effect, that the Student’s behavioral and academic difficulties are entirely a function of absenteeism. However, there is nothing in the record to clearly support this proposition. Instead, the record suggests that the Student’s behavioral and academic difficulties are largely related to her autism diagnosis. Moreover, while I agree that some of the Student’s absences have extended for an unusually lengthy period of time, the record also supports the notion that many of the Student’s absences were a function of genuine medical necessity.

I find that a dedicated aide was necessary for the Student in the 2011-2012 school year to progress academically, to provide her with behavioral supports, to address her issues with transitions, and to help her with social interactions. As a result of the foregoing, I find that Respondent's decision to eliminate the aide was not reasonably calculated. Respondent therefore denied the Student a FAPE when it failed to provide the Student with a dedicated aide in its April, 2012 IEP.

In regard to the March, 2013 IEP, the same conclusion must be reached. During the 2012-2013 school year, without the aide, the Student's behavioral issues not only continued but spiked. The IEP reads that "(t)here has been a recent uptick in the severity and length of [the Student's] tantrums and this has also been observed at home according to her mother." (P-1-6) The record also reveals that the Student did not want to go to school during the middle of the 2012-2013 school year. The Student also started to have bedwetting and soiling incidents at this time. An aide would have been able to help the Student address these issues by verbal prompts, modeling, and close monitoring.

The Student was also having difficulty with focus at this time. The teacher at the IEP meeting indicated that the Student had a poor attention span, would wander off during class, and needed redirection and prompts. The record also indicates that, and after being redirected, the may only be on task for a minute. The Student's progress reports specifically link difficulties in letter and number work to focus. An aide would have been able to assist the Student in this connection so that she would have someone next to her monitoring his attentional issues so she could consistently be on task during academic subjects.

The Student's need for an aide is also reflected by the fact that the IEP team agreed to allow Petitioner provide her own aide for the Student in the classroom. Respondent does not harmonize this position with its current position that an aide was unnecessary for this Student.

It is also worth noting that the IEP specifically indicates that the Student needs "individualized adapted instructions" which are to be delivered in a small group or 1:1 setting. (P-1-3) However, there is no provision in the IEP for an aide to deliver on this service, and classroom accommodations do not provide for small group instruction.

Respondent again argues that the Student's unexcused absences during the 2012-2013 school year were the sole reason that the Student had behavioral and academic issues. The record, however does not establish such a definitive connection between the Student's unexcused absences and the Student's behavioral and academic issues. For instance, there is nothing in the record to connect the Student's uptick in behavioral issues to attendance issues. The record also affirmatively establishes that there is a link between the Student's poor performance in math and language and the Student's inability to focus. Additionally, as noted, that many of the Student's absences were a function of genuine medical necessity. To this IHO, an aide would have been appropriate for this IEP to address the Student's behavioral issues, focusing issues in class, together with her transitional issues and issues with social interaction.

As a result of the foregoing, I find that Respondent denied the Student a FAPE by failing to recommend a dedicated aide in its March, 2013 IEP.

Petitioner asserts that appropriate relief in this matter is to order that the dedicated aide be placed on the Student's IEP.

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

The statute directs the court to “grant such relief as [it] determines is appropriate.” The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be “appropriate.” Absent other reference, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

There is credible testimony in the record that the Student has been making some strides in word identification in the current program despite the absence of a dedicated aide. However, I find that this progress is due to a particular educational program that the Student has responded to. The testimony makes clear that the Student is still having behavioral difficulty at School D, with tantrums up to 10 minutes in length. The Student has not made any meaningful progress in math during this school year. The testimony also indicates that the Student requires “hand over hand” instruction for writing at School D. I deduce from this record that a dedicated aide is necessary to manage the Student’s behavior in all subjects, to help the Student with focus in math, and to help the Student in her attempts to write. I will add that the classroom at School D has more students, and higher functioning students, than the classroom in School C. A dedicated aide will assist in providing the Student with “individualized adapted instructions” per her IEP. Accordingly, I will order that the Student receive a dedicated aide for the duration of the 2013-2014 school year.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent is adjudged to have denied the Student a FAPE by recommending insufficient services in its April, 2012 and March, 2013 IEPs;

2. The Student's March IEP is hereby rewritten to provide for a full time dedicated aide for the duration of the 2013-2014 school year.

Dated: November 13, 2013

Michael Lazan
Impartial Hearing Officer

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 USC §1415(i).

Date: November 13, 2013

Michael Lazan
Impartial Hearing Officer