

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

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

2011 APR -5 AM 11:33
STUDENT HEARING OFFICE
OSSE

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a year-old male, who is currently attending a DCPS elementary school. Student's current IEP lists Emotional Disturbance ("ED") as his primary disability and provides for him to receive 15 hours per week of specialized instruction outside general education, 30 minutes per week of speech-language services, and 60 minutes per week of behavioral support services.

On January 26, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to provide Student with the dedicated aide recommended by the MDT on November 23, 2010, and failed to conduct triennial speech and language assessments or convene a follow-up meeting. As relief for these alleged denials of a free appropriate public education ("FAPE"), Petitioner requested, *inter alia*, an independent speech and language evaluation and a meeting, the services of a dedicated aide or funding for an independent aide, and compensatory education.

On February 9, 2011, DCPS filed its Response to the Complaint. In the Response, DCPS asserted that (1) it had conducted a speech and language assessment in 2010 and the report was attached to the Response, and (2) based on two observations of Student and the reduction of his class size, DCPS did not believe Student required a dedicated aide.

On March 15, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner acknowledged that Student's speech and language assessment had been conducted and voluntarily withdrew its claim concerning the assessment. However, Petitioner continued to assert that Student required a dedicated aide in school. DCPS asserted that the MDT stated that Student "might benefit" from the assistance of an aide, while Petitioner continued to insist that the MDT recommended an aide for Student on November 23, 2010. Each party represented that the MDT Notes supported its position. The hearing officer issued the Prehearing Order on March 18, 2011.

By their respective disclosure letters dated March 21, 2011, Petitioner disclosed twenty-three documents (Petitioner's Exhibits 1 – 23), and DCPS disclosed DCPS-1 through DCPS-5.

The hearing officer convened the due process hearing on March 28, 2011.¹ Both parties' disclosed documents were admitted into the record without objection. Petitioner offered to provide as documentary evidence Student's disciplinary records, which Petitioner represented it received subsequent to the five-day disclosure deadline. However, DCPS objected to the admission of the records, so the hearing officer excluded them pursuant to 34 C.F.R. § 300.512(a)(3). Thereafter, the hearing officer received a status update on the case, received opening statements and testimonial evidence, and received closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS deny Student a FAPE by failing to provide Student with the dedicated aide that Student needs and that the MDT allegedly recommended at Student's November 23, 2010 meeting?

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 Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

1. Student is currently in the _____ grade, and he has been receiving special education services since kindergarten.²
2. For the past three school years during grades 1 through 3, Student attended a full-time special education school where he received full-time special education services. Student was provided with an aide at the school in the second and third grade.³
3. Student's full-time special education school closed at the end of SY 2009/10. As SY 2009/10 neared its end, Student's MDT stated that Student had shown some improvement over the 3 years that he had attended the full-time special education school and suggested that perhaps Student no longer needed full-time special education. Parent agreed, primarily because she had always wanted Student to return to a general education setting. Moreover, Student's teachers were concerned that Student's behavior would worsen if he were placed with other students who had behavior problems. In anticipation of Student's transition to a general education setting, his IEP was revised by reducing his hours of specialized instruction to 15 hours per week. Student's current IEP also requires him to receive 30 minutes per week of speech and language services and 60 minutes per week of behavioral support services in an outside of general education setting.⁴
4. Parent selected a DCPS elementary school for Student to attend based on information she received from other parents indicating that the school was a good one. However, from the start of SY 2010/11, Student had struggles at the school. He was suspended for 1 day in September 2010, and then suspended again in November. Student was also suspended in December, February and March. The suspensions were all for 1 to 2 days, except for the March suspension, which was for 5 days. Most of the suspensions were for fighting and being disrespectful to staff, but the March suspension was for kicking the window out of the door of the music room at school. Moreover, Parent and her father, Student's grandfather, began receiving telephone calls from the school concerning Student's behavior as early as September and continuing every month thereafter. The calls are from either Student's teacher or the in-school suspension staff person. Parent will speak with Student over the phone, and sometimes the school will ask the grandfather to come up to the school and talk to or sit with Student. On 1 or 2 occasions, the school asked the grandfather to come pick Student up and take him home.⁵
5. On November 23, 2010, DCPS convened an MDT meeting for Student. Student's general education teacher, special education and social worker all shared concerns about Student's impulsive behavior and its negative effects on his academic performance. The general education teacher stated that Student's impulsivity in the classroom caused the teacher to have concerns for the safety of Student and others in the class. The special education teacher reported that Student is capable of doing the work but hi inability to control his impulsive behavior interfered with his ability to focus. The social worker

² Testimony of Parent.

³ *Id.*

⁴ Testimony of Parent; *see* Petitioner's Exhibits 8-9, DCPS-1, DCPS-4 and DCPS-5.

⁵ Testimony of Parent.

stated that Student's behaviors are so unpredictable that he often reacts without any opportunity to recognize his triggers. The following types of behaviors Student exhibited were of concern: playing all the time, not paying attention, not completing work, fighting with peers, leaving class and even leaving the school building once, kicking other students, inappropriately touching girls, and cursing. The team determined that Student might benefit from the support of a dedicated aide and determined that a referral should be made. The SEC agreed that a dedicated aide was necessary because Student was not safe at school and needed to work one-on-one.⁶

6. An aide can provide the following assistance to Student: provide step-by-step instructions, remind Student to sit down and not to touch others, stop Student from leaving the classroom or school building by talking to him, and generally stop Student from escalating to out of control behaviors.⁷
7. DCPS did not provide Student with a dedicated aide after the November 23, 2010 MDT meeting. Instead, the SEC submitted a referral for an aide to DCPS, and then DCPS designated an employee to conduct two observations of Student and determine whether or not Student requires the recommended dedicated aide. This process is in accordance with DCPS's procedures for dedicated aides.⁸
8. Student's November 23, 2010 IEP Progress Report reveals that for Reporting Period 2 Student was "Progressing" towards all of his goals in the academic areas of mathematics, reading, and written expression, he was "Progressing" towards one of his speech and language goals and had "Mastered" the remaining two speech and language goals, but he was only "Progressing" towards two of his emotional/social/behavioral development goals and had made "No Progress" towards the remaining 4 goals in the area of emotional/social/behavioral development.⁹
9. Student's second advisory Report Card for SY 2010/11 reveals that he received overall scores of 1, below basic, in the academic areas of reading/English/language arts, mathematics, science, and social studies for the second advisory, and he received overall scores of 2, basic, in art, music, and health/physical education. The Report Card reveals that Student was only able to exhibit the desired behaviors in the areas of work habits and personal/social skills with "Frequent Prompting." Moreover, the teacher comments for the second advisory indicate as follows: "[Student] is not improving and his behavior is really holding him back."¹⁰
10. On December 14 and 16, 2010, a DCPS social worker conducted observations as part of the functional behavioral assessment ("FBA") she conducted for Student. During the December 14, 2010 observation of Student during the math block with the special education teacher and a total of 12 students, the social worker observed Student get upset

⁶ Petitioner's Exhibits 5-6; DCPS-3; testimony of educational advocate; testimony of SEC.

⁷ Testimony of educational advocate.

⁸ Testimony of SEC; testimony of advocate; Petitioner's Exhibit 17.

⁹ Petitioner's Exhibit 14.

¹⁰ Petitioner's Exhibit 15.

and begin walking around the classroom while ignoring the teacher's instruction to sit down, throwing paper on the floor despite the teacher's request for him to stop, scooting his chair across the floor, yelling out to the teacher, cursing at the teacher, aggravating his peers, and engaging in various undesirable behaviors. The social worker ended the observation when Student began targeting his aggression towards a female student.

The second observation of Student took place on December 16, 2010 during breakfast and the transition to instruction with a total of 20 students. This time, Student repeatedly left the classroom and went into the hallway, harassed several of his classmates, even going so far as to point an imaginary gun at one, and failed to comply with instructions from the teachers and the educational aide to behave.

Student's special education and general education teachers both informed the social worker that Student is impulsive, aggressive and lacks focus. Student's behaviors tend to occur daily throughout the entire school day and begin without provocation, and he does not accept consequences or responsibility for his actions. The social worker noted that Student's inability to focus has a direct impact on his availability and participation in the academic setting, whether he is pulled into a smaller setting or left in the general education setting with the rest of his classmates. The social worker recommended, *inter alia*, that Student "would benefit from a dedicated aide in an effort to ameliorate behaviors with one on one supervision during the entire school day."¹¹

11. On January 15, 2011, Student was observed in class by a DCPS School Psychologist who was conducting an updated psychological reevaluation of Student. During the observation, Student was observed blurting out answers in class, jumping up from his seat and correcting his classmates' responses, placing his body on top of a desk, pointing his pencil at all of classmates and crumpling paper in his desk, bothering other students, wandering around the room, touching a female student's hair, and getting into other students' personal space.¹²
12. Student was also observed by a DCPS employee on January 13 and February 7, 2011 in connection with the Request for Dedicated Aide that was completed for Student. During the January 13th observation, Student was observed stating that he could not do and was having problems with the assignment, socializing with his classmates and walking around the classroom during the teacher's instruction, working at a computer independently after completing his work, hitting another student, bothering other students by getting up in their faces and standing in their personal space, running around playing with another student in the hallway, and later sitting down with his peers and eating lunch at a table in the cafeteria. During the February 7th observation, Student was observed completing his work but sitting on his knees with the back of his seat facing his desk, moving around in his seat and blurting out comments while another student was working at the board, getting out of his seat without permission, and yelling out for a teacher to help him and slamming his book on the desk once his regular teacher left the classroom and another teacher came to cover the class. Ultimately, Student kept returning to his seat after repeatedly getting up to go to the trashcan and managed to complete his work, but only so long as the substitute teacher remained by his desk. There were 17 students in the class at

¹¹ Petitioner's Exhibit 12.

¹² Petitioner's Exhibit 13.

the time of both observations, and this was after a reduction in the class size from 30 to 20. The teacher reported that the smaller class size had resulted in some decrease in Student's impulsivity, but he continued to have difficulty socializing appropriately and staying focused. The evaluator concluded that there had been numerous concerns regarding Student's behavior and ability to focus, but he had made some improvements since the reduction in class size in January 2011 and appeared to be able to function in his academic setting without the restriction of an assigned dedicated aide. As a result, the evaluator declined to recommend a dedicated aide for Student.¹³

13. On February 7, 2011, DCPS convened another MDT meeting for Student. The DCPS observer who conducted the January 13 and February 7, 2011 observations of Student in connection with the request for a dedicated aide did not participate in the meeting, nor was she a participant in the previous MDT meetings for Student. Student's general education and special education teachers once again discussed Student's undesirable behaviors, and the general education teacher reported that Student requires one on one attention. The DCPS MDT Meeting Notes expressly state that "[t]he team agreed that [Student] needed a dedicated aide." Nevertheless, the Notes state in conclusion that it would be determined at Student's resolution meeting whether the dedicated aide was a service that would be made available to Student.¹⁴
14. At the due process hearing for this case, Petitioner's educational aide requested 23 hours of counseling services as compensatory aide for Student on the ground that Student's negative behaviors increased a lot during the time he was not provided with an aide from November 26, 2010 through the present. Although the advocate requested the services to "reduce past harm suffered," the advocate failed to offer any proof of the past harm suffered and how the requested services would redress that harm.¹⁵

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:

Dedicated Aide

An IEP must include, *inter alia*, a statement of the special education and related services to be provided to the disabled child. 34 C.F.R. § 300.320(a)(4). Under IDEA, "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34(a).

IDEA charges a Student's IEP team with the task of developing, reviewing and revising a Student's IEP. *See* 34 C.F.R. § 300.324. The IEP team generally consists of the child's

¹³ DCPS-3.

¹⁴ Petitioner's Exhibit 3.

¹⁵ Testimony of advocate.

parent(s), at least one regular education teacher and one special education teacher of the child, an LEA representative, an individual who can interpret the instructional implications of evaluation results, and if appropriate, the child and other individuals with knowledge or expertise regarding the child. 34 C.F.R. § 300.321(a).

In this case, Petitioner argues that the services of a dedicated aide is a related service that Student requires and that Student's MDT has recommended for him. On the other hand, DCPS argues that it properly declined to provide Student with the services of a dedicated aide because the DCPS employee who conducted observations of Student in January and February of 2011 did not recommend a dedicated aide for Student.

A review of the evidence in this case reveals that Student was provided with the services of a dedicated aide at his previous school, where he received full-time special education services in a full-time special education environment. Student has been exhibiting significant and constant negative behaviors since the start of SY 2010/11 when he began attending his current school, a DC PS elementary school where he receives 15 hours of specialized instruction in a general education environment and 1.5 hours of related services outside of general education. Student's constant negative behaviors, which include impulsivity and lack of focus, are interfering with his ability to benefit from his educational programming. These behaviors and their negative impact have been documented in various observation reports, including the January and February 2011 observation report prepared by the DCPS employee, as well as in the Notes for each of the recent MDT meetings for Student. Moreover, the social worker who prepared Student's current FBA recommended that Student be provided with a dedicated aide, and Student's MDT recommended a dedicated aide for him at the November 23, 2010 MDT meeting and agreed that Student needs a dedicated aide at the February 7, 2011 MDT meeting.

Upon consideration of this evidence, the parties' arguments, and the applicable law, especially the provisions set forth above which assign to a disabled child's IEP team the task of determining which special education and related services the child will receive, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide Student with the dedicated aide that he clearly requires to benefit from special education and that his MDT and current FBA have recommended for him. The hearing officer has considered DCPS's argument that its employee conducted observations and determined not to recommend an aide for Student; however, the determinations of a DCPS employee who is not a member of Student's IEP team cannot override the determinations of Student's IEP team, especially where, as here, there is abundant support in the record for the IEP team's determination.

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. *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005). In every case, however, 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 at 524.

In the instant case, Petitioner has requested 23 hours of counseling services as compensatory education for the violation of IDEA in this case. However, Petitioner has failed to demonstrate what specific educational deficits resulted from DCPS's failure to provide Student with a dedicated aide for the approximately four-month period from November 23, 2010 to the present, or how the requested 23 hours of counseling services will compensate for that failure and address those educational deficits. As a result, the hearing officer will deny Petitioner's request for compensatory education on the ground that Petitioner failed to support its request for 23 hours of compensatory education. *See Gill v. D.C.*, Civil Action No. 09-1608 (RMC) (D.D.C. March 16, 2011) (court affirmed hearing officer's denial of compensatory education request where Petitioner failed to provide sufficient evidentiary support for its compensatory education request).

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within 8 school days of the issuance of this Order, which means on or before April 26, 2011 – the first day of school after Spring Break, DCPS shall begin providing Student with the services of a dedicated aide. DCPS shall continue to provide Student with the services of a dedicated aide until such time as Student's IEP team determines that Student no longer requires those services to access his educational programming.
2. Petitioner's request for 23 hours of compensatory education is **DENIED**.

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: 4/5/2011

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer