

**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
May 6, 2014

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving an eligible Student with an emotional disturbance.

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 February 19, 2014 in regard to the Student. This Hearing Officer was appointed to preside over this case on February 21, 2014.

A Response was filed by the District denying this contention on February 28, 2014. A resolution meeting was held on March 5, 2014. This meeting did not resolve the case. The resolution period ended on March 21, 2014.

On April 1, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on April 7, 2014 outlining the summarizing the rules to be applied in this hearing and identifying the issues in the case.

A hearing date followed on April 25, 2014. This was a closed proceeding. Petitioner was represented by Kiran Hassan, Esq. Respondent was represented by Maya Washington, Esq. Petitioner entered into evidence exhibits 1-36; Respondent entered into evidence exhibits 1-11. Petitioner presented as witnesses: Petitioner; Witness A, a case manager; Witness B, a school psychologist; and Witness C, an advocate. Respondent presented: Witness D, a Program Manager; Witness E, a special education teacher; and Witness F, a Social Worker.

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.

ISSUE

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

1. Did the Student require an FBA and BIP within a few weeks of the beginning of the 2013-2014 school year? If so, did DCPS deny the Student a FAPE?
2. Was the Student improperly denied a dedicated aide for the 2013-2014 school year? If so, did DCPS deny the Student a FAPE?

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 eligible for services as a student with an emotional disturbance. (P-15-1)
2. The Student has been diagnosed with Anxiety Disorder NOS, Mood Disorder NOS, and Pervasive Developmental Disorder, NOS. (P-23-1, P-25-1, P-26-1)
3. The Student's mood disorder can impact on her instruction. (Witness E)
4. The Student has behavioral issues regarding following directions, being defiant, and not listening to staff. (Witness A)
5. She is "very aggressive" and physically attacks family, teachers and students. She has had altercations with security staff at the school and has attempted to leave the school. (Petitioner; P-25-2)
6. The Student is thrill seeking and is not very concerned with other people's feelings. (P-10-2)
7. She has stabbed students in school during the current school year. (Petitioner)
8. The Student has pulled fire alarms in school. (Petitioner)
9. The Student has been suspended from school. (Petitioner)
10. The Student has had a difficult time "letting things go." (Witness E)
11. The Student is defiant on some days, and engaged on other days. The Student will run off sometimes. (Witness A)
12. With this student, the issue is not the frequency of the incidents, it is the intensity of the incidents. (Witness F)
13. The Student needs constant redirection to make good decisions. (P-15-2)

14. The Student is below level in mathematics and in reading. In reading, she often misses key information when reading a text and when she is corrected, she gets frustrated and will shut down. (P-15-3-4)

15. The Student does better with small group and 1:1 instruction. (Petitioner)

16. Incentives help her stay focused in class. (Petitioner)

17. The Student often does not complete her work. (Petitioner)

18. She needs extra support in reading and math. In particular, she needs extra reading work. She enjoys math better than reading. (Witness E)

19. In June, 2012, the Student tested with a Full Scale IQ of 95 on the WISC-IV and a Total Achievement Score of a 100 on the WIAT-III. (P-16-1)

20. The Student attended School A during the 2011-2012 and 2012-2013 school years. (Petitioner)

21. The IEP dated March 20, 2012 from School A indicates that the Student has writing deficits in regard to letter formation, issues regarding the intelligibility of speech, and social and emotional functioning. In regard to social and emotional functioning, the Student had a high degree of distractibility. It indicates that she needs additional support in the classroom to increase attention and on task behavior. (P-5-1-5)

22. The IEP indicates that the Student has made progress in terms of her behaviors. (P-5-5)

23. The IEP calls for 2.5 hours per week of specialized instruction in the general education environment, with speech and language therapy for 30 minutes per week and behavioral support services for 45 minutes per week. The IEP called for a location with minimal distractions and preferential seating. (P-5-6)

24. The Student had developed some coping skills by that time. (P-6-2)
25. At this time, at School A, the Student would get caught up in her own thoughts and require redirection. There were outbursts once in awhile. (P-6-2)
26. By September, 2012, the Student had changed. An amended IEP indicated that “when the Student isn’t angry, she is enjoyable to be around.” It also indicates that she has difficulty modulating her responses to adults and peers and will use coarse language and maladaptive behaviors to deal with her frustrations. It indicates that the Student had a great deal of difficulty de-escalating and there were long displays of maladaptive behavior, including spitting, threatening teachers, or other staff. She would only calm down when fatigued. (P-9-3)
27. Behavioral support was increased to 1 hour of services per week. (P-9-5)
28. An MDT meeting in December, 2012 indicated that the Student had even more severe behavioral concerns, including urinating on herself, fighting, and pushing the limit when she does not get her way. (P-10-1)
29. An IEP dated March 18, 2013 indicated progress in writing, but indicated little progress in regard to behavioral issues. This IEP contained the same language describing behaviors as the September, 2012 IEP. The IEP recommended the same 1 hour a week of behavioral support services with 2.5 hours of specialized instruction outside of general education in written expression. (P-11-2-4)
30. At the IEP meeting on March 18, 2013, teachers discussed how they had used “lockdown” procedure with the student, wherein she is left in a room until she calms down. She had issues with stealing, picking on students, and disregard for other people’s feelings. However, the issues were sporadic. (P-12-2)

31. For the 2013-2014 school year, the Student moved to a DCPS school. She moved because of her behavioral problems at School A. (Petitioner)
32. The Student went to School B in August, 2013, where she remains. (Petitioner)
33. When the Student started at School B in August, 2013, Petitioner told Ms. A from Respondent that that Student had behavioral issues. (Petitioner)
34. The Student was placed in a general education classroom which had an AmeriCorps worker in the classroom for 4 hours per day. (Witness D)
35. Petitioner with Ms. A of the District at the beginning of school. He introduced the Student, gave her an IEP from School A, and asked for a dedicated aide. (Petitioner)
36. The Student's behavior was poor at School B. She was "very aggressive." She engaged in "explosive" behavior, she pulled a fire alarm, and she would hide in the classroom. She physically attacked teachers and students. She had altercations with security staff and attempted to leave the school. In October she eloped from school. (Petitioner; P-25-2)
37. In October, there was a meeting at which the parent was asked to sign a copy of the IEP that was written at School A. This was considered an annual review meeting. A functional BIP was recommended for the Student. The meeting lasted 10 minutes. (P-13-1)
38. A "Safety Plan" was created for the Student on October 15, 2013 with school staff. (Petitioner)
39. The Safety Plan for the Student dated October 15, 2013 recommends keeping the Student in close proximity, providing a quiet space in the classroom, limiting independent movement, allowing the Student to utilize counseling, using calming techniques, notifying school personal of the Student's issues. (P-21-1)

40. Still, even with the safety plan, she ran out of the classroom and ran around the school. She pulled a fire alarm, she had run out of school, she was off task during instructional time, and she was often not responsive to redirection. (Petitioner; P-14-1)

41. An FBA and BIP were requested on October 18, 2013. (Witness C)

42. An FBA/BIP was then recommended for the Student. (P-22-2)

43. The Student stabbed a student with a pencil in February. (Petitioner)

44. The Student stabbed two children in total during this school year. One child, who was stabbed in the back, had to go to the hospital. (Witness E; Petitioner)

45. The Student's reading level did not increase from the start of the school year to the date of the next IEP meeting in February, 2014. (Witness C)

46. The Student did not show growth during September through February, 2014. (Witness E; P-15-4)

47. A meeting was held on January 27, 2014. At the meeting, Witness F indicated that the Student's behavior is difficult to predict. She indicated that the Student hits, bites, and runs away. The school had difficulty determining her triggers, and there were concerns about the Student shutting down and not wanting to do her work. Teachers indicated that she needed more frequent breaks and more verbal praise. (P-14-1-2)

48. The FBA of the Student dated January 22, 2014 indicates that the Student's behavioral issues manifest themselves when she becomes frustrated and does not complete assignments. It also indicates that the initial trigger cannot always be pinpointed. It indicates that a loosely structured classroom can contribute to her behavior problems. (P-19)

49. The BIP of the Student dated January 27, 2014 recommends a chart, a cool down space, praise and encouragement, and limiting independent movement in the school

environment. Rewards indicated include choice time. Consequences include loss of rewards during the day, communication with the parent about her day, and removal of privileges at home. (P-20-1-2)

50. In February, 2014, there was an IEP meeting which focused mainly on behavioral issues. The parent sought a dedicated aide. Ms. A from the District told Petitioner that the Student's behaviors were not that bad, that an aide is for children with severe disabilities such as autism. (Petitioner)

51. At the review, a DCPS representative said that an aide is not for behavioral issues but is for academic issues. This was a premise for the team's decision in regard to the need for a dedicated aide. (Witness E)

52. The IEP dated February 10, 2014 indicates that the Student can be defiant and easily frustrated. It indicates that the Student's outbursts can last to two hours long. (P-15-3)

53. It indicates that the Student will leave the school building, refuse to do work, and be aggressive toward staff and peers. (P-15-5)

54. The IEP dated February 10, 2014 recommends 10 hours per week of specialized instruction outside general education and 240 minutes per month of behavioral support services. (P-15-7)

55. The IEP does not recommend a dedicated aide. DCPS's position was that an aide is too restrictive and would create more problems for the Student than it would solve. (Witness D)

56. DCPS felt that the aide would not be able to leave the Student's side and that this would make her uncomfortable. (Witness D)

57. The IEP was implemented as an hour of pull-out instruction in the morning, with a 13-1 teacher to student ratio, and an hour in the afternoon, with an 8-1 teacher to student ratio.

(Witness E)

58. In the small group pull-out instruction, the other students are eligible for services as students with emotional disturbance, with Other Health Impairment, and with a Specific Learning Disability. The teacher tries to keep the instruction “light.” (Witness E)

59. Markers have been given to her instead of pencils so she does not stab anyone with a pencil. (Witness E)

60. The BIP has helped to decrease the Student’s behaviors, with medication management. She is now better focused, she has less outbursts. (Witness F)

61. Still, there are behavioral outbursts at the school. The Student tried to elope from the school in April, 2014. (Petitioner)

62. The Student receives counseling on a regular basis, 4 hours of support per month. (Witness F)

63. The Student’s grades through March, 2013 include a 2s in Reading, Writing, Speaking and Listening, with 1s in Math. The Student needed frequent prompting in regard to following directions, working with others, and completing work. (P-22-1, 3-4)

64. The Student’s progress reports for 2013-2014 report progress in all most areas that were introduced except for tuning into the feelings of others for the third period. Progress was reported for the first term (8/26/13 through 11/01/2013) in demonstrating self-control. (R-7-1-13)

65. The parties are planning to review a psychiatric evaluation to determine if a smaller setting is needed for the Student. (Petitioner)

66. I found all of the witnesses credible in this proceeding.

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; Shaffer 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; Shaffer 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).

1. Need for an FBA or BIP.

Petitioner claims that the Student needed an FBA or BIP after the first few weeks of school, 2013-2014, based on the Student's significant behavioral problems at the time.

Courts in the District of Columbia have held that it is "essential" for the LEA to develop an FBA for a child with behavioral problems. The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's

behavior”); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) . The FBA should focus on the antecedents to the behaviors, on the theory that a change in the antecedents can lead to a change in the behaviors. C.F. ex rel. R.F. v. New York City Dep't of Educ., 2011 WL 5130101 at *9 (S.D.N.Y. 2011); R.K. ex rel. R.K. v. New York City Dep't of Educ., 2011 WL 1131492 at *19 (S.D.N.Y. 2011). The information gleaned from the assessment is central to formulating an IEP tailored to the needs of individual disabled children. Harris, 561 F.Supp. 2d at 68.

In addition to an FBA, if the behavior of a student impedes the student’s learning or the learning of other students, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). According to DCMR Sect. 5-3007.3, if a student’s behavior impedes the child’s learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

An FBA is an “assessment.” As such, the failure to write up an FBA should be deemed a procedural violation. A failure to assess is a procedural violation of IDEA. Only where when the parents are able to show that harm resulted from the failure to assess, FAPE denial can result. As stated by the D.C. Circuit: “(a)n IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.” Lesesne ex rel. B.F. v. D.C., 447 F.3d 828, 834 (D.C. Cir. 2006)(emphasis in original); see also Kruvant v. District of Columbia, 99 Fed.

App'x. 232, 233 (D.C. Cir. 2004) (though DCPS admitted that it failed to satisfy its responsibility to assess the student within 120 days, of her parents' request, parents did not show harm).

In this case, the record shows that DCPS in fact did conduct a meeting to assess the Student's behavior after the Student had multiple serious behavioral incidents in the beginning of the 2013-2014 school year at School B. The result was a Safety Plan for the Student dated October 15, 2013. While the plan does indicate that it was written to deter the Student from running out of the building, the plan provides intervention in the event of any behavioral incidents. The plan recommends keeping the Student in close proximity, providing a quiet space in the classroom, limiting independent movement, allowing the Student to utilize counseling, using calming techniques, and notifying school personal of the Student's issues. This Safety Plan was developed and signed by the Student's classroom teacher, two social workers, a school administrator, and an LEA representative.

The record indicates that Respondent had to act quickly given the Student's behavioral concerns. Under the circumstances, this IHO is of the view that Respondent's Safety Plan was a reasonable short term solution to the problem, and that a failure to write up an FBA and BIP after the Student's first few weeks at School B did not deny the Student a FAPE.

Thereafter, by November 15, 2013, there was an agreement between the parties that the Safety Plan was inadequate. (P-22-2) Respondent then took over two months to create an FBA/BIP. There is no explanation in the record for this delay. Without a FBA or BIP, the Student engaged in hitting, biting, running away and stabbing, among other dangerous behaviors. The behavioral issues had an impact on the Student's academic performance. As reported by Witness E, the Student also did not make meaningful academic progress during this time period,

particularly in reading. I find that Respondent's delay in formulating an FBA/BIP resulted in a denial of FAPE to the Student from December, 2013 through the date of the FBA/BIP in January, 2014.

2. Failure to Provide an Aide.

The FBA/BIP was written in January, 2014. An IEP meeting followed, in February, 2014. Petitioner contends that a dedicated aide should have been recommended at this meeting.

By this time, the Student had demonstrated that she was capable of dangerous behavior. She had left the school, she had pulled a fire alarm at the school, she was off task during instructional time, and she was often not responsive to redirection. She engaged in outbursts lasting up to two hours long. Moreover, the Student twice stabbed students with a pencil during the school year. In fact, one stabbing incident occurred just prior to the Student's IEP meeting in February, 2014.

Even so, Respondent did not add behavioral services to the February, 2014 IEP. Respondent took the position that with a new BIP in place, the Student would receive adequate behavioral support going forward. Respondent rejected Petitioner's request for a dedicated aide at that time.

A review of the BIP reveals that, in substance, it is similar to the Safety Plan that had been relatively ineffective earlier. Like the Safety Plan, the BIP recommends a cool down space. Like the Safety Plan, the BIP recommends limiting independent movement in the school environment. Moreover, a BIP is dependent on an FBA that accurately determines the antecedents to a Student's behavior. However, the FBA here indicated that it is difficult to determine the antecedents for the Student's outbursts. This suggests to this IHO that

Respondent should have added additional behavioral supports to make sure the Student was safe, and to make sure other students were safe in the classroom as well.

Considering also that the Student had a problem with elopement, and considering that the Student had no special education support at all in this general education classroom, Petitioner's suggestion of a dedicated aide was a sensible one. A dedicated aide could watch the Student to make sure that she did not engage in violence. An aide could monitor the Student to insure that she would not leave the classroom. Moreover, a dedicated aide would also be able to provide the Student with cues to make sure the Student was progressing in regard to instruction. In this connection, I note that the IEP from February, 2014 specifically indicates that the Student needs "constant" redirection to make good decisions.

Respondent's denial of the request for the aide was premised on, inter alia: 1) the fact that a dedicated aide must stay right next to the Student for the entire school day; and 2) the fact that a dedicated aide is for academic issues, not behavioral issues; and 3) the fact that the Student's outbursts were sporadic. To this IHO, none of these points are persuasive. There is no requirement that a dedicated aide be in close proximity to the Student all the time. A dedicated aide could sit apart from a Student if it were appropriate during a given activity. Moreover, there is no requirement that the use of a dedicated aide be limited to academic issues. In fact, the DCPS Dedicated Aide User Manual specifically indicates that a dedicated aide may be needed to implement a BIP. (P-35-3)

Additionally, I am not persuaded by the rationale that the Student's issues were sporadic. When an 8 year old is engaged in stabbing and elopement, it is appropriate to be vigilant to avoid any possibility of a tragedy even if the incidents do not occur every day.

In sum, I find that Respondent's behavior interventions were not reasonably calculated in the IEP dated February 10, 2014. As a result, I find that Respondent denied the Student a FAPE through this IEP.

3. Relief.

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

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 confer 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).

The testimony makes clear that the Student is still having behavioral difficulty at School B. Petitioner credibly testified that the Student eloped from the school in April, 2014. There is nothing in the record to suggest that the Student has made any particular academic progress at the program. Moreover, this IHO is concerned that, without a dedicated aide, the Student may end up seriously harming another student, or herself. The record indicates that the Student will engage in violence without warning. A fellow student was sent to the hospital after being stabbed by the Student during the school year.

Respondent argues that the Student would do better in a small classroom environment, and this IHO does not disagree. Still, without any medical backup to support Respondent's view that the Student will not engage in this sort of violence again, I believe it is appropriate, and prudent, to order that the Student receive a dedicated aide. I will order that the IEP be amended to require a dedicated aide.

In regard to compensatory education, one of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is 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, 521-23 (D.C. Cir. 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award." Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner calculates that 20 hours of behavioral support services and 50 hours of tutoring in math and reading would be appropriate to put the Student in a place where she should have been if she was receiving a FAPE. Petitioner premises this award on FAPE denial from the start date of November 27, 2013. I find Petitioner's calculation of the award to be a reasonable one. (P-31) I will therefore award the Student 20 hours of behavioral support services, and 50 hours of tutoring services in math and reading to compensate for the FAPE denial here.

ORDER

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

1. Respondent is adjudged to have denied the Student a FAPE by failing to conduct a timely FBA and BIP and by recommending insufficient services in its February, 2014 IEP;
2. The Student's February, 2014 is hereby rewritten to provide for a full time dedicated aide;
3. The Student is hereby awarded 20 hours of behavioral support services, and 50 hours of tutorial services in math and reading. Behavioral support services shall be provided by a psychologist or a licensed social worker. Tutorial services shall be provided by a licensed special education teacher.

Dated: May 5, 2014

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: May 5, 2014

Michael Lazan
Impartial Hearing Officer