

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
)	
Petitioners,)	Date Issued: January 21, 2015
)	
v.)	
)	
District of Columbia Public Schools,)	
)	
)	
Respondent.)	Hearing Officer: Michael Lazan

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a _____ student who is eligible for services as a student with developmental delay. _____ .

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent” or “District”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on November 7, 2014 in regard to the Student. On November 20, 2014, Respondent filed a response. A resolution meeting was held on November 25, 2014. The resolution period expired on December 7, 2014.

II. Subject Matter 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

¹ Personally identifiable information is attached as Appendix A.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On December 2, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on December 5, 2014 summarizing the rules to be applied in this hearing and identifying the issues in the case.

A hearing date followed on January 6, 2015. This was a closed proceeding.

Petitioner moved to enter into evidence exhibits 1-25; Respondent moved to enter exhibits 1-6, and then 8-12. Respondent objected to exhibits 1-7 because they are part of the administrative record. This objection was overruled. Respondent objected to exhibit 22 on relevance grounds. This exhibit was then withdrawn.

The parties presented closing statements orally on the record after completion of testimony.

Petitioner presented as witnesses: Petitioner; Witness C, advocate; Witness D, counsel; Witness E, Admissions Director. Respondent presented: Witness A, a teacher; Witness B, a psychologist; and Witness F, a program manager.

IV. Credibility

I found all the witnesses credible in this proceeding. There were no material inconsistencies uncovered in connection to any witness, and all witnesses presented their

testimony with reasonable candor. I found the parent's testimony particularly credible. None of the parent's main factual assertions were contradicted by the record.

V. Issues

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

1. Did DCPS deny the Student a FAPE by creating an IEP that was not reasonably calculated on August 19, 2014?

Petitioner claims that the IEP does not provide enough specialized instruction, does not provide behavioral support services, and does not provide behavioral support goals.

2. Did DCPS deny the Student a FAPE by failing to conduct a Functional Behavior Assessment ("FBA") and Behavior Intervention Plan ("BIP") in connection to the IEP dated August 19, 2014?

3. Did DCPS deny the Student a FAPE by failing to provide the Student with a dedicated aide in connection to the IEP dated August 19, 2014?

As relief, Petitioner seeks compensatory education, placement at a non-public school, an FBA/BIP, and a psychological assessment.

VI. Findings of Fact

1. The Student is eligible for services as a student with a developmental disability.

2. The Student has severe behavioral issues at school. He will refuse to work in class, run out of class, run out of the building, act "extremely" aggressive to his

peers, and act very disrespectful to adults. He has great difficulty attending to task. He can have little or no interest in school. (P-13-1-2)

3. The Student struggles academically. The Student is well below grade level in writing and reading.

His reading was below basic and his overall thinking and reasoning abilities were in the 3rd percentile for his age. (P-9-6)

4. The Student's behavioral issues are caused, at least in part, by his academic difficulties. (Testimony of Witness B)

5. For prekindergarten, during the 2012-2013 school year he went to School A. He was discharged from the school due to poor behavior within two months. (Testimony of Petitioner)

6. For kindergarten, during the 2013-2014 school year, the Student started at School B. He did "okay" at the school, but the program was not rigorous. Many of the students did not speak English. (Testimony of Petitioner)

7. He then transferred to School C, where he struggled. He would go underneath tables, hit other children, knock down books, and generally not participate in the large classes (with thirty-two to thirty-five students). He could not spell his name after the end of the school year. (Testimony of Petitioner)

8. Academically, he would shut down when he was supposed to read. He did not know the alphabet. "RTI" interventions were unsuccessful, including small group instruction, 1:1 instruction, removal from class, seeing a social worker, using picture card cues, and preferential seating. (P-9-8; P-15-1-3)

9. The Student's grades at School C were especially poor in reading and social studies. (P-16-3)

10. Near the end of the school year, Petitioner brought a Due Process Complaint against Respondent. The matter settled, and a settlement agreement resulted in the Student's evaluation . (Testimony of Petitioner)

11. The parties agreed to evaluate the Student within 45 days of the date of the agreement, and to convene an IEP meeting within 10 days of the completion of the evaluations. This agreement was signed by both parties on June 6, 2014. (P-5)

12. School C sent Early Stages meeting notes, reports cards, health records, and disciplinary forms in connection to the evaluation. (Testimony of Witness A)

13. One report, by Witness B, stated that the Student was physically and verbally aggressive to students, has been disrespectful to his teacher, and whines and cries when he does not get his way. He was resistant to testing and refused to complete testing. He

(P-15-1, 3)

14. Another early stages report, by Witness A, stated that the student needs "intensive support." (P-16)

15. The testing revealed that the Student had a full scale IQ of 71. (P-15-5)

16. The Student's math scores on the Woodcock-Johnson III placed him in the mildly delayed range with a standard score of 78.

. He was unable to combine letter sounds to pronounce words. The Student's reading fluency was not evaluated. (P-9-3-4; P-16-2-4)

17. The Student's written expression was poor at the time. On the Woodcock-Johnson III, the standard score was in the significantly delayed range, with a standard score of 58. (P-9-6)

18. One of the assessments – by Witness A -- recommended presenting information in various modalities, picture cues, placing words on index cards, giving him activities to help with short term memory, having him follow a less desirable tasks with a more desirable one, maintaining physical contact with him to ensure he remains on tasks, providing prompts, asking him to repeat information, having him answer “what if” questions, and using concrete examples with him. (P-15-10)

19. The assessment by Witness B stated that, due to his significant delays in math problems, spelling, and writing, he may require a special education teacher. (P-16-4)

20. This assessment recommended a “highly structured” setting, with minimal distractions, a visual timer, an interactive behavior chart, structured breaks between tasks, rules posted on his desk, a positive behavior chart posted daily, prompts to wear his glasses, and using manipulatives in math. (P-16-5-6)

21. At the Initial IEP meeting, on August 19, 2014, attending were the parent, the student, a special education teacher/LEA representative (Witness A), a Psychologist (Witness B), three family care coordinators, (P-9-1)

22. At the CSE meeting, there was little discussion of the Student's behavioral issues. Meeting notes do not mention any specific behavioral problems or any interventions to address them. (P-20)

23. Some of the team felt the Student was particularly impacted by vision issues, and that his vision problems caused both his academic and behavioral issues.

(Testimony of Witness A)

24. The team was not able to complete an observation of the Student or to have a teacher of the Student at the review. The District felt that this was impossible due to summer break issues. (Testimony of Witness A)

25. The IEP team found that the Student was developmentally disabled, but the team was “not sure what the delay was”. (Testimony of Witness A)

26. There was no discussion of the Student’s possible instruction outside of general education at this review. (Testimony of Witness A)

27. The team felt that it did not have enough information to determine that he would require behavioral support. (Testimony of Witness B)

28. The team felt it was appropriate for the IEP to provide a “basic framework” in light of the limited information available to it. (Testimony of Witness B)

29. They felt that, once the Student attended school, the school could determine whether he needed such interventions as an FBA or BIP. (Testimony of Witness B)

30. The team also refrained from putting services on the IEP if those services were likely to be provided. For instance, small group instruction not recommended because “he would be getting it.” (Testimony of Witness B)

31. The IEP recommended ten hours per week of specialized instruction in general education. No behavioral support services were added. A visual schedule, preferential seating, a visual timer, an interactive behavior chart, structured breaks,

individual visual support, positive behavioral supports, and graphic organizers were also recommended. (P-9-9)

32. The IEP had three goals relating to math, four goals relating to reading, three goals relating to writing, and three “cognitive” goals. There were goals relating to attending and remaining on task. (Exh. P-9)

33. The parent did not understand the IEP’s behavioral supports, or its requirements on class size. Still, despite having counsel, she did not express disagreement at the meeting. (Testimony of Petitioner)

34. The Student started first grade at School D on August 25, 2014. Petitioner chose this school for the Student, who could have stayed at School C. (Testimony of Petitioner)

35. Immediately after the IEP was written, problems were reported. The Student would refuse to go to his classroom unless he could play. He was reported to run out of class, wander away from groups, run out of the building, jump headfirst off a stage, act “extremely” aggressive to his peers, and fail to understand how to follow rules. He was a danger to himself and others. He had great difficulty attending to task.

. (P-13-1-2; Testimony of Petitioner).

36. A BIP was written on September 9, 2014, adding counseling, frequent breaks, verbal praise, and a behavioral incentive program. (R-5)

37. The school began creating behavioral charts for the Student. However, this practice ended after September. (Testimony of Petitioner)

38. The IEP was amended on November 5, 2014, adding 120 minutes per month of behavioral support services. (R-4-9)

39. The IEP was amended on November 21, 2014 to provide the Student with ten hours a week of specialized instruction outside general education, and five hours a week of specialized instruction inside general education. (P-8-10)

40. At School D, the Student's academic grades with as low as they could possibly be during the first term. (P-17-1)

41. The IEP was amended again on December 17, 2014, increasing specialized instruction to 20 hours per week. This IEP also contained supports including preferential seating, reducing distractions, teaching positive rules of space, providing breaks, teaching to strength, presenting demonstration models, using visual organizers and sequences, and modifying the assignments. (P-11-1; R-2-10-11)

42. Non-public School E has accepted the Student. The tuition is \$56,000 per year. There is a 3-1 teacher to student ratio at the school, with two instructors and four students in the classrooms. Crisis interventions and behavioral interventions are provided. There is a language based curriculum, with no opportunity for mainstreaming. (Testimony of Witness E)

VII. 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; 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).

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).

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 August, 2014 IEP did not provide enough specialized instruction, did not provide enough behavioral support, and did not provide sufficient goals for behavioral support. Petitioner alleges that an FBA should have been conducted prior to the review, and that a BIP should have accompanied the IEP. Finally, Petitioner

contends that the August 19, 2014 IEP failed to provide the Student with a dedicated aide.

The IEP team did not benefit from the presence of one of the Student's former teachers since the review was held in August, when school is out of session. Respondent argues that the August review was necessary because of the timelines placed on it by the stipulation of settlement that was signed after the first Due Process Complaint before IHO Ruff.

However, this stipulation of settlement did not waive Petitioner's rights to a full and thorough IEP meeting. It is required that a teacher "of the child" be present at an IEP meeting to provide the team with insight into the Student's actual performance during the previous year. 34 CFR Sect. 300.321(a)(2). While I can understand Respondent's position here, Respondent provides no authority to the effect that an IEP meeting can proceed without sufficient information because of summer break. I will point out that there is no testimony clearly explaining what was done to secure the attendance of the Student's former teachers at the meeting.

Even without the teachers, the team did benefit from two Early Stages reports which discussed the Student's behavioral issues. One Early Stages report, by Witness B, stated that the Student is noted to be physically and verbally aggressive to other students, disrespectful to his teacher, and that he whined and cried when he does not get his way. He was resistant to testing and refused to complete testing. He was constantly disrupting class. He was being removed from class. He preferred to whine, play and cry throughout the day.

The team also had specific recommendations before it in regard to the Student's behavioral and academic issues. Witness A recommended presenting information in various modalities, picture cues, placing words on index cards, giving activities to help with short term memory, having him follow a less desirable tasks with a more desirable one, maintaining physical contact with him to ensure he remains on tasks, prompts, asking him to repeat information, having him answer "what if" questions, and using concrete examples with him. Witness B went further. She recommended a highly structured setting with minimal distractions, a visual timer, an interactive behavior chart, structured breaks between tasks, rules posted on his desk, a positive behavior chart posted daily, prompts to wear his glasses, and manipulatives in math.

The team did not credit most of these recommendations, which members themselves wrote. They also did not credit the comments of the Petitioner, who provided information to the team about the Student's behavior. Instead, the team provided only a basic framework for instruction, as Witness B stated during the hearing. According to Witness B, the details could be filled in later, since the team did not have sufficient information before it to provide much else.

This is not how the IEP process is supposed to work. The primary tool for ensuring that the student is provided a FAPE is the child's IEP. Honig v. Doe, 484 U.S. 305, 311 (1988). The IEP is the "centerpiece" of the statute's education delivery system and should address the Student's special education needs through goals. 34 CFR Sect. 300.320(a). The IEP should follow a comprehensive review of the Student through assessment in all suspected areas of disability. 34 C.F.R. Sect. 300.304(c)(4). The IEP should provide all relevant detail about the Student's academic and behavioral

performance, and should then present a comprehensive framework for instruction. 34 CFR Sect. 300.320(a)(1); Anchorage Sch. Dist. V. M.P., 689 F.3d 1047 (9th Cir. 2012 (quoting Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 882 (9th Cir. 2001))“(t)he statute is particularly protective of parents' right to participate in the formulation of their child’s IEP because “[p]arents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know”).

This IEP provides little data about the Student’s behavioral issues, and there is little behavioral intervention recommended beyond one goal and scattered classroom modifications. The minutes to the meeting are consistent with the IEP; there is virtually no mention of the Student’s behavioral issues. There is no mention in the IEP about the Student’s disruptive behavior to classmates or teachers. There are no counseling services, there was no functional behavior assessment completed, no behavioral intervention plan was attached, no small group instruction was recommended. The team did not discuss whether a smaller class size might be beneficial, or whether the Student might have done better with similar peers. Importantly, the team ignored Witness A’s direction to provide the Student with a highly structured classroom with minimal noise. Accordingly, I find the District’s IEP denied the Student a FAPE, no matter whether the parent agreed or not. See Letter to Lipsitt, 52 IDELR 47 (OSEP Letter December 11, 2008).

Respondent argued that the Student was not especially ready for school in 2013-2014. Respondent also argued that the Student did not have consistency in his program

during 2013-2014. Respondent therefore suggests that any issues in his programming are attributable to the parent.

To this IHO, if the Student has needs based on prior education, or lack of it, those needs should be referenced in the IEP. The existence of needs that might be caused by outside factors, or even parental neglect, does not give the District a pass on providing appropriate special education services.

In sum, while there is no evidence that the District needed to necessarily put a dedicated aide on the Student's IEP, or even that the specialized instruction hours were necessarily inadequate at the time of the IEP's creation, I do find that the IEP's behavioral supports were inadequate, and the behavioral goals should have been more comprehensive to address, among other things, the Student's tendency to engage in verbal and physical abuse of others. The District denied the Student a FAPE through its August 19, 2014 IEP.

VIII. Relief

As a remedy, Petitioner asserts that appropriate relief in this matter is to order placement at School E and 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).

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that “(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school.” Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief “must be tailored” to meet a student’s “unique needs.” Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider “all relevant factors” including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

The record indicates that School E would provide the Student with helpful interventions, such as a smaller class size. However, the Student has not tried a self-contained special education classroom with small class size in a public school. The record indicates that it is time to try a structured small class setting for this student, who gets distracted by other students, needs extra attention, and is well behind in academics, especially in writing. While School E may be a good match for the Student, there is nothing in the record to suggest that a public school could not educate the Student in the same way going forward. Moreover, School E is a setting which does not provides an education to the Student with any typically developing peers consistent with Least

Restrictive Environment (“LRE”) requirements. While LRE does not have to be the deciding factor in determining whether to order that a student be placed in a non-public school, in this fact pattern, where the Student has had not even tried a smaller public school classroom, I find it inappropriate to order that the Student be placed at School E.

Petitioner also seeks compensatory education for the period of FAPE denial. 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 seeks twenty-five hours of behavioral support or ABA therapy, a functional behavioral assessment or ABA therapy assessment, 80 hours of independent tutoring services, and a comprehensive or updated psychological evaluation.

Petitioner's compensatory education proposal was unclear on how the behavioral support services were to be delivered or why ABA therapy was necessary for the Student. There is no testimony on the Student's need for ABA. There was no clear testimony explaining how the behavioral support services should be delivered. Additionally, the Student did receive behavioral support services in the form of counseling soon after the August, 2014 IEP through the District's BIP. To this IHO, the record does not support an award of compensatory behavioral support services.

In regard to the request for an FBA, the record shows that the Student's behaviors have continued throughout the 2014-2015 school year. While a BIP was created for the Student, no corresponding FBA was written so that the BIP could accurately determine the reason for the Student's behaviors. Accordingly, I agree that a comprehensive FBA should be conducted here. I will order that the Student receive an FBA, through an independent provider of Petitioner's choice, at a reasonable and customary rate in the community.

The request for 80 hours of compensatory tutoring was devised with some analysis of the extent of the Student's FAPE deprivation during the school year. (P-24) The record shows that the Student has learned little during the 2014-2015 school year. While the District did attempt other interventions after the August IEP was created, the Student continues to struggle. The request for eighty hours of compensatory education amounts to equals only about three or so weeks of school, a modest request where the

Student has pretty much missed out on four months of school. I find Petitioner's compensatory education proposal reasonable with respect to tutoring.

Finally, the record does not support the request for a psychological assessment, which was just conducted this past summer by Early Stages. There is nothing in the record to explain why the Student needs to put through yet another assessment.

X. Order

As a result of the foregoing, I hereby order the following:

1. The IEP team shall convene within fifteen days of the issuance of this HOD to rewrite the IEP by:
 - a. Including a current and complete section relating to the Student's behavioral needs, including a complete and thorough behavioral goals; and
 - b. Requiring that, for academic instruction, the Student be placed in a structured, small classroom setting with minimal distractions, led by a special education teacher, and with less than twelve children in the classroom;
2. The Student is hereby awarded eighty hours of 1:1 instruction in reading math and writing, by a certified special education teacher;
3. Respondent shall pay for a Functional Behavioral Assessment by a provider to be selected by Petitioner. The price of the FBA shall be reasonable and customary in the community. After the assessment is completed, Respondent will then update their BIP accordingly;
4. Petitioner's other requests for relief are hereby denied.

Dated: January 21, 2015

Michael Lazan
Impartial Hearing Officer

X. Notice of Appeal Rights

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: January 21, 2015

Michael Lazan
Impartial Hearing Officer