

**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
March 18, 2014

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

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 December 30, 2013 in regard to the Student.

This Hearing Officer was appointed to preside over this case on January 3, 2014. Respondent denied the contentions in the Complaint dated January 7, 2014. This response was timely pursuant to the regulations. A resolution meeting was scheduled for January 9, 2014, but there was no appearance from Petitioner. This meeting was rescheduled to January 17, 2014. The resolution period ended on January 29, 2014.

Respondent submitted a motion for partial dismissal of issues 2, 3, and 4 on February 21, 2014. This motion seeks dismissal based on res judicata grounds. In particular, Respondent moves in connection to an earlier decision by IHO Mortensen, who issued an HOD in regard to this Student in November, 2012. Petitioner opposes this motion, contending that her claims for compensatory education were not litigated in connection to the earlier HOD.

The HOD by IHO Mortensen referenced two issues:

1. Whether Respondent denied the Student a FAPE when it refused to include ESY services in the Student's IEP dated May 14, 2012 for the summer of 2012?;
2. Whether Respondent denied the Student a FAPE when it failed to propose or provide an IEP reasonably calculated to enable the Student to be involved in and progress in the general education curriculum because the IEP dated May 14, 2012, does not include specialized instruction and related services to be provided entirely outside of the regular education environment necessitating a more restrictive educational placement?

Respondent's motion was granted by order dated March 4, 2014 with respect to issue number 2 and the portion of issue number 4 which relates to the May, 2012 IEP. Respondent's motion was otherwise denied.

A hearing date followed on March 7, 2014. This was a closed proceeding.

Respondent entered into evidence exhibits 1-24. Petitioner presented as witnesses Petitioner; the Student; Witness A, a psychologist; Witness B;

an advocate; Witness C, an advocate; Witness D, a teacher. Respondent presented as witnesses: Witness E, a psychologist; Witness F, a program manager; and Witness G, a program manager.

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.

ISSUES

As identified in the Prehearing Conference Summary and Order and in the Order on the motion to dismiss, the issues to be determined are as follows (omitting issue 2 and a portion of issue 4, which were dismissed):

1. Did the Student require a dedicated aide in connection to the December 19, 2013 IEP? If so, did the lack of a dedicated aide in the corresponding IEP deny the Student a FAPE?

3. Did DCPS provide an inappropriate location of services to the Student from August, 2011 through November 29, 2012? If so, did DCPS deny the Student a FAPE?

4. Did DCPS provide the Student with an inappropriate IEP in August, 2011? 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 Multiple Disabilities. (P-8-1)

- 2.
3. The Student has been diagnosed with Oppositional Defiant Disorder, ADHD-Inattentive Type, and Learning Disorder NOS. (P-13-3)
4. The Student works at a 4.5 to 5th grade level in math with assistance. The Student's behaviors significantly affect his academic achievement in math. He has low motivation in math. He tries to avoid his math work. (P-8-2)
5. The Student works on the 3rd to 4th grade level in reading. He is easily frustrated by his reading assignments. He has deficits in decoding, fluency and comprehension. He needs individualized attention and instruction in reading. (P-8-4)
6. The Student has strong auditory comprehension. (P-8-4)
7. In writing, the Student's performance is consistent with the performance of an average 7 or 8 year old, on the second grade level. He does not write legibly and is limited in his ability to write sentences. He requires small group or individual instruction in writing. (P-8-5)
8. The Student responds to individual counseling sessions and has the ability to communicate his outside experiences and their impact on school functioning. He has low self-worth and poor hygiene. (P-8-7)
9. He responds to 1:1 teacher support. (Witness E)
10. He responds to the use of assistive technology. (Witness E)
11. He needs a place in the classroom to cool down so he will not escape. (Witness E)
12. The Student has low motivation to attend class and sleeps in class. (P-6-2)
13. The Student avoids schoolwork through his behaviors. (P-6-3)
14. The Student has been having difficulties "across the board" in all classes. (P-6-3)

15. The Student can be physically aggressive in school. (P-13-4)
16. The Student is oppositional during instruction and his attendance is subpar. (P-13-10)
17. The Student has to be removed from class frequently. (P-13-10)
18. The Student requires directional cues. (P-6-4)
19. The Student has low frustration tolerance, oppositional behaviors, poor peer interactions, and an inability to focus. (P-8-2)
20. The Student's behavior has gotten progressively worse at home in the recent past. (P-10-2)
21. The Student is at risk for a sleep disorder. (P-10-2)
22. The Student sees his peers are unpredictable, harmful, and rejecting. (P-11-3)
23. The Student has been deemed "clinically significant" in areas of hyperactivity, aggression, conduct problems, attention problems, atypicality, and withdrawal. (P-11-3)
24. The Student will use profanity in class. (P-11-4)
25. The Student seeks to be validated by his peers, resulting in maladaptive behaviors. (P-8-7)
26. The smaller the classroom setting, the better it is for the Student. (Witness E)
27. The Student has been engaged in disruptive behavior in schools since he was prekindergarten. (P-13-2)
28. For 2011-2012, the Student went to School B, a public school.
29. The Student had very difficult behaviors at School B, where he sometimes could not be found. (Testimony of Witness B)

30. The IEP dated May, 13, 2012 recommended 26 hours per week of specialized instruction outside general education, behavioral support services for 60 minutes per week, occupational therapy for 60 minutes per week. (P-1-4)

31. The Student went to School A after an HOD by IHO Mortensen during the 2012-2013 school year. (Testimony of Witness A)

32. At School A, he receives an extremely low teacher to student ratio, therapeutic classroom consultation for teachers, weekly meetings with a psychologist, at-risk counseling by a psychologist, behavior management staff, and a structured “level” behavior system. (P-14-3)

33. The School employs a behavior system based on daily performance. Students can earn points towards rewards each day. Students also can lose points for negative behaviors each day. (Testimony of Witness A)

34. The Student has also been having a staff member sit in close proximity to him to complete assignments. (P-14-3)

35. Notwithstanding all these interventions, the Student’s behavior was poor during the 2012-2013 school year. (P-14-3)

36. The Student failed many of his classes for 2012-2013. He did not do the majority of his assignments. (P-10-2)

37. During 2012-2013 at School A, he slept in class for a significant amount of the time. (P-10-1-4)

38. The IEP dated May, 6, 2013 recommended 27 hours per week of specialized instruction outside general education, behavioral support services for 60 minutes per week, occupational therapy for 60 minutes per week, and speech and language pathology for 60 minutes per week. ESY is recommended. (P-8-10, 13)

39. For the 2013-2014 school year, the Student has again attended School A.

(Testimony of Petitioner)

40. The Student received counseling from Witness A on an ad hoc basis during the school year. (Testimony of Witness A)

41. The Student has been in classrooms with approximately a 3-1 student to teacher ratio for the 2013-2014 school year. (Testimony of Witness F)

42. For the 2013-2014 school year, the Student has regressed behaviorally. The Student has engaged in sleeping, verbal aggression, physical aggression, threats, and unsafe behaviors. He has been suspended numerous times. The Student has failed to progress in the level system. He was sent to the school's time out area, or "B.C.C." 80 times during the first two months of the school year (P-14-1-3; P-6-3)

43. The Student has done minimal work in 2013-2014. (Testimony of Witness A, D)

44. An FBA was written for the Student during the 2013-2014 school year. The Student's FBA indicates that the Student is defiant and non-compliant to avoid doing academic tasks or directions that he does not want to complete. The Student prefers to display negative behaviors in place of exposing his academic weaknesses. His behavioral problems are related to poor impulse control, low frustration tolerance and low self-esteem. (P-11-2)

45. The FBA recommends the use of School A's structured behavior management system, consisting of "levels." (P-11-4)

46. A BIP dated December 6, 2013 recommends the use of the leveled behavior system which uses the opportunity to receive rewards, points, or loss of points. (P-12-1-2)

47. An IEP meeting was held for the Student on December 19, 2013. At this meeting, the team reviewed the Student's FBA and BIP. Witness A indicated that the Student required a

1:1 aide. The DCPS staff indicated that more data was needed before a 1:1 aide could be considered. (P-7-1-2)

48. For 2013-2014, the Student's academic grades have ranged from A- in Earth Science to F in English 9. (P-15-1)

49. The Student has made no progress on most his academic goals during the 2013- school year. (R-4-1-8)

50. Respondent has offered the Student a new location of services, School C. School C is a self-contained private school with a different structure than School A. School C has a "cubicle model" and de-escalation is not used as much. The school does not restrain students, and there are social workers and counselors in the classrooms every day. (Testimony of Witness G)

51. I found all 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. 1:1 Aide, December, 2013 IEP.

Petitioner contends that the Student required a 1:1 aide in his December, 2013 IEP. Petitioner contends that the 1:1 aide would help address the Student’s severe behaviors in the classroom, which have gotten worse for this school year. Petitioner contends that the aide is necessary for immediate crisis management, passive physical restraint, implementation of a BIP, intervention to prevent dangerous elopement and to prevent serious imminent danger to the student and others.

To this IHO, Petitioner’s contentions do not reflect a complete characterization of this Student’s difficulties. The difficulties here are also related to the Student’s difficulties with academics and lack of interest in school. This Student’s behaviors are a manifestation of his academic issues. As stated in his FBA, “he prefers to display disruptive behaviors in place of exposing his academic weakness.” (P-11-3)

Petitioner cites to a number of cases, including Bethlehem Area School Dist., 52 IDELR 25 (SEA PA 2008), where a severely autistic student frequently lay on the floor engaging in self-injury. In Bethlehem, the Student’s medical providers recommended that the Student receive a 1:1 aide. As opposed to the facts in Bethlehem, the record here does not clearly establish the reasons why a 1:1 aide would help the Student. The record indicates that this teenage Student sleeps during class frequently, has poor impulse control, poor self-image, and low frustration tolerance. In fact, the Student sleeps so deeply and so persistently in school that he could not be tested by a speech and language pathologist. (P-10-6) It is unclear to this IHO how a 1:1 aide

could manage these issues, and none of the witnesses offered any clear explanation of exactly what a 1:1 aide would do to keep the Student from misbehaving.

Additionally, the record shows that School A has used this kind of approach for this Student, without success. Among the interventions tried for this Student at School A include having a staff member sit in close proximity to him to complete assignments. Even so, the Student failed to complete assignments, slept in class, and was consistently disruptive. The Student was sent to the school's Behavior Counseling Center no less than 80 times in the first two months of the school year.

It is notable that the Student is already in a classroom in a non-public school with a very small Student to teacher ratio. The record indicates that the Student is being taught with only two other students, in a 3-1 setting. The record does not establish that the addition of another adult in the classroom will make any difference for this unfortunately troubled Student.

Further, the record suggests that this teenager may not appreciate being shadowed by an aide for the duration of the school day. Witness F indicates that many teens are self-conscious and that a 1:1 aide can be disruptive instead of helpful. There is nothing in the record to suggest that a 1:1 aide would be accepted by this Student, who is embarrassed at his academic weaknesses. Indeed, the record suggests that the Student – who is self-conscious about his academic issues – might react negatively to the aide. I will add that the cases cited by Petitioner do not involve teenagers with an acute awareness of their peers.

Rather than pin the Student's problems on the lack of an aide, it is fair for the Respondent to posit that this Student's problems may lie in the fact that he is simply not responding to the behavior management program at School A. As pointed out by Witness G, the Student is rejecting a behavioral model that relies on excluding the Student in the classroom. A switch of

location of services, rather than an IEP change, would appear to be the best solution for this Student. As also pointed out by Witness G, the proposed new location of services, School C, is a reasonable choice for this Student in view of the fact that exclusion from the classroom is not as heavily relied on there. To this IHO, the Student appears to seek removal from the classroom as a means of escaping his academic work.

Accordingly, I must dismiss Petitioner's contentions with respect to the need for a 1:1 aide in the December, 2013 IEP.

2. August, 2011 IEP.

Petitioner contends that the August, 2011 IEP was inappropriate for this Student. However, this IEP is not in the record, and there was no testimony in the record concerning this IEP. Petitioner has not met her burden on this issue. I must dismiss Petitioner's contentions with respect to the August, 2011 IEP.

3. Location of Services, August, 2011 through November, 2012.

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) ("[t]he primary vehicle" and "centerpiece" of the statute's education delivery system" is the IEP). Courts hold that school districts may designate schools for students as long as the District assigns a school that may appropriately implement a Student's IEP. T.Y. v. New York City Department of Educ., 584 F.3d 412 (2d Cir. 2009).

Still, although the LEA has the discretion with respect to the location of services, that discretion cannot be exercised in such a manner to deprive a Student of a FAPE. Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988).

Additionally, Districts may be held liable on a "failure to implement" theory. "Failure to implement" claims are actionable if the school district cannot materially implement an IEP. A

party alleging such a claim must show more than a de minimis failure, and must indicate that substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 2012 WL 548173 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007).

Accordingly, for Petitioner to prevail on a claim that Respondent provided an inappropriate location of services, Petitioner should show that the location of services either failed to implement the IEP or created an atmosphere that was inappropriate for the Student. Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006)(environment deemed inappropriate for Student).

Here, there is no evidence and virtually no testimony about the inappropriateness of School B, which educated the Student for the 2011-2012 school year and the 2012-2013 school year through the date of IHO Mortensen's HOD in November, 2012. There is no testimony about the kind of classes the Student attended, what the Student's school day was like, what the environment was like at the school, and how the school did or did not implement the Student's then IEP. While the limited testimony in the record from Witness B does indicate that the Student did poorly during this period, with no IEP in the record it is impossible for this IHO to tease out whether the issue was the IEP, the location of services itself, or other issues relating to the Student. I find that Petitioner has not satisfied her burden on this issue. I must dismiss Petitioner's contentions with respect to the location of services from August, 2011 through November, 2012.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, all remaining claims in this case are dismissed with prejudice.

Dated: March 15, 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: March 15, 2014

Michael Lazan
Impartial Hearing Officer