

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

STUDENT,¹
By and through PARENT,

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Case No.

Bruce Ryan, Hearing Officer

Issued: September 26, 2011

2011 SEP 27 AM 9:05

OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed July 13, 2011, on behalf of a year old student (the "Student") who resides in the District of Columbia, currently attends a DCPS full-time special education school (the "School"), and has been determined to be eligible for special education and related services under the IDEA.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by failing to develop an appropriate individualized education program ("IEP"), in that the IEP fails to prescribe the services of a dedicated aide. Petitioner alleges (*inter alia*) that at a March 4, 2011 MDT/IEP team meeting, each member of the team agreed that the services of a dedicated aide were warranted for the Student, consistent with the recommendations of a 12/23/2010 comprehensive psychological evaluation. *See P-1* (Due Process Complaint Notice).

¹ Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

DCPS filed its Response on July 25, 2011, which denies the allegations. DCPS asserts (*inter alia*) that the IEP team did *not* agree that a dedicated aide was required at the 03/04/2011 meeting because the Student had shown improvement in his behavior and academic progress.

A resolution meeting was also held July 25, 2011, which did not resolve the Complaint. The parties did not agree to end the 30-day resolution period early, and the period thus ended on August 12, 2011.

A Prehearing Conference ("PHC") was then held on August 16, 2011, at which the parties discussed and clarified the issues and requested relief. *See P-3* (Prehearing Order, ¶¶ 5-6.

Disclosures were filed by both parties, as directed, by September 8, 2011, and the Due Process Hearing was held in Room 2004 on September 15, 2011. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-12.

Respondent's Exhibits: R-1 through R-5.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witness: Parent-Petitioner.

Respondent: No Witnesses.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is February 25, 2011.

III. ISSUE AND REQUESTED RELIEF

A discussion at the PHC resulted in the following single issue being presented for determination at hearing:

Inappropriate IEP (Dedicated Aide) — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP (*i.e.*, one that was reasonably calculated to provide educational benefit), as of March 4, 2011, in that the IEP fails to provide the services of a dedicated aide?

Petitioner requests injunctive relief in the form of ordering DCPS: (a) to amend the Student's IEP to include a prescription for a dedicated aide; and (b) to provide the Student with the services of a dedicated aide.²

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issue and relief specified above. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005).

IV. FINDINGS OF FACT

1. The Student is a year old student who resides in the District of Columbia. He has been determined to be eligible for special education and related services under the IDEA as a child with an Other Health Impairment ("OHI") due to his disabilities, including prior diagnoses of Attention Deficit/Hyperactivity Disorder ("ADHD") and congenital encephalopathy. *See P-10* (03/30/2011 IEP); *P-4* (12/23/2010 comprehensive psychological evaluation), pp. 15-18.
2. During the 2010-11 school year, the Student attended a general education DCPS elementary school, where he exhibited problematic behaviors that adversely affected his educational performance. *See P-1; P-5* (FBA); *P-7* (11/23/2010 meeting); *Parent Testimony*. At an MDT/IEP team meeting held in November 2010, DCPS authorized Petitioner to obtain an independent evaluation of the Student. *P-7, p. 4*.
3. In late December 2010, a comprehensive psychological evaluation of the Student was independently conducted by a licensed clinical-school psychologist. *See P-4*. The evaluator found (*inter alia*) that the Student met the criteria for ADHD, Combined Type, consistent

² Petitioner did not seek any compensatory education services or other retrospective relief in her Complaint, as confirmed at the PHC. Petitioner's counsel also conceded in closing argument that Petitioner presented no evidence of educational harm and/or likely educational benefits to support a compensatory education award in the due process hearing, despite being provided an opportunity to do so. The Hearing Officer thus considers such item of requested relief to have been waived in this case.

- with his prior diagnosis; that he exhibits significant ADHD symptoms that likely are secondary to the neonatal brain damage he suffered;³ and that he “presents with pervasive academic, behavioral, and emotional difficulties.” *Id.*, pp. 16-17. During the evaluation, the Student “demonstrated gross inattention, hyperactivity, and impulsivity and required constant direction to complete the evaluation.” *Id.*, p. 17. The evaluator also made several educational recommendations, including that the Student receive the assistance of a one-to-one aid. According to the evaluator, “[t]he magnitude of his cognitive delays, academic weaknesses, and ADHD symptomatology suggest the need for intensive one-on-one support for meeting his educational needs in the school setting.” *P-4*, pp. 18-19. *See also P-5* (independent FBA).
4. In early January 2011, the same independent evaluator also completed a functional behavior assessment (“FBA”) to identify specific behaviors that influenced the Student’s educational performance. *P-5*. The FBA found that the Student engaged in several behaviors of concern, including inattention/off-task behaviors, wandering out of the classroom and running away from school staff, refusal of services, and other non-compliance with school rules. *Id.*, pp. 7-8. Again, the evaluator concluded that “[t]he magnitude of [Student’s] behaviors and his cognitive and academic limitations suggest the need for a one to one aide in the classroom so that he can receive individualized assistance in meeting pre-determined goals.” *Id.*, p. 7.
 5. On or about January 10, 2011, DCPS convened a meeting of the Student’s MDT/IEP team to review the independent FBA. At this meeting, the Special Education Teacher reported that she “sits [Student] right next to her b/c she feels he needs more one on one attention”; and she “agree[d] that a 1:1 aide would be very helpful for [Student] to help him in class.” *P-8* (01/10/2011 meeting notes), pp. 2, 4.
 6. On or about January 20, 2011, DCPS developed a behavior intervention plan (“BIP”) for the Student based on the independent FBA. *P-6*. The BIP included using an appropriate classroom behavior management system to promote on-task behavior, as well as a requirement that a “Teacher/Paraprofessional will provide student with individualized support (as needed) in the classroom.” *Id.*, p. 1.

³ According to the evaluator, this is because organic brain damage in areas responsible for executive functioning and emotional regulation may elicit inattention, hyperactivity, and impulsivity similar to that found in ADHD. *P-4*, p. 17. The evaluator also noted that the Student was “currently not on any medications for ADHD because of his significant medical history.” *Id.*, p. 16.

7. On or about March 4, 2011, DCPS convened a meeting of the Student's MDT/IEP team to complete its review of the 12/23/2010 comprehensive psychological evaluation. *P-9*. At this meeting, the team discussed the evaluation report, behavior observations, and the recent behavior intervention plan. Petitioner requested that DCPS prescribe the assistance of a dedicated aide in accordance with the evaluator's recommendations and the Student's ongoing difficulties in the school setting. *See Parent Test.*; *P-9* (03/04/2011 meeting notes). The available evidence indicates that the team agreed at that time that the Student reasonably required the services of a dedicated aide to meet his educational needs and receive FAPE. *Id.*
8. The Student's current IEP is dated March 30, 2011, and was adopted as a result of the 03/04/2011 team meeting. It provides 25.5 hours per week of specialized instruction in an Outside General Education setting, 60 minutes of Speech-Language Pathology services and 30 minutes of Behavioral Support Services per week also in an Outside General Education setting, and 30 minutes per month of Occupational Therapy services in a General Education setting. *See P-10*, p. 9. With respect to whether the Student requires the support of a Dedicated Aide, the IEP says "No." *Id.*
9. On or about June 3, 2011, DCPS convened another meeting of the Student's MDT/IEP team. At this meeting, DCPS reported that the Student would be placed at the School for the 2011-12 school year. Petitioner and her attorney also inquired into the status of the dedicated aide and why the process had not moved forward since the March meeting. DCPS members of the IEP team responded that this was a "process" and that a DCPS representative would follow up about the dedicated aide concerns. *P-11* (06/03/2011 meeting notes). Petitioner signed the 03/30/2011 IEP at this time, but wrote that she "disagrees w/IEP due to the failure to include a dedicated aide." *P-10*, p. 1. *See also Parent Test.*
10. It is undisputed that DCPS has not provided the Student with the services of a dedicated aide, that DCPS has never revised or amended the Student's IEP to require such services, and that DCPS has never issued any Prior Written Notice informing Petitioner of its refusal to amend the IEP to provide a dedicated aide.

V. DISCUSSION AND CONCLUSIONS OF LAW

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof on the sole issue presented in this case. Petitioner proved by a preponderance of the evidence that DCPS has denied the Student a FAPE by failing to include the services of a dedicated aide in his March 4, 2011 IEP. Petitioner's testimony on this issue was uncontroverted and consistent with the available documentary evidence including IEP meeting notes. Petitioner's request for appropriate injunctive relief is therefore granted as set forth herein.

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1.

To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982).⁴

In this case, Petitioner has shown that the Student's educational needs as of March 4, 2011, reasonably required the intensive one-on-one support of a dedicated aide due to the severity of his in-school behaviors and his cognitive and academic limitations. This need was specifically recognized by the Student's IEP team in reviewing the recommendations of an independent comprehensive psychological evaluation and FBA. Petitioner testified that the school principal at that time told the IEP team that he was "going to push it through as soon as possible because [Student] needed that additional support." *Parent Test*. Petitioner then

⁴ See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. ").

attempted to follow up with responsible DCPS staff on multiple occasions over the remainder of the 2010-11 school year, but nothing happened.

At the same time, DCPS failed to issue any updated IEP document based on the 03/04/2011 meeting discussions until June 3, 2011 (some three months later), thereby depriving Petitioner of the ability to assess the elements of the Student's program. *Cf. N.S. v. District of Columbia*, 709 F. Supp. 57, 73 (D.D.C. 2010) ("One of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary."); *Alfono v. District of Columbia*, 422 F. Supp. 2d 1, 6 (D.D.C. 2006).

DCPS argues that "the consensus of the IEP team was that there was insufficient justification to support a request for a dedicated aide." P-2. DCPS further contends that "the IEP team did not agree with the Petitioner that a dedicated aide was required because the student has shown improvement in his behavior and academic progress." *Id.* However, DCPS presented no testimony of any other IEP team member to dispute Petitioner's testimony on this issue, despite listing various witnesses in its five-day disclosure. Nor does the record support DCPS' other assertions. The contemporaneous meeting notes reflect the team's discussion of continued, significant behavioral difficulties, rather than improvement (*see P- 5 — P-9*); and the Student does not appear to have made significant academic progress during the 2010-11 school year. *See R-5* (report card); *Parent Test.*

It is possible, of course, that the Student may not need the same services of a dedicated aide now that he attends a different, full-time special education school for the 2011-12 school year. Under such circumstances, DCPS may properly act to update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities." *Maynard v. District of Columbia*, 54 IDELR 158 (D.D.C. 2010), *slip op. at p. 6*; *see* 34 C.F.R. 300.324. But that does not mean that DCPS can simply choose to ignore educational needs previously determined to require IEP services, without prior notice to the parent and the parent's participation in the IEP team review process.

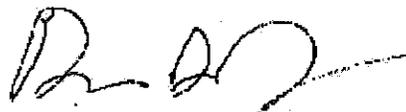
Accordingly, pending any further IEP process to review the educational and functional needs of the Student at his current School, the Hearing Officer will grant Petitioner's request to

enforce the determination of the March 4, 2011 IEP team that the Student requires the services of a dedicated aide to access his education and receive meaningful educational benefit.⁵

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. The requests for relief in Paragraph 2 (a) and (b) of the Requested Relief in Petitioner's July 13, 2011 Due Process Complaint are hereby **GRANTED**;
2. Within **five (5) school days** of this Order (*i.e.*, by **October 3, 2011**), DCPS shall amend the Student's IEP dated March 30, 2011, to provide for the services of a dedicated aide, and shall provide such services, **unless and until** DCPS convenes a meeting of the Student's MDT/IEP team (with Petitioner present) to review and revise the IEP in this respect based on updated information concerning the Student's educational needs, including his behavior and performance in his current School.
3. This case shall be, and hereby is, **CLOSED**.



Dated: September 26, 2011

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).

⁵ At the conclusion of the due process hearing, the parties stipulated that DCPS had recently issued a Letter of Invitation for a 30-day IEP review meeting to take place at the School on or about September 30, 2011. Nothing in this HOD precludes the MDT/IEP team from making changes to the dedicated aide requirement of the 03/30/2011 IEP if such a change is shown to be appropriate to address the Student's needs in his current educational placement, based on all relevant updated information.