

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
June 10, 2013

[Parent], on behalf of
[Student],¹

Date Issued: June 7, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on March 27, 2013. The Petitioner is represented by Michael Eig, Esq., and the Respondent is represented by Daniel McCall, Esq. A response to the complaint was filed on April 5, 2013. A resolution meeting was held on April 12, 2013, and resulted in no agreements. A prehearing conference was convened on April 17, 2013 and a prehearing order was issued on April 18, 2013.

The Respondent filed a motion to dismiss on April 30, 2013. The Petitioner filed an opposition to the motion on May 3, 2013. The motion was denied in a written order on May 7, 2013.

The Petitioner filed a prehearing brief and disclosed documents to be submitted as evidence on May 22, 2013, as required by the Undersigned. The Respondent disclosed documents to be

¹ Personal identification information is provided in Appendix C which is to be removed prior to public dissemination.

submitted as evidence on May 22, 2013, and did not file a prehearing brief. At the hearing the Petitioner moved to prevent the Respondent from presenting a case as a result of the lack of the required prehearing brief. The motion was denied as the Respondent prejudiced itself by failing to file the required brief explaining its legal arguments and the evidence it would present to support its arguments. Further, the Respondent was required to present all of its evidence during the presentation of its case, rather than all at once at the outset of the hearing.

The parties were notified, multiple times starting on March 29, 2013, that witnesses would be required to testify in person at the hearing, unless there was a motion to permit a telephone testimony, timely filed and granted, based on a showing of good cause. No motions for telephone testimony were filed, and the Respondent sought to have a witness, _____ testify via telephone on the day of the hearing. The Respondent proffered that the witness's schedule had changed and that she could no longer attend the hearing in person because she was at a meeting at her school. The motion was denied and the witness was permitted to testify in person. The Respondent did not produce the witness. The Respondent made a proffer of the witness's testimony on the record at hearing, but had not made that specific proffer in a required prehearing brief, as noted supra, nor had it included any indication of the proffered testimony in its response to the complaint, despite specific factual allegations made in the complaint, as required by 34 C.F.R. § 300.508(e) & (f) .

The due process hearing was convened and timely held at 9:00 a.m. on May 30, 2013, in room 2006 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing closed just after 4:00 p.m. that day. The due date for this Hearing Officer's Determination (HOD) is June 10, 2013. This HOD is issued on June 7, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is:

Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to provide the Student with an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum and meet each of the Student's other needs that result from his disability, because the IEP during the 2012-2013 school year lacked the related service of a dedicated aide?

The Petitioner is seeking reimbursement for the cost of the dedicated aide for the 2012-2013 school year.²

The Respondent denied the Student a FAPE and the cost of the Student's dedicated aide at the non-public school for the 2012-2013 school year must be at public expense.

IV. EVIDENCE

Four witnesses testified at the hearing, two for the Petitioner and two for the Respondent. The Petitioner's witnesses were:

1. The Petitioner, Student's Father (P).
2. Dr. _____ (J.M.), providing an expert opinion on why the Student required a dedicated aide.

The Respondent's witnesses were:

² As of the date of hearing, the Petitioner had not yet incurred any reimbursable expenses, although he had a verbal contract with the non-public school to pay for the aide. The non-public school had incurred the cost of the aide.

1. _____, DCPS Office of Special Education Non-Public Unit Supervisor (B.P.).

2. _____ Contractor with _____ (J.W.).

While no witness testimony is entirely discredited, all of the witnesses have credibility gaps, which has resulted in particular scrutiny of their testimony. P, for example, despite being an attorney, having been a party to a prior complaint, and being represented by the same attorney in both the prior and current complaint, did not know what he complained about in the prior complaint, what he agreed to in the prior settlement agreement, and did not object to the Respondent not including the requested dedicated aide in the June 2012 revision of the IEP. J.M., for example, despite being the head of the non-public school, a former Special Assistant to the Assistant Secretary, Office of Special Education and Rehabilitative Service in the United States Department of Education, and admitted as an expert in the field of special education, had invoices created on April 17, 2013, which were then submitted on May 2, 2013, for the aide for the 2011-2012 and 2012-2013 school year. The invoices were addressed to OSSE, not the Petitioner or the Respondent, and included the wrong date of birth and identification number for the Student, and told the Petitioner that he had not been previously invoiced because J.M. understood the Respondent was obligated to pay, even though she did not have any contact or conversations with the Respondent about the Student's need for a dedicated aide when it was discussed and determined by the non-public school in December 2011, and raised no concerns with the Respondent about the Respondent's refusal to include the aide once it was made aware at the June 2012 IEP team meeting. B.P., for example, despite being the supervisor of the Respondent's non-public unit, did not even become aware of the discussion about an aide for the Student until the complaint in this matter was originally filed in February 2013 (which was

withdrawn and subsequently re-filed in March) and otherwise had no first-hand knowledge of the Student or his history. Finally, J.W., despite being directly responsible for monitoring public school students at the non-public school on behalf of the Respondent, did not know about the Student's disabilities, did not know J.M, despite being in meetings with her and having been a monitor of the non-public school for the last two school years, and yet remembered comments from the school psychologist regarding possible motivation by the Student's parents concerning the Student's placement. Thus, testimony provided has been particularly scrutinize and corroborated prior to the findings of fact herein.

41 of the Petitioners' 46 disclosures were entered into evidence. The Petitioners' exhibits are listed in Appendix A. Six of the Respondent's 10 disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. 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. Student is a year old learner with multiple disabilities.³ He has Developmental Coordination Disorder, which is marked by poor coordination and clumsiness. He also has Specific Learning Disabilities in the areas of reading, writing, and math. He has a Mixed Receptive-Expressive Language Disorder. He has a mild sensorineural hearing loss, for which he uses hearing aids. The Student also has Attention Deficit Hyperactivity Disorder-Hyperactive Impulsive Type, Bipolar Disorder, Anxiety Disorder. He presents with motor control, visual perception, and sensory processing issues, requiring occupational therapy (OT).
2. The Student has just completed his eighth grade year at the non-public school, where he has attended since sixth grade.⁴ The Student was unilaterally placed at the non-public school by his parents.⁵
3. By the spring of 2011, the Student's sixth grade year, he was performing well at the non-public school, and at least one teacher (social studies) noted he "benefitted from frequent one-on-one teacher support to maintain his focus and attention."⁶
4. The Petitioner filed a complaint seeking mediation, through Counsel, in August 2011, to obtain public funding for the Student's placement at the non-public school, as well as funding for the related services of counseling, speech and language, OT, and wrap-around services if necessary.⁷ The mediation occurred and resulted in a settlement agreement on December 1, 2011, which reimbursed the Petitioner for the Student's sixth grade year at the non-public school, reimbursed the Petitioner for the Student's seventh grade year at the non-public school, and reimbursed the Petitioner for various related services, including

³ P 3, P 4, P 5, P 6, P 7, Testimony (T) of P.

⁴ T of J.M. The name of the school is listed in Appendix C.

⁵ T of P, T of J.M..

⁶ P 9.

⁷ P 10, P 11.

transportation, speech and language, OT, and counseling.⁸ The parties agreed that the non-public school was not endorsed by the Respondent and that it would not be the Student's stay put placement.⁹ The parties also agreed that an IEP meeting, including the parents, would take place prior to May 27, 2012, to plan for the 2012-2013 school year.¹⁰

5. The 2011-2012 school year was the Student's seventh grade year.¹¹ J.M. determined, in December 2011, that the Student required a dedicated aide to keep him focused on the curriculum in class and prevent him from shutting down.¹² She determined the Student could not attend the non-public school without a dedicated aide.¹³ She made an agreement with the Petitioner that he would pay for the aide if the Respondent did not, but never billed him for it, until May 2013, and then only with an inaccurate invoice without the Student's correct date of birth or student identification number listed, and addressed to the Office of the State Superintendent of Education.¹⁴ The non-public school only told the Petitioner that they needed the Respondent to pay for the aid and did not inform the Respondent that the Student required an aide, that they sought reimbursement for the aide from the Respondent for the remainder of the 2011-2012 school year, and did not seek to convene an IEP team meeting to discuss the Student's need for an aide.¹⁵

6. An IEP meeting, lacking any of the Student's teachers or a representative from the non-public school, was held June 19, 2012, and the Petitioner raised the issue of the aide with the

⁸ P 12.

⁹ P 12.

¹⁰ P 12.

¹¹ T of J.M., T of P.

¹² T of J.M. (J.M. claimed that as the academics became more rigorous the Student was becoming overwhelmed in class and shutting down. However, no progress reports from the fall of 2011 were presented as evidence, and none of the teachers testified to corroborate this claim, and so it is not verified.)

¹³ T of J.M.

¹⁴ T of J.M., T of P, P 31, P 32.

¹⁵ T of J.M. (The Petitioner is not seeking reimbursement for the actual or potential cost of the aide during the 2011-2012 school year, and the Student was still unilaterally placed at the non-public school for that school year, despite the Respondent's reimbursement of certain costs for that year.)

team.¹⁶ The LEA representative at the meeting, _____ refused to include the aide in the IEP and advised the team that the aide would be revisited after the start of the new school year.¹⁷ No prior written notice of the refusal or proposed IEP was provided to the Petitioner (although it appears the IEP was provided).¹⁸ The partial team did determine to place the Student at the non-public school for the 2012-2013 school year.¹⁹

7. The Student's present levels of functional performance, with regard to behavioral concerns, as of June 2012, were the following: the Student could be non-compliant, defiant, oppositional, threatening, and impulsive; he exhibited some hypersensitivity, inappropriate behaviors where the teacher had to isolate him from the other children for safety reasons; the Student threatened suicide and became physically aggressive towards others; and he exhibited poor self-control and impulsivity.²⁰ These behaviors were preventing him from successfully accessing the general education curriculum due to interrupting his attention to academic tasks and participation.²¹ He required assistance in improving his social skills, managing his emotions/feeling appropriately, constant redirection and verbal reinforcement, and a reducing in the frequency of behaviors.²²
8. J.W., an employee of a contractor for the Respondent, took over from Gross in the fall of 2012, as the LEA representative on the IEP team.²³ She was responsible for monitoring the Student's program at the non-public school.²⁴ J.W. was not made aware of the Student's history and the prior IEP team meeting, the need to review the IEP and the question of the

¹⁶ T of P, T of J.M., P 25. (This is a key fact, and this finding is made by a preponderance of the evidence, credibility issues notwithstanding.)

¹⁷ P 15, T of P.

¹⁸ T of P.

¹⁹ T of P, T of J.M., R 5.

²⁰ P 15.

²¹ P 15.

²² P 15.

²³ T of J.W., T of P, P 19.

²⁴ T of J.W.

aide, and only reviewed the IEP and scanned a psychological report.²⁵ She did not know the Student was being provided a dedicated aide until so advised at an IEP team meeting in November 2012.²⁶

9. In November 2012, the Student's present levels of functional performance, with regard to behavior, were the following: the Student was a very hard worker and had greatly improved in his ability to maintain appropriate behavior during class, and to respond appropriately to his peers and teachers over the last two years, particularly with the support over the last year of a dedicated aide; the support of the aide had permitted him to spend more focused time in the classroom, with the result being an increase in the quality of his work; he still demonstrated poor response inhibition, resulting in silly behavior or making inappropriate remarks in order to amuse peers; he struggled with the executive functioning skills necessary to respond appropriately to peer conflicts or criticism, and would respond defensively and with little emotional control, resulting in non-compliance, oppositional behavior that is disruptive to the class and requires his removal; removals from class had greatly decreased, and learning and maintaining the executive skills needs to sustain academic progress continued to be an important part of the Student's program, including continuing to develop skills that help with emotional control in order to maintain better focus and to more consistently demonstrate behaviors necessary for academic success, and improving his ability to inhibit his responses to peers both socially and in the context of classroom behavior.²⁷ His academic achievement and functional performance were still being impacted by his

²⁵ T of J.W.

²⁶ T of J.W. (J.M. testified that anecdotal evidence of the Student's need for the aide was provided to the Respondent at the start of the 2012-2013 school year, but no confirming evidence of this, or the "evidence" referred to, was offered and it is not a finding of fact.)

²⁷ P 17, P 19.

disability, and his lack of self-control, impulsivity, and poor self-regulation prevented him from attending to academic tasks and participation in the general education curriculum.²⁸

10. At one of the November 2012 IEP team meetings (they were held November 13 and 29, 2012), the Respondent was asked to pay for the aide.²⁹ The Respondent refused because the aide was not in the IEP.³⁰ At the meeting on November 29, 2012, J.W. advised that more data would have to be collected before a determination about adding an aide could be made.³¹ The Respondent never agreed to add the aide to the IEP.
11. J.W. made observations of the Student on October 30, 2012, and December 4, 2012, and very little information was recorded.³²
12. The Respondent believes the Student's behaviors can be addressed in a different school, but never proposed a change in location.³³ J.W. believes the Student does not require a dedicated aide to assist him with his behaviors, because the two times she observed him it did not appear he needed an aide, even though he already had one, and that a behavior intervention plan (BIP) would be better to address his needs.³⁴ No BIP with interventions or supports other than the dedicated aide were ever proposed or discussed by the IEP team.³⁵
13. The non-public school provided the dedicated aide throughout the 2012-2013 school year. The Student performed well academically due, in part, to improved functional performance made possible by the support of the dedicated aide.³⁶ In English, the Student required the

²⁸ P 17, P 19.

²⁹ T of P, T of J.W., P 17, P 19, P 20.

³⁰ T of P, T of J.W., P 20.

³¹ T of J.W., P 21.

³² T of J.W., R 4. (R 4 provides little useful information about the Student's classroom performance, and J.W. testified there was a third observation sometime in November, but this could not be corroborated and she provided no details about the third observation.)

³³ T of P, T of J.M., T of B.P., T of J.W., P 21.

³⁴ T of J.W., P 25. (A BIP is a term of art, and it is possible the BIP could be the provision of a dedicated aide.)

³⁵ T of P, T of J.W., P 19, P 21, P 25.

³⁶ P 33.

support of the aide when he perceived the work to be overwhelming or frustrating. With differentiation, and the frequent opportunity to work on homework in school with the assistance of the aide, the Student was able to keep up with the modified curriculum. He showed significant emotional growth and was often able to overcome disappointments and bad moods and get to work, with the assistance of his aide, who supported him on difficult days and provided positive feedback when he was successful. In Social Studies he took initiative to complete his homework on time, using the study hall where he could work with his aide. The Student struggled with comprehending assigned readings and his teacher and aide helped him to accumulate reading strategies to improve his understanding. The aide helped the Student prepare for tests, by helping him to turn his Cornell notes into brain frames to organize each topic and its corresponding facts. The aide helped the Student to maintain focus and attention in class by helping him in developing self-monitoring strategies to help ensure engagement in class activities. The Student often needed redirection to remain focused on a task and was encouraged to self-advocate in a positive and appropriate manner. The small class size and availability of the aide were large factors in the Student's success in math. The aide worked closely with him and encouraged him to implement strategies and other math resources to complete his work more independently. He is on the on fourth to fifth grade level in math, up from being able to perform only simple addition and subtraction in June 2012.³⁷

14. At the time of hearing, the Petitioner had not paid for the dedicated aide for the Student for the 2012-2013 school year.³⁸ The cost of the aide was projected to be \$15,008.19, based on a rate of \$23.00 per hour for 652.53 hours.³⁹

³⁷ P 15, P 33.

³⁸ T of P, T of J.M.

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide education benefits. Suggs v. District of Columbia, 679 F. Supp. 2d 43, 51 (D.D.C.2010). "An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his

³⁹ P 31, P 32.

current educational program, *see Reid v. District of Columbia*, 401 F.3d [516,] 519-20 [(D.C.Cir. 2005)]; the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d [63,] 68 [(D.D.C. 2008)]; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” *Suggs*, 679 F. Supp. 2d at 51-52.

3. A local education agency (LEA) does not have to pay for the cost of education, including special education and related services, of a child with a disability at a private school if the LEA made FAPE available and the parents elected to place the child in the private school. 34 C.F.R. § 300.148(a).
4. The Petitioner unilaterally placed the Student in a non-public school for the 2010-2011 school year, and sought public funding for that placement. This resulted in a settlement agreement on December 1, 2011, in which the Respondent agreed to reimburse the Petitioner for the cost of the 2010-2011 school year, and the 2011-2012 school year. The Respondent also agreed to reimburse the Petitioner for certain related services as well, which did not include a dedicated aide. The Petitioner agreed to participate in an IEP team meeting prior to May 27, 2011, to develop an IEP for the 2012-2013 school year. This agreement, along with an agreement that the Respondent did not endorse the Student’s placement at the non-public school and that the non-public school would not constitute the Student’s stay put, demonstrates the Respondent’s reassertion of its supervisory authority over the Student’s education for the 2012-2013 school year. The IEP team developed an IEP at a team meeting on June 19, 2012, without the Student’s current teachers or any member from the non-public school (*See*, 34 C.F.R. §§ 300.321 & 300.325), and the Student’s need for a dedicated aide

was discussed. The LEA representative advised the team that an aide would not be added to the IEP, without explanation, and advised the team the issue of an aide would be revisited at the start of the new school year. No written notice explaining the Respondent's reason for the refusal, or even its proposals in the IEP, was provided to the Petitioner. The aide issue was not revisited until November 2012. By that time, a new LEA representative was on the IEP team, and did not even know the Student had been provided an aide by the non-public school and had been doing so since the middle of the prior school year. This shows the Student's special education and related services were not under public supervision and direction as required. The Respondent has argued that someone should have told them about the aide. Because the Student's education program was to be under public supervision and direction for the 2012-2013 school year, it was incumbent upon the Respondent to be aware of the services the Student was receiving at school. In fact, the Petitioner had alerted the Respondent to the Student's need for the aide the prior school year at the IEP team meeting and was inappropriately rebuffed (without any written notice or explanation). The lack of the required meeting participants and lack of public supervision and direction are violations of the FAPE requirement, pursuant to 34 C.F.R. § 300.17(a), and contributed to the substantive denial of FAPE.

5. FAPE was denied because the Student required the aide to be involved in and make progress in the general education curriculum and meet his other needs resulting from his disability. The Student's disability led to frustration in class and an inability to maintain focus on the learning resulting in behavior problems and being removed from the classroom. The Student required the aide to help him maintain focus and deal with anxiety and other feelings and impulses which would normally result in inappropriate behavior and a disconnect from

learning. This proved to work well for the Student. During the 2012-2013 school year, after the Student's education program transferred to public supervision, the Petitioner and non-public school kept providing the aide, even though it had not been added to the IEP. The Student continued to perform well with the assistance of the aide, as evidenced by his progress reports. Nevertheless, the Respondent continued to refuse to provide the aide at the November 2012 IEP team meeting without any explanation, noting only that data would continue to be gathered, which made no sense given the Student was already being provided an aide and the progress reports showed this was working well for the Student. Further, the Respondent never offered any alternatives to the use of the aide to address the Student's functional needs.

6. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). Given the evidence in this case demonstrates the Student's need for an aide, which was not effectively refuted by the Respondent, the Respondent will be required to ensure the aide that was provided to the Student for the 2012-2013 school year is at no cost to the Petitioner, pursuant to 34 C.F.R. § 300.17.
7. The Respondent argues that if the Student requires an aide at the non-public school, then the non-public school is not appropriate. This argument fails because related services are provided to "assist a child with a disability to benefit from special education. . . ." 34 C.F.R. § 300.34(a). If the Petitioner's argument stands, then anytime a mainstreamed public school student required a related service, such as a dedicated aide, the mainstream setting would be determined to not be appropriate. This is not a logical outcome.

VII. DECISION

The Respondent denied the Student a FAPE when it did not include the related service of a dedicated aide in the IEP for the 2012-2013 school year.

VIII. ORDER

The Respondent will ensure the related service of the dedicated aide of the Student during the 2012-2013 school year is at no cost to the Petitioner. If the Petitioner has already paid the non-public school for the cost of the aide, the Respondent will reimburse the Petitioner within 30 days of receipt of proof of expense incurred, such as a cancelled check or receipt.

IT IS SO ORDERED.

Date: June 7, 2013



Independent 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).