

DC Office of the State Superintendent of Education
Office of Review & Compliance
Student Hearing Office
1150 5th Street, SE
Washington, D.C. 20003
CONFIDENTIAL

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STUDENT HEARING OFFICE
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<p>[Parent], on behalf of [Student],</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools,</p> <p>Respondent.</p>	<p>Case</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>January 15, 2009</p> <p><u>Representatives:</u></p> <p>Joy Freeman-Coulbary, Petitioner</p> <p>Harsharen Bhuller, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 1:00 p.m. on January 6, 2010. The record closed on that date. The due date for the Hearing Officer's Determination (HOD) is January 16, 2010, pursuant to Standard Operating Procedure § 1003. This HOD is issued on January 15, 2010.

The hearing in this matter was conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

Present at the due process hearing were:

Petitioner's Counsel, Joy Freeman-Coulbary, Esq.¹

Respondent's Counsel, Harsharen Bhuller, Esq.²

Petitioner, Student's Mother

Student's Father

Jennifer Gibbs, Respondent's Representative

Three witnesses testified at the hearing:

Student's Education Advocate

Student's Father (S.F.);

IEP Coordinator,

The complaint in this matter was filed on November 16, 2009. A response to the complaint was filed by the Respondent on November 24, 2009. The resolution period ended December 2 when the parties agreed in writing that an agreement could not be reached and the matter should proceed to hearing. A prehearing conference was held on December 4, 2009, and a prehearing order was issued on that date.

21 documents were disclosed and filed by the Petitioner on December 29, 2009. (P 1 – P 21)

P 1 – P 14, P 20 and P 21 were admitted as exhibits into the record. Petitioner's exhibits are as follows:

- P 1 - Due Process Complaint Notice, November 13, 2009
- P 2 - Prehearing Order, December 4, 2009
- P 3 - Due Process Complaint Disposition, December 2, 2009, with handwritten notes
- P 4 - Individualized Education Program (IEP), May 16, 2008 (See R 2)
- P 5 - Parent Conference Record IEP – DPG Meeting, May 16, 2008 (See R 1)
- P 6 - Confidential Neuropsychological Evaluation, February 21, 2008 (See R 1)

¹ Ms. Freeman-Coulbary replaced Christopher Anwah, Esq. as counsel of record for this case, as indicated in a notice filed December 29, 2009.

² Ms. Bhuller replaced Daniel McCall, Esq. at the hearing for undisclosed reasons.

- P 7 - Confidential Educational Evaluation, January 3, 2008 (See R 1)
- P 8 - Psychoeducational Re-Evaluation, December 19, 2007, January 3, 2008
- P 9 - Occupational Therapy Evaluation, December 11, 2007
- P 10 - Revised Psychoeducational Re-Evaluation, December 19, 2007, January 3, 2008
- P 11 - Speech-Language Re-Evaluation, December 6, 2007
- P 12 - Confidential Clinical Evaluation, December 12, 2007 (See R 1)
- P 13 - Vineland-II Parent/Caregiver Rating Report, January 10, 2008
- P 14 - Request and Justification for Extended School Year Services, March, 2008
- P 20 - Professional Resume, James Moses Ballard, II, Ph.D
- P 21 - IEP, May 8, 2009 (See R 7)

The documents not entered into the record were:

- P 15 - Vineland Adaptive Behavior Scales, November 12, 2002
- P 16 - Psychoeducational Evaluation, October 25, 2002
- P 17 - Social Work Evaluation Report, September 26, 2002
- P 18 - Neurodevelopmental Evaluation, August 28, 2002
- P 19 - IEP Meeting Notes, March 4, 2003

Eight documents were disclosed and filed by the Respondent on December 29, 2009. No objection was raised to the admission of any of the disclosed documents and they were admitted into the record. (R 1 – R 8). Respondent's exhibits are as follows:

- R 1 - Confidential Educational Evaluation, January 3, 2008 (See P 7); Parent Conference Record IEP – DPG Meeting, May 16, 2008 (See P 5); IEP Meeting Notes, May 16, 2008; Confidential Neuropsychological Evaluation, February 21, 2008 (See P 6); Confidential Clinical Evaluation, December 12, 2007 (See P 12)
- R 2 - IEP, May 16, 2008 (See P 4)
- R 3 - Elementary School Program Report Card 2008-2009 School Year
- R 4 - Reading Testing 2008-2009
- R 5 - Progress Summary 2008-2009
- R 6 - Student Report of Progress, June 18, 2009
- R 7 - IEP, May 8, 2009 (See P 21)
- R 8 - IEP Progress Report – Annual Goals, November 17, 2009

The Respondent made motions on the record for a directed verdict following the Petitioner's opening statement and following the close of the Petitioner's case. The motions were denied on the record.

II. ISSUES

- 1) Whether the Respondent failed to conduct a sufficiently comprehensive evaluation to identify all of the Student's special education and related service needs?
- 2) Whether the Respondent failed to provide an individualized education program (IEP) reasonably calculated to provide the Student with educational benefit since November 16, 2007?

III. FINDINGS OF FACT

1. The Student is a year old child with a disability enrolled in a private school that is providing special education and related services to the Student on behalf of the Respondent.³ Student is currently in the grade and has been determined eligible for special education and related services through the definition of speech or language impairment (S/L).⁴ His father would like him to be in a "normal" school so he looks like a "normal" child and without special education services his entire school career.⁵
2. The Student underwent several assessments as part of a reevaluation during fourth grade (December 2007 – February 2008).⁶ The assessments included a neuropsychological, educational, psychoeducational, occupational therapy, speech and language, clinical, and a behavioral.⁷ The assessments indicated some degree of variability in determining the

³ Testimony (T) of T of T of P 21/R 7.

⁴ P 21/R 7.

⁵ T of

⁶ P 6, P 7, P 8, P 9, P 11, P 12, P 13, R 1.

⁷ P 6, P 7, P 8, P 9, P 11, P 12, P 13, R 1.

Student's disability and educational needs.⁸ The neuropsychological assessment report stated that the Student's symptoms of Rolandic Epilepsy (a condition he was previously diagnosed with) do not "appear to contribute significantly to his slow academic progress, but rather that he may in addition have other forms of neurodevelopmental delay."⁹ The report also recommended that a "complete neurological evaluation should be made to determine possible co-existence of diverse forms of abnormal cerebral conditions."¹⁰ The Student's Parents requested, based on this recommendation, that a neurological assessment be done at the May, 2008, IEP team meeting.¹¹

3. During fourth grade (in December 2007), according to reevaluation data (specifically the results of the Woodcock Johnson III) the Student was performing at a grade equivalency of 1.9 in broad reading, a grade equivalency of 2.6 in broad mathematics, a grade equivalency of 2.0 in broad written language, and a grade equivalency of k.8 in oral language.¹²
4. When the Parent's requested the neurological assessment in May, 2008, school staff were going to "check on ability to order" the assessment.¹³ No written notice of a proposal or

⁸ P 6, P 7, P 8, P 9, P 11, P 12, P 13, R 1.

⁹ P 6/R 1. (This evidence contradicts the testimony offered by the Petitioner, through that the Student's head shaking, one of his symptoms, interferes with the Student's academic progress. Nevertheless, the Student, when his head is shaking, which is most of the time, is successfully redirected by teachers in the classroom and is able to answer questions and be engaged in classroom activity. T of T of.

¹⁰ P 6/R 1.

¹¹ T of S.F., T of P 5/ R 1. (S.F. testified that the Parents requested this "every time" they met since at least May 2008. However, only the request made at the May 2008 IEP team meeting was conclusively corroborated with the meeting notes from that meeting.)

¹² P 7/R 1, P 8, P 10. (The Woodcock Johnson III is a nationally-normed diagnostic tool designed to identify an individual's current strengths and weaknesses. It is not a curriculum-based assessment.)

¹³ T of T of P 5/R 1.

refusal to reevaluate the Student with the neurological assessment was ever provided, and the requested assessment was not done.¹⁴

5. The Student's IEP was revised at the May 2008 IEP team meeting.¹⁵ The reading fluency goal (by developing decoding and word attack skills) was to be measured with objectives that correspond to first and second grade standards.¹⁶ He mastered all of the objectives toward this goal but for one.¹⁷ The reading comprehension goal was to be measured with objectives that correspond to kindergarten through fourth grade standards.¹⁸ The Student met the goal by April 2009.¹⁹ The math calculation goal was to be measured with objectives that correspond to kindergarten through fifth grade standards.²⁰ Seven of the eight objectives for this goal were met by April 2009.²¹ The written language goal was to be measured with objectives that correspond to third, fourth, fifth, and eighth grade standards.²² This goal was not met by April 2009 (sufficient progress was made on only two of five objectives).²³ The expressive language goal was to be measured with

¹⁴ T of T of (This finding is also supported by the lack of evidence of a notice in the record.)

¹⁵ P 4/R 2.

¹⁶ P 4/R 2 (See District of Columbia Reading/English Language Arts Pre-K through Grade 12 standards.)

¹⁷ R 2.

¹⁸ P 4/R 2.

¹⁹ R 2.

²⁰ P 4/R 2, (See, District of Columbia Mathematics Pre-K through Grade 12 standards. One of the objectives was so vague, it could not be determined which standard it corresponded to.)

²¹ R 2.

²² P 4/R 2 (See District of Columbia Reading/English Language Arts Pre-K through Grade 12 standards.)

²³ R 2.

objectives that correspond to first through fourth grade standards.²⁴ Eight of nine objectives for this goal were met by April 2009.²⁵ The receptive language goal was to be measured with three objectives that correspond to at least one second grade standard.²⁶ This goal was met by April 2009.²⁷ There were also functional goals to improve the Student's articulation skills (produce "s" and "z" in initial, medial, and final position of multisyllabic words – this goal was not met), pragmatic language skills (maintaining eye contact and proper body position, interpret/react to facial expressions and non-verbal forms of communication, modify language with awareness/sensitivity to listener, ask for clarification, and restate key information – only two of five objectives toward this goal were met by April 2009), motor skills (appropriate formation, connections, and line placement of letters, using cursive writing, and finger position when typing, oral motor control when eating snacks, appropriate trunk posture for 20 minutes, safely navigating the classroom without bumping people or things, keeping hands to self when excited, participation in movement activities for 15 minutes, catching a tennis ball with one hand, 20 push-ups in less than a minute, ten minutes of continuous moderate intensity physical activity, standing on one leg for 10 seconds, 10 side hops over a line in 15 seconds, and skip with reciprocal arms and legs for 10 cycles – all objectives for these goals met, but for catching a tennis ball), and social emotional skills (not interrupting or speaking over others, identifying another person's perspective, collaborating with peers, listing three

²⁴ P 4/R 2 (See District of Columbia Reading/English Language Arts Pre-K through Grade 12 standards.)

²⁵ R 2.

²⁶ P 4/R 2 (See District of Columbia Reading/English Language Arts Pre-K through Grade 12 standards. The three objective here were the most difficult to relate to D.C. language arts standards.)

²⁷ R 2.

areas in which he is doing well and two in which he needs to improve, and describing his feelings and feelings of others in relation to his words or actions at least once monthly – the two goals were met, except for part of one objective concerning interrupting others).²⁸

6. The Student's IEP was revised again in May 2009.²⁹ The IEP includes five math goals, all apparently based on fourth grade standards.³⁰ The IEP includes five reading goals that correspond to second, third, and sixth grade standards (although the goal on reading 100 words per minute does not appear to relate to any reading standards).³¹ The IEP includes four writing goals that correspond to a second grade standard and two fourth grade standards (the goal on editing does not appear to relate directly to any standard).³² The IEP includes nine goals under the area of "Communication/Speech and Language," some goals which correspond to third, fourth and sixth grade standards (numbers 1, 2, 3, and 6), the rest which do not or are functional in nature.³³ The IEP includes five goals under the area of "Emotional, Social, and Behavioral Development" which were revised from the May 2008 revision of the IEP.³⁴ The IEP includes six goals under the area of "Motor

²⁸ P 4/R 2.

²⁹ P 21/R 7. (The May 2009 revision of the IEP did not include objectives, but many of the objectives in the prior revision were changed to goals in the May 2009 revision.)

³⁰ P 21/R 7.

³¹ P 21/ R 7.

³² P 21/R 7.

³³ P 21/R 7. (Goal 6 is nearly identical to Goal 4 under "Reading.")

³⁴ P 21/R 7, P 4/R 1.

Skills/ Physical Development” which were largely revised from the May 2008 revision of the IEP.³⁵

7. The Student advanced academically only two years in two years, despite being at least two years behind in meeting the educational standards for his grade.³⁶ He did not meet his speech and language goals (articulation and pragmatic language) between May 2008 and May 2009, although he was making progress and there may not have been a trigger to review and revise the IEP concerning these goals prior to May 2009.³⁷

IV. CONCLUSIONS OF LAW

1. Evaluations must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.” 34 C.F.R. § 300.304(c)(6), D.C. Mun. Regs. tit. 5, § 3005.9(h). Furthermore, evaluations must include “Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. § 300.304(c)(7). *See also*, D.C. Mun. Regs. tit. 5, § 3005.9.
2. A reevaluation of a child with a disability must occur if the child’s parent requests a reevaluation. 34 C.F.R. § 300.303(a)(2), D.C. Mun. Regs. tit. 5, § 3005.7. This is not an

³⁵ P 21/R 7, P 4/R 1.

³⁶ P 4/R 2, P 21/R 7, R 3, R 4, R 5, T of .

³⁷ R 2.

unlimited requirement. The regulations includes express limitations under paragraph b. There may be other reasons to refuse a request for reevaluation, which a parent could contest if so notified. As the United States Department of Education so clearly explains:

If a parent requests a reevaluation and the public agency disagrees that a reevaluation is needed, the public agency must provide prior written notice to the parent, consistent with § 300.503, that explains, among other things, why the agency refuses to conduct the reevaluation and the parent's right to contest the agency's decision through mediation or a due process hearing.

Fed. Reg. Vol. 71, No. 156, Monday, August 14, 2006, p. 46640.

3. In this case the Parents requested a reevaluation at least once, in May 2008. The Respondent did not provide written notice of either a refusal or proposal, consistent with 34 C.F.R. § 300.503 and D.C. Mun. Regs. tit. 5, §§ 3024 & 3025, regarding its position with regard to the request, leaving the Parents without knowledge of where the District stood on their request and why.
4. The request for reevaluation was based on the recommendation in a then recent assessment report (P 6) which advised that the Student's slow academic progress may be the result of "other forms of neurodevelopmental delay" that had not already been identified. The IEP Coordinator testified that school staff on the IEP team did not know if they could provide a neurological assessment and that they felt that it was not necessary to revise the IEP.³⁸ Without evidence to show a legitimate reason to deny the request for the reevaluation, and the recommendation that other reasons should be examined to figure out why the Student is progressing so slowly academically, the Respondent must arrange and pay for the neurological assessment.

³⁸ The witness also indicated there was confusion about the requested assessment because it was medical in nature. Medical services for diagnostic and evaluation purposes, such as the requested neurological assessment, are related services that must be provided or paid for by a local education agency if necessary to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34(a).

5. Federal regulations at 34 C.F.R. § 300.17 define a free appropriate public education

(FAPE) 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.

The Supreme Court has described the purpose of the IDEA quite clearly:

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Board of Educ. v. Rowley, 458 U.S. 176, 203-204 (1982).

6. Federal Regulations at 34 C.F.R. § 300.320(a)(2) requires and IEP to include:

A statement of measurable annual goals, including academic and functional goals designed to —

- (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- (B) Meet each of the child's other educational needs that result from the child's disability[.]

“[A]n IEP that focuses on ensuring that a child is involved in the general education curriculum will necessarily be aligned with the State's content standards.” Fed. Reg. Vol. 71, No. 156, Monday, August 14, 2006, p. 46662.

7. Despite the lack of complete information about the Student's disability and its affect on his progress and involvement in the general curriculum, the Student made some educational progress (relative to himself) with the IEP that was developed. It is not known what the results of the neurological assessment will show, if anything, that will

impact the educational programming for the Student. However, the Student did not achieve two of his functional goals, although he met others, and his academic achievement in math, reading, and writing remain significantly behind where he should be based on his grade level. The academic goals do not meet D.C.'s educational standards for sixth grade and therefore do not approximate the grade levels used in D.C.'s regular education. As a result, the Student's academic progress is not sufficient to close the gap between his current academic achievement and the achievement expected of a sixth grader (he remains, essentially, two years behind his peers academically). If the Student is to be involved in and progress in the general curriculum his IEP (including the academic goals and special education and related services) must be calculated to close that gap. The Student's IEP is not currently reasonably calculated to provide the Student with educational benefit.

V. DECISION

1. The Petitioner prevails on Issue 1 because Respondent failed to conduct a sufficiently comprehensive evaluation upon the request of the Parents, and failed to provide prior written notice of its refusal to do so.
2. The Petitioner prevails on Issue 2 because the IEP is not currently reasonably calculated to provide the Student with educational benefit.

VI. ORDER

1. The Petitioner will arrange and pay for a neurological assessment of the Student, in order to determine whether there are other neurological factors or conditions impacting the Student's academic and functional progress.

2. The assessment must be arranged no later than January 29, 2010, and every effort must be made to have the assessment completed by April 2, 2010.
3. Any delays resulting from the Petitioner, Petitioner's Counsel or Advocate, or the evaluator, will not be held against the Respondent for compliance purposes, and any timelines of this Order impacted by such delays will be extended day for day.
4. Within seven calendar days of the Respondent's receipt of the assessment report, an appropriately constituted IEP Team must meet to review the assessment report, and any additional data available at the time, and review and revise the IEP in accordance with the assessment report recommendations, if the IEP Team agrees with the recommendations. Any refusals (as well as proposals) must be communicated in accordance with 34 C.F.R. § 300.503 and D.C. Mun. Regs. tit. 5, §§ 3024 & 3025.
5. When the IEP is revised, the academic goals must be aligned with D.C. content standards, and the special education and related services must be designed to enable the Student to reach the goals by the end of his seventh grade year.³⁹
6. At least three alternate times for an IEP team meeting must be provided to the Parents, including the time the IEP team will meet if they do not respond or are unable to attend any of the proposed meeting times.
7. Tutoring must immediately (but no later than January 25, 2010) be provided to help ensure the Student can reach the current academic goals in the IEP by the time it is revised again. The tutoring must consist of at least one hour per school day until the IEP is revised and the revision put into effect.

³⁹ This may give the Respondent a little more than a year to accomplish what it should have accomplished with the Student by now.

IT IS SO ORDERED.

Dated this 15th day of January, 2010.

A handwritten signature in black ink, appearing to be 'Jim Mortenson', written over a horizontal line.

Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).