DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

[Student][1], through [Parents], Petitioner, v. District of Columbia Public Schools (DCPS), Respondent.	Case HEARING OFFICER'S DETERMINATION ON REMAND March 29, 2010 Representatives: Michael Eig, Petitioner Daniel McCall, Respondent Independent Hearing Officer: Jim Mortenson

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STUDENT HEARING OFFICE
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I. PROCEDURAL BACKGROUND & ISSUE

This matter came before Independent Hearing Officer (IHO) Latif Doman, on November 24, 2008. IHO Doman issued a Hearing Officer's Determination on December 13, 2008, dismissing the matter. The case was appealed by the Petitioner and, based on a motion of the Respondent, was remanded on February 12, 2010[2], and assigned to this IHO[3] on March 1, 2010, to determine

[1] Personally identifiable information is attached as Appendix A to this decision and the appendix must be removed prior to public distribution.

[2] The Remand Order is the only document provided to this IHO from the Federal District Court file that was not already part of the administrative record.

[3] The previous IHO is no longer on the Student Hearing Office roster.

the appropriateness of DCPS' proposed placement of the Student at

for school year 2008-2009.[4]

Following the remand, a prehearing was held on March 4, 2010, to discuss the process and procedures for the remand. A prehearing order was issued on March 10, 2010. This IHO determined the HOD should be issued within 45 days of the remand (March 29, 2010), and that another evidentiary hearing was not necessary. Not withstanding that another evidentiary hearing was not necessary, this IHO requested that, as a technical matter, the Petitioner submit evidence on the cost of the private placement he is seeking reimbursement for. This evidence was determined to be necessary and not controversial because it would preserve administrative and judicial resources in the event I were to find that the Respondent's proposed placement was not appropriate, that the Petitioner's placement was appropriate, and that Parents were entitled to reimbursement.[5] This HOD is issued on March 29, 2010.

This remand is considered, 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, and the Order of the Honorable Richard J. Leon, United States District Judge.

This HOD is based on the hearing record below and the details of the evidence and witnesses below. Four witnesses testified for the Petitioner and the Respondent disclosed 12 witnesses and presented none. The four witnesses who testified at the hearing were:

Griffin Doyle, Psychologist;

Stephanie Owens, Educational Specialist;

Special Education Teacher; and

[4] This HOD includes a complete analysis of the remanded issue, pursuant to 34 C.F.R. § 300.148, including whether the Parents' placement was appropriate and what reimbursement, if any, they are entitled to.

[5] *See*, Prehearing Order, March 10, 2010.

Parent.

In addition to the documents entered into the record at the hearing (P 1 – P 46)[6] the record will also reflect the additional cost data requested by this IHO, referred to collectively as H 1.

II. FINDINGS OF FACT

1. At the start of the 2008-2009 school year the Student was a year old learner diagnosed with sensory integration disorder and developmental delay.[7] The individualized education program (IEP) team met on August 1, 2008, and an IEP for the upcoming school year was proposed.[8]

2. The IEP included only a partial statement of the Student's present levels of academic achievement and functional performance.[9] While assessment reports provided detail as to how the Student's disability affected his participation in appropriate activities, the IEP only stated that the Student was "withdrawn and has limited interaction with his peers this [sic] impacts on his ability to engage in age appropriate activities."[10] Yet, the IEP contains not only social emotional goals, but also motor skill goals which are an

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[6] The prior HOD states there was one exhibit from the Respondent. This was a typo as no document is in the record and the transcript (p. 9, 1-4) indicates no Respondent exhibits were entered into the record.

[7] Transcript (T) at 114, P 7 (This independent assessment was determined by DCPS to meet "the standards for independent evaluations in terms of examiner qualifications and the appropriateness of the test for the purpose of assisting with an eligibility determination." P 16).

[8] T at 152, P 24.

[9] P 24. (Because the Student was only five years old, and had not yet begun kindergarten, academic achievement was not much of a factor to consider at that point, although assessment data did show he had high average intellectual skills. P 11, P 16, P 17.)

[10] P 24. P 4, P 7 and P 14 are assessment reports that all provide a good deal of detail about the Student's disability that does not appear in the IEP. The following are an example of some of the details not reflected in the IEP: the Student has below average expressive language skills, has significant difficulties with fine, visual and gross motor skills, posture control and trunk/shoulder instability, low muscle tone and decreased endurance, etc.

appropriate area to address based on assessment data, but do not stem from any statement of present levels of functional performance.[11]

3. The IEP includes six annual goals for the Student which will each be examined below.[12] The first goal is "To improve ability to use sensory information to understand and effectively interact with people and objects in the school environment, [Student] will: [Then three short-term objectives are listed to measure progress toward the goal.][13] Based on the statement and the objectives one cannot tell what it means to "effectively interact with people and objects."[14] Thus the goal is too vague to be measurable and it cannot be determined if it has been met even if the short-term objectives are met.[15]

4. The second goal is "To demonstrate written communication skills for greater proficiency when using writing implements, [Student] will: [Then three short-term objectives are listed to measure progress toward the goal.][16] Based on the statement and the objectives one cannot tell what "greater proficiency" means.[17] Thus the goal is too vague to be

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[11] P 4, P 7, P 14, and P 24.

[12] P 24.

[13] P 24. The IEP lists four purported short-term objectives. However, the fourth on the list is not an objective at all but rather a statement of support service to be provided to classroom staff by an occupational therapist.

[14] P 24.

[15] P 24. The objectives measure progress toward an undefined goal.

[16] P 24. The IEP lists four purported short-term objectives. However, the fourth on the list is not an objective at all but rather a statement of support service to be provided to classroom staff by an occupational therapist.

[17] P 24.

measurable and it cannot be determined if it has been met even if the short-term objectives are met.[18]

5. The third goal is "To demonstrate improved fine motor skills for better participation and success in the classroom environment, [Student] will: [Then six short-term objectives are listed to measure progress toward the goal.][19] Based on the statement and the objectives one cannot tell what "improved fine motor skills" or "better participation in the classroom environment" is.[20] Thus the goal is too vague to be measurable and it cannot be determined if it has been met even if the short-term objectives are met.[21]

6. The fourth goal is "To demonstrate improved motor planning to enhance quality of movement and efficient organization of self for effective participation during school activities, [Student] will: [Then three short-term objectives are listed to measure progress toward the goal.][22] Based on the statement and the objectives one cannot tell what "improved motor planning," "to enhance quality of movement and efficient organization of self," or "effective participation during school activities" looks like.[23] Thus the goal is

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[18] P 24. In this case, the three objectives can be measured but, because the goal statement is so vague, one cannot say that meeting the objectives shows the goal is accomplished. In fact, the same goal statement could be used from year after year with changing objectives and this is not what is intended for a measurable annual goal. The objectives measure progress toward an undefined goal.

[19] P 24.

[20] P 24.

[21] P 24. In this case, the six objectives can be measured but, because the goal statement is so vague, one cannot say that meeting the objectives shows the goal is accomplished. In fact, the same goal statement could be used from year after year with changing objectives and this is not what is intended for a measurable annual goal. The objectives measure progress toward an undefined goal.

[22] P 24.

[23] P 24.

too vague to be measurable and it cannot be determined if it has been met even if the short-term objectives are met.[24]

7. The fifth through seventh goals are "The student will improve his social skills as evidenced by mastering th[e] following short term objectives."[25] There are six measurable objectives with the fifth goal, three with the sixth goal, and five with the seventh goal.[26] The goals are undefined and are used interchangeably in the IEP.[27] The significance of this error is clearly demonstrated with the seventh goal which purports to be a goal under the area of academics, despite being worded the same as the prior two goals under the area of social skills.[28] The objectives under the seventh goal to "improve his social skills" are to demonstrate specific math skills.[29] Thus the goals are too vague to be measurable, despite their wording designed to be self-fulfilling upon reaching the objectives.[30]

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[24] P 24. In this case, the three objectives can be measured but, because the goal statement is so vague, one cannot say that meeting the objectives shows the goal is accomplished. In fact, the same goal statement could be used from year after year with changing objectives and this is not what is intended for a measurable annual goal. The objectives measure progress toward an undefined goal.

[25] P 24.

[26] P 24.

[27] P 24.

[28] P 24.

[29] P 24. This goal and set of objectives are even more surprising given that not only are no academic/math needs identified in the statement of present levels of academic achievement and functional performance, there is no apparent assessment data showing this need.

[30] P 24.

8. The IEP includes descriptions of how the Student's progress toward meeting the annual goals (despite their inadequacy) will be measured, in the short-term objectives.[31] The IEP does not include a description of when periodic reports on that progress would be provided.[32]

9. The IEP includes a statement of the special education and related services and supplementary aids and services to be provided.[33]

10. The IEP includes an explanation of the extent to which he will not participate with non-disabled children in the regular class.[34]

11. The IEP indicates the Student will take an alternate assessment of student achievement, but fails to include a statement why the Student cannot participate in the regular assessment and a statement why the alternate assessment is appropriate for the Student.[35]

12. The IEP includes the projected date for the beginning of the services (all August 25, 2008), the anticipated frequency of the services (specialized instruction for 10 hours per week and occupational therapy and speech-language service for 90 minutes per week

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[31] P 24.

[32] P 24.

[33] P 24. This includes: specialized instruction; occupational therapy; and speech-language.

[34] P 24. Student requires a small setting to reduce external stimuli and will participate in non-academic subjects with non-disabled peers.

[35] P 24. The IEP states the Student will be assessed by "Portfolio: Determined by Special Educator." It is not clear that such an alternate assessment meets the requirements of 34 C.F.R. § 300.160(c) ("A State (or in the case of a district-wide assessment, an LEA) must develop and implement alternate assessments and guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments, even with accommodations, as indicated in their respective IEPs,. . . .")

each), the location of the services (all in a special education setting), and the duration of the services (10 months).[36]

13. The Student's Parents maintained his enrollment at both and for the 2008-2009 school year.[37] They also obtained private occupational therapy, speech and language services, and counseling services.[38]

14. was an appropriate placement for the Student.[39] The Student was one of 11 children in his afternoon group.[40] Such a small group made it easier to integrate learning social skills.[41] The class routine was very structured and predictable for the Student.[42] The teachers used a gentle and nurturing approach and made the Student comfortable in his surroundings.[43] The teachers were able to provide the Student with the support he needed and to help facilitate interaction.[44] The Student was provided with 90 minutes of time outside and was able to engage in activity to help

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[36] P 24.

[37] P 23, P 29, and P 32.

[38] T at 92, P 23, P 30, P 31.

[39] P 29. The Respondent did not present any evidence at hearing contradicting this, or any of the other evidence concerning the Parent's private placements and related services for the 2008-2009 school year.

[40] P 29.

[41] P 29.

[42] P 29.

[43] P 29.

[44] P 29.

with his sensory motor delays and vestibular support.[45] The results were a general improvement in his expressive communication and social skills during the first quarter of the school year.[46]

15. was an appropriate placement for the Student.[47] There were four children and two teachers in his class.[48] is a half-day (morning) program that promotes the joy of learning in its students, relationships, early literacy and math skills, and conflict management.[49] The classroom space, including the number of people in the classroom, is carefully designed to ensure children with sensory needs are not over-stimulated.[50] There is little structure and students are engaged through their interests, prompted by play, and staff are able to build on the students' skills through that.[51]

16. The one hour per week of occupational therapy services provided by were appropriate for the Student.[52] A plan of care was put in place to: Improve sensory processing and modulation skills; improve praxis/play skills; improve postural control/balance; improve bilateral coordination; and improve fine/visual motor skills.[53]

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[45] P 29.

[46] P 29.

[47] P 32, P 33, and P 35.

[48] T at 178-79, P 32.

[49] P 35.

[50] T at 179, P 35.

[51] T at 179-81, P 35.

[52] P 30, P 45.

[53] P 30.

17. The one hour per week of speech-language therapy services provided by Communication Center was appropriate for the Student.[54] Specific goals were created for the Student in his areas of weakness including: expressive, receptive, and pragmatic language, and he made progress in these areas during the first quarter of the 2008-2009 school year.[55] Additional services during the year were necessary to continue to address his speech deficits.[56]

18. The counseling sessions provided by Dr. J. Griffin Doyle for one hour two times per week were appropriate for the Student.[57] The Student's sensory needs are the result of his very significant constitutional neuro-developmental atypical sensory motor systems.[58] The therapy was provided to aid the Student in correctly following through on the process of taking in sensory information and making sense of it so that he can learn from what he takes in.[59]

19. The cost to the Student's Parents for the educational placements and related services they provided to the Student were[60]:

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[54] P 31.

[55] P 31.

[56] P 31.

[57] T at 59-101.

[58] T at 60.

[59] T at 68-76.

[60] H 1. The documentation of costs incurred was carefully reviewed and the amounts reflected here represent fees for providing services to the Student, and items such as meetings with attorney have been excluded.

- Dr. J. Griffin Doyle

III. CONCLUSIONS OF LAW

1. 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).

2. An IEP must include the following components:

> (1) A statement of the child's present levels of academic achievement and functional performance, including —
> (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
> (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(2)(i) 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;

(ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(3) A description of —

(i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and

(ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(4) A statement of the special education and related services and supplementary aids and services, based on peer reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;

(6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and

(ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why —

(A) The child cannot participate in the regular assessment; and

(B) The particular alternate assessment selected is appropriate for the child; and

(7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

34 C.F.R. § 300.320(a) & (b), *see also,* D.C. Mun. Regs. tit. 5, § 3009.

3. The Student's IEP was not formulated in accordance with the requirements of 34 C.F.R. § 300.320 and D.C. Mun. Regs. tit. 5, § 3009. It failed to include a complete statement of the child's present levels of academic achievement and functional performance, including how his disability affects his participation in appropriate activities. The IEP lacked measurable annual goals designed to meet his needs that result from his disability to enable the Student to be involved in and make progress in the general education

curriculum and meet each of his other educational needs that result from his disability. The IEP did not include a description of when periodic reports on the progress the Student was making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) would be provided. The IEP did not include a statement why the Student could not participate in regular State or districtwide assessments and why the particular alternate assessment selected was appropriate for the Student. Thus, because the proposed IEP did not meet the requirements of 34 C.F.R. § 300.320 and D.C. Mun. Regs. tit. 5, § 3009, a FAPE was not offered.

4. 34 C.F.R. § 300.148(c) addresses reimbursement for private school placement when there is a dispute about a FAPE:

> (c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEA.

5. 34 C.F.R. § 300.148 provides limitations to reimbursement:

> (d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied —
> (1) If —
> (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;
> (2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or
> (3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

6. The placement and related services provided by the Parents were appropriate for the Student. The placements and programs at both School were designed for children his age and with similar needs and the staff adapted to address his needs. The related services provided, speech and language, occupational therapy, and counseling, all were designed to aid in assisting the Student in benefiting from the educational services provided.

7. Because DCPS denied the Student a FAPE when it proposed an IEP that failed to meet many of the basic requirements for an IEP in the fall of 2008, and because the placements and services the Parents provided to the Student, at their own expense, were appropriate, and because no cause for limitation on reimbursement has been shown by DCPS, the Parents are entitled to reimbursement for the placement and services provided to the Student for the 2008-2009 school year.

IV. DECISION

The Petitioner prevails because the IEP proposed by the Respondent for the 2008-2009 school year was not appropriate.

V. ORDER

The Respondent must reimburse the Parents the following amounts for the following placements and related services for the 2008-2009 school year:

- Dr. J. Griffin Doyle

  Total:

Reimbursement must be made within 60 calendar days of the date of this order.

IT IS SO ORDERED.

Dated this 29th day of March, 2010.

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).