DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

2010 MAR 12 PM 2: 37
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STUDENT HEARING OFFICE

[Parent][1], on behalf of [Student], Petitioner, v. [LEA], Respondent.	Case HEARING OFFICER'S DETERMINATION March 12, 2010 Representatives: Miguel Hull, Petitioner Ellen Dalton, Respondent Independent Hearing Officer: Jim Mortenson

I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on March 2, 2010, in hearing room 1, and concluded on March 3, 2010. The due date for the Hearing Officer's Determination (HOD) is March 13, 2010, pursuant to Standard Operating Procedure (SOP) § 1003. This HOD is issued on March 12, 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.

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

Present at the due process hearing were:

Miguel Hull, Esq., Petitioner's Counsel

Ellen Dalton, Esq., Respondent's Counsel

Petitioner, Student's Mother

Maria Ortega, Education Advocate

Respondent's Director of Special Education

The Student appeared at the beginning of the hearing but did not attend.

Nine witnesses testified at the hearing:

Maria Ortega, Education Advocate (M.O.);

Petitioner (P);

Special Education Teacher

Speech & Language Pathologist

Special Education Teacher

Director of Special Education

Dr. Daphney Denerville, Speech & Language Pathologist (Expert testimony regarding speech and language issues) (D.D.);

Special Education Coordinator, and

Dr. David Cranford, Clinical Psychologist (Expert testimony on student assessments) (D.C.).

The complaint in this matter was filed on January 14, 2010. The Petitioner sought to include the State Educational Agency (SEA) in the matter, and the SEA was dismissed because there were no facts alleged indicating the SEA was directly responsible for the provision of a free appropriate public education (FAPE) to the Student. A response to the complaint was filed by the Respondent on January 25, 2010. A resolution meeting was held on January 29, 2010, and

resulted in partial resolution. A prehearing conference was held on February 3, 2010. Of two identified issues at the prehearing conference, one more issue was resolved prior to the start of the hearing, leaving the issue below to be resolved by the IHO.

17 documents were disclosed and filed by the Petitioner on February 23, 2010. (P 1 – R 17) All of the documents but one (P 2) were admitted as exhibits into the record. Petitioner's exhibits are:

P 1	-	Administrative Due Process Complaint Notice, January 14, 2010
P 3	-	Answer to Due Process Complaint, January 25, 2010
P 4	-	Individual Education Program (IEP) and meeting notes (See R 6), September 21, 2009
P 5	-	IEP, September 22, 2008 (See R 5)
P 6	-	Meeting Notes, September 22, 2008 (See R 4)
P 7	-	Student Report, April 20, 2009
P 8	-	Speech and Language Reevaluation, October 27, 2006 (See R 1)
P 9	-	Psychoeducational Reevaluation, March 2, 2007 (See R 3)
P 10	-	Educational Report, January 9, 2007 (See R 2)
P 11	-	Consent for Evaluation Form, January 29, 2010
P 12	-	Speech and Language Evaluation, February 21, 2010 (See R 12)
P 13	-	Psychoeducational Evaluation, February 20, 2010 (See R 11)
P 14	-	Maria Consuelo Ortega Curriculum Vitae
P 15	-	Maria Ortega School Psychologist K-12 Standard
P 16	-	Maria Ortega Speech Pathologist K-12 Standard
P 17	-	Maria Consuelo Ortega Commonwealth of Virginia Postgraduate Professional License

16 documents were disclosed and filed by the Respondent on February 23, 2010, (R 1- R16) and two additional documents were requested by the IHO (R 17 & R 18). All of the documents were admitted into the record. Respondent's exhibits are:

R 1	-	Speech and Language Reevaluation, October 27, 2006 (See P 8)
R 2	-	Educational Report, January 9, 2007 (See P 10)
R 3	-	Psychoeducational Reevaluation, March 2, 2007 (See P 9)
R 4	-	Meeting Notes, September 22, 2008 (See P 6)
R 5	-	IEP, September 22, 2008 (See P 5)
R 6	-	Meeting notes, September 21, 2009 (See P 4)
R 7	-	IEP, September 21, 2009
R 8	-	8th Grade Report Card, 2009-2010 School Year

R 9 - Grade Report Card, 2009-2010 School Year
R 10 - Resolution Meeting Notes, January 29, 2010
R 11 - Psychoeducational Evaluation, February 20, 2010 (See P 13)
R 12 - Speech and Language Evaluation, February 21, 2010 (See P 12)
R 13 - Fax Confirmation, February 22, 2010
R 14 - Letter of Invitation, February 22, 2010
R 15 - Dr. Cranford Curriculum Vitae
R 16 - Dr. Denerville Curriculum Vitae
R 17 - IEP, February 26, 2010
R 18 - Interest Determination, Exploration and Assessment System (transition assessment), December 1, 2009

II. ISSUE

Whether the Respondent failed to provide special education and related services in conformity with the Student's individualized education program (IEP)? Specifically, whether 25.5 hours per week of specialized instruction was content, methodology, or delivery of instruction adapted to address the Student's needs flowing from her mental retardation?

III. FINDINGS OF FACT

1. The Student is a year old learner in the LEA and is enrolled in the grade.[2] She was determined eligible for special education and related services under the definition of mental retardation (MR) in first grade at a District of Columbia public elementary school.[3] The Student has been enrolled in the LEA since September 2007.[4]

[2] Testimony (T) of P, P 13/R 11, R 17.

[3] T of P.

[4] T of P.

2. The Student's intellectual ability is in the lowest .2% of the population, as a result of her disability, and as measured by the WISC-IV assessment.[5]

3. A reevaluation of the Student was conducted and an assessment report was written on January 9, 2007, concerning the Student's academic strengths and weaknesses.[6] The report was based on results from a Woodcock Johnson III Tests of Academic Achievement (WJ-III).[7] The Student's academic performance, based on those tests, resulted in the following standard scores[8]:

Broad Reading = 41

Broad Math = 69

Broad Written Language = 45

4. When the Student was reevaluated in 2010, one of the assessments provided was the WJ-III.[9] The standard scores from that assessment were[10]:

Broad Reading = 38

Broad Math = 54

Broad Written Language = 35

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[5] R 11, T of

[6] P 10/R 2.

[7] P 10/R 2.

[8] P 10/R 2.

[9] P 13/ R 11.

[10] P 13/ R 11.

These scores, when compared to the prior WJ-III scores, and based on the Student's cognitive ability, represent the Student demonstrating performance at the ceiling of her ability, referred to as a "plateau."[11]

5. The Student's IEP was revised in September 2009 to reflect that her academic performance would be assessed using the DC-CAS Alternate Assessment, and revised again in February 2010 to reflect that she would not be working toward a high school diploma.[12] The Petitioner had been reluctant to agree to change from a diploma track to a certification track and was encouraged to do so by LEA staff and her Education Advocate.[13]

6. The Student is making progress on her IEP goals.[14]

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[11] T of T of T of (The Petitioner argued that the assessment report (P 13/R 11) does not state that the Student reached a plateau in performance and so this cannot be true. The testimony received from experts in assessments sheds light on the meaning of the assessment results in conjunction with other assessment and performance data concerning the Student, and the authors of the assessment report in question were not presented to explain what they wrote in the report. The credible and unchallenged testimony of the experts in this area is that as a child gets older, the assessment gets more complicated and as a result, if the child is not cognitively able to accurately respond to the more complex questions, scores will drop. This does not demonstrate regression from what was learned, but rather demonstrates the child can no longer progress meaningfully due to her cognitive impairment. The testimony was also that this does not mean the child is not educable, but rather that the focus of education must be on functional skills.)

[12] P 4, R 17. (The Respondent had disclosed a different version of the September 2009 IEP. There appears to have been changes made to the IEP when the hand-written document was transferred to a computerized system. Only the original IEP (P 4) is relied on here and the later version submitted by the Respondent (R 4) is treated as non-existent. The differing IEPs are not a current issue because the IEP has since been revised (R 17). Also, the IEP appears to be missing a statement why the Student cannot take the DC-CAS (regular assessment) and why the DC-CAS Alternate Assessment is appropriate for the Student. *See* 34 C.F.R. § 300.320(a)(6)(ii). The LEA is cautioned to review this and, if necessary, correct this error.)

[13] T of P, T of T of

[14] R 9, T of , T of T of T of testified that the Student was not doing well, based primarily on her perception that the material presented to her was above her level and she relied on the recent WJ-III scores to bolster the idea that the Student was, as a result, regressing. This line of reasoning is not convincing given the expert testimony about what the WJ-III measures, how, and what the results show in light of other data about the Student and her abilities. P testified that she was concerned about the results she was seeing in report cards ("exceptionally well") and what she sees the Student can actually do (far below grade level). This testimony also is not convincing as to the Student's performance because it fails to take into account the Student's ability and how her academic progress is measured (based on alternate academic achievement standards).)

IV. 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. The definition of special education, under 34 C.F.R. § 300.39, includes the term *specially designed instruction* which "means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction –

> (i) To address the unique needs of the child that result from the child's disability; and
>
> (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

3. States must have "alternate assessments for those children who cannot participate in regular assessments, even with accommodations, as indicated in their respective IEPs[.]"

34 C.F.R. § 300.160(c). Alternate assessments must be aligned with the State's challenging academic content standards and challenging student academic achievement standards." Id. at § 300.160(c)(2)(i).[15] Alternate assessments are used to measure the academic performance for certain students with disabilities against modified academic achievement standards or alternate academic achievement standards. Id. at § 300.160(c), (modified academic achievement standards and alternate academic achievement standards may be developed by States pursuant to 34 C.F.R. § 200.1).

4. The Petitioner has not shown the Student was not provided special education and related services in conformity with her IEP. Specifically, the Petitioner has not shown that the specialized instruction provided to the Student failed to include content, methodology, or delivery of instruction adapted to address the Student's needs flowing from her mental retardation. Because the Student cannot participate meaningfully in regular academic assessments (as indicated by her cognitive ability and her failure to master grade-level academic achievement standards), the IEP team determined that the Student would be assessed using alternate academic achievement standards.

> An alternate assessment based on alternate achievement standards may cover a narrower range of content (e.g., cover fewer objectives under each content standard) and reflect a different set of expectations in the areas of reading/language arts, mathematics, and science than do regular assessments or alternate assessments based on grade-level achievement standards. The questions on an alternate assessment might be simpler than those on a regular assessment or the expectations for how well students know particular content standards may be less complex but still challenging for students with the most significant cognitive disabilities."

Alternate Achievement Standards for Students With the Most Significant Cognitive

[15] The District of Columbia provides guidance to LEAs on the use of the DC CAS Alternate Assessment, and refers to the DC CAS Alternate Assessment as being based on alternate achievement standards for students with the most severe cognitive disabilities. However, this IHO could not locate the alternate achievement standards developed by the District of Columbia which the assessment is based on. (*See* 34 C.F.R. § 300.160(c)(3), 34 C.F.R. § 200.1).

Disabilities, Non-Regulatory Guidance, U.S. Department of Education, August 2005, p 16. While alternate achievement standards "are aligned with the State's academic content standards . . . they may reflect prerequisite skills rather than grade-level skills[.]" Id. at 20. Thus, the Student's inability to perform at grade level has been taken into account by the IEP team, and correctly so, and it cannot be concluded that the instruction provided did not include content, methodology, or delivery adapted to the Student's needs flowing from her disability, particularly when she is making progress toward reaching her annual IEP goals.

V. DECISION

The Respondent prevails because the Petitioner failed to demonstrate the Respondent failed to provide special education and related services in conformity with the Student's IEP or otherwise failed to provide specialized instruction that did not address the Student's unique needs that result from her disability.

VI. ORDER

This matter is hereby DIMISSED.

IT IS SO ORDERED.

Dated this 12th 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).