

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 style="text-align: center;">Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools,</p> <p style="text-align: center;">Respondent.</p>	<p>Case</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>April 27, 2009</p> <p><u>Representatives:</u></p> <p>Donovan Anderson, Petitioner</p> <p>Daniel Kim & Tiffany Puckett, 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 April 20, 2009. The hearing concluded on that date. The due date for the Hearing Officer's Determination (HOD) is April 30, 2009, in accordance with the Blackman/Jones Consent Decree. This HOD is issued on April 27, 2009.

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, Donovan Anderson, Esq.

Respondent's Counsel, Daniel Kim, Esq.

II. ISSUE

Whether the Respondent has proposed an appropriate individualized education program (IEP)? Specifically, whether the Respondent has failed to conduct timely and appropriate reevaluations in order to review, revise, and implement an IEP reasonably calculated to provide educational benefit to the Student?

III. FINDINGS OF FACT

1. The Student is a year old learner currently enrolled at Academy, a private school in the District. R 4, Testimony (T) of The Student has been identified as a child with multiple disabilities, including speech and language and specific learning disabilities. R 2, R 4, T of
2. The Student was not timely re-evaluated. Stipulated fact.
3. An IEP team meeting was held on February 19, 2009, to review and revise the IEP. P 2, R 5, T of The Petitioner participated in that meeting. P 2, R 5, T of
4. The Student is not assigned to a grade. R 4.
5. The Student's grades are mixed and show progress in the curriculum as of April 1, 2009. R 7. He received the following grades for the most recent quarter of school completed:

- Reading - C
- Writing - D
- Math - D
- Social Studies - A
- Environmental Education - P (passing)
- Art - S (satisfactory)

- Music - S
- Gym - P
- Health - P

6. The Student's IEP, revised in February 2009, is not clear or complete. R 4. The statement of present levels of academic achievement and functional performance does not adequately describe how his disability affects his involvement and progress in the general education curriculum (the same curriculum as for nondisabled children). The statements in the IEP describe present levels of academic achievement in math, reading, and writing. R 4. The impact of his disabilities on functional performance are not described, despite evidence that there are behavioral and fine motor issues. R 4, R 5/P 2; R 6.
7. The IEP includes nine measurable annual academic goals, three each dealing with math, reading, and writing. R 4. There are no goals concerning functional performance or any of the other educational needs resulting from the Student's disability. R 4.
8. The IEP includes descriptions of how each of the annual goals will be measured and a description of when periodic reports on the progress the Student is making toward meeting the annual goals will be provided (quarterly).
9. The IEP includes 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. R 4. Included are 1.5 hours per week of psychological counseling and 50 minutes per week of occupational therapy. R 4. It is not clear from the statements of the Student's present levels of academic

achievement and functional performance why these related services are required.

R 4.

10. The IEP includes an explanation of the extent to which the Student will be segregated 100% of the time. R 4. It is based on the determination that the Student requires direct and “immediate teacher involvement at the first sign of frustration in order to help him stay in control.” R 4. The IEP also explains that the Student “needs a positive behavior management system that provides him with structure as well as consequences & rewards to help him stay on task & complete assignments.” R 4.
11. The IEP includes a statement of the individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the Student on State and districtwide assessments. R 4. The Student is to be assessed using regular State and districtwide assessments with specified accommodations. R 4.
12. The IEP includes the projected date for the beginning of the special education and related services and the anticipated frequency, location, and duration of those services. R 4. It does not include the projected date for the beginning of the supplementary aids and services and the anticipated frequency, location, and duration of those supplementary aids and services. R 4.
13. The Respondent has authorized the Petitioner to obtain an independent evaluation for the Student. R 1. The assessments authorized as part of the evaluation include: comprehensive psychological assessment consisting of cognitive, educational, and

clinical components as well as a social history; a speech/language assessment, and an occupational therapy assessment. R 1.

IV. CONCLUSIONS OF LAW

1. A child with a disability must be reevaluated at least once every three years, unless the district and parent agree otherwise. 34 C.F.R. § 300.303(b)(2). The Student was not timely reevaluated. The District has authorized an independent reevaluation of the Student.
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).

3. The IEP is deficient in at least three aspects. First, it lacks complete statements of present levels of academic achievement and functional performance as required by 34 C.F.R. § 300.320(a)(1). It is apparent from the record, including the IEP itself (e.g. the related services of psychological counseling and occupational therapy, and the explanation of why the Student requires a fully segregated placement), that the Student has needs relating to behavior and motor skills. This is not reflected in the statements of present levels of academic achievement and functional performance. If the related services listed are required, and the explanation for the segregated placement is accurate, these items should stem from the statement of present levels of academic achievement and functional performance. There is no mention of the Student's status with regard to speech and language needs in the statement of present levels of academic achievement and functional performance. The IEP lists the Student as multiply disabled due, in part, to a speech and language disability. Either the Student still had needs in this area, or not. The IEP should either state this or, if the Student no longer needs special education and related services due to a speech and language disability, the multiple disabilities label should be updated.

4. Second, and based on the evidence about functional needs, there are no annual functional goals as required by 34 C.F.R. § 300.320(a)(2). This must be reviewed and revised, if necessary. If there are no functional needs, no functional goals are expected (and the related services listed and segregated placement may not be necessary).
5. Finally, there is no projected date for the beginning of the supplementary aids and services (often referred to as “accommodations”) and the anticipated frequency (e.g. how often or under what conditions they will be employed), location, and duration of these services, as required by 34 C.F.R. § 300.320(a)(7). This flaw in the IEP must be corrected to ensure staff are aware of when to be using the supplementary aids and services determined by the IEP team, and so that the parent is likewise informed.
6. Federal regulations at 34 C.F.R. § 300.513 provide direction on making determinations about whether a child has received a free appropriate public education (FAPE):

(1) Subject to paragraph (a)(2) of this section, a hearing officer’s determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies —

- (i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
- (iii) Caused a deprivation of educational benefit.

7. Despite the flaws in the IEP, the Student is currently making educational progress as shown by his report card¹. The flaws in the IEP, thus, are procedural in nature and do require correction. There is no substantive ground to determine the Student was denied a FAPE, that the Petitioner's opportunity to participate in the decision making process was significantly impeded, or that these flaws caused a deprivation of educational benefit. The lack of a timely reevaluation is likewise a procedural violation in this case, and there was no resulting denial of FAPE or educational benefit. Because the Respondent has taken action to correct this, no further action will be ordered concerning the reevaluation. The Petitioner was involved in the last IEP team meeting and there is no evidence that her opportunity to participate in decision making has been significantly impeded.

V. DECISION

1. The Respondent has not proposed an appropriate IEP for the Student and has not conducted a timely reevaluation. These violations must be corrected. The Student has not been educationally harmed by these violations

VI. ORDER

1. The Respondent must convene the IEP team within 10 days of the completion of the reevaluation assessment reports. The Respondent must provide the Petitioner

¹ The reason the Student is not placed in a grade is not in the record. Thus, a true analysis of whether he is involved in and making progress in the general curriculum, the same curriculum as his peers, cannot be made. Based on this lack of evidence and since this was not presented as an issue in this case, it is not examined further.

with at least three alternative times to meet (not all consecutive) and inform her of the date the IEP team will meet if she fails to select one of the proposed times.

Her attorney must be copied on any correspondence or other notices sent or delivered to the Petitioner.

2. The IEP team must revise the IEP consistent with the findings and conclusions of this Hearing Officer's Decision (HOD), the assessment reports, and 34 C.F.R. § 300.320.
3. If the Petitioner believes the resulting proposed IEP has not complied with this order, she is directed to enforce this order, including by filing a complaint with the Office of the State Superintendent of Education pursuant to 34 C.F.R. §§ 300.151-300.153.
4. If the Petitioner fails to obtain the authorized independent educational evaluation (IEE) by June 1, 2009, the Respondent must propose an evaluation plan it will perform and seek the Petitioner's consent by June 10, 2009. (If the IEE is pending, this section does not apply.) In the event this is necessary, and the Petitioner fails to provide consent within 10 calendar days, this matter will be deemed resolved and no further action will be required by this Order.

IT IS SO ORDERED.

Dated this 27th day of April, 2009.



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. § 415(i)(2).