

Respondent's Counsel, Daniel Kim, Esq.

Petitioner, Student's Mother.

Petitioner, Student's Father.

Three witnesses testified at the hearing. The witnesses were:

Dr. Eric Levine, Education Advocate (E.L.)

Petitioner, Student's Mother (P)

High School Coordinator,

The complaint in this matter was filed on April 17, 2009. A response to the complaint was filed on April 30, 2009. A prehearing conference was held on May 1, 2009, and a prehearing order was issued on May 4, 2009. Resolution attempts were unsuccessful and the hearing timeline began on May 17, 2009.

51 documents were disclosed and filed by the Petitioner on June 10, 2009. There were no objections raised to the admission of any of the disclosed documents and they were all admitted as exhibits into the record. (P 1 – P 51). Petitioner's exhibits are as follows:

- P 1 - Due Process Complaint, April 17, 2009
- P 2 - Neuropsychological Evaluation, February 15, 2005
- P 3 - DCPS Teacher Assistance Team Meeting Notes, April 7, 2009
- P 4 - DCPS Psychological Evaluation Report Addendum, May 19, 2005
- P 5 - DCPS MDT (IEP team) meeting notes, May 26, 2005
- P 6 - Re-evaluation, June 3, 2005
- P 7 - DCPS IEP team eligibility meeting notes, September 9, 2005
- P 8 - DCPS 504 Plan, September 9, 2005
- P 9 - DCPS individualized education program (IEP), March 2, 2006
- P 10 - DCPS IEP team meeting notes, March 2, 2006
- P 11 - DCPS Occupational Therapy Observation, January 23, 2007
- P 12 - DCPS IEP team meeting notes, February 7, 2007
- P 13 - DCPS Special Education Services Completion of Services Form, February 8, 2007
- P 14 - DCPS IEP, February 8, 2007
- P 15 - DCPS IEP, October 4, 2007

- P 16 - DCPS Consent for Evaluation & Evaluation Plan, November 1, 2007
- P 17 - DCPS IEP team meeting notes, December 6, 2007
- P 18 - Summary and Score Report, March 11, 2008
- P 19 - DCPS IEP team meeting notes, April 11, 2008
- P 20 - DCPS IEP, April 11, 2008
- P 21 - DCPS IEP team meeting notes, October 2, 2008
- P 22 - DCPS Report of Educational Reevaluation, November 1, 2008
- P 23 - DCPS Eligibility Meeting Report, November 13, 2008
- P 24 - DCPS IEP team meeting notes, November 14, 2008
- P 25 - DCPS Report of Comprehensive Psychological Reevaluation, November 28, 2008
- P 26 - DCPS IEP team meeting notes, December 2, 2008
- P 27 - Letter to Lewis from Eig, January 13, 2009
- P 28 - Email to Eig from Mitchell, January 13, 2009
- P 29 - Letter to Perry from Eig, February 4, 2009
- P 30 - DCPS Consent to Evaluate, February 19, 2009
- P 31 - Letter to Perry from Eig, March 6, 2009
- P 32 - DCPS Report of Comprehensive Psychological Reevaluation, April 9, 2009
- P 33 - Letter to Perry from Eig, April 16, 2009
- P 34 - Letter to Newsome from Eig, April 17, 2009
- P 35 - Student Hearing Office Due Process Hearing Notice
- P 36 - Letter to Eig and Kim from Mortenson, April 23, 2009
- P 37 - DCPS Resolution Meeting Confirmation, April 29, 2009
- P 38 - Letter to Perry from Eig, April 29, 2009
- P 39 - DCPS Response to Complaint, April 30, 2009
- P 40 - Letter to Perry from Eig, May 1, 2009
- P 41 - Prehearing Order, May 4, 2009
- P 42 - IEP review, Bennett-Spellman, May 6, 2009
- P 43 - DCPS Resolution Meeting Notes, May 7, 2009
- P 44 - DCPS Prior Notice, May 7, 2009
- P 45 - DCPS IEP, May 7, 2009
- P 46 - Letter to Mortenson from Eig, May 26, 2009
- P 47 - Letter to Eig and Kim from Mortenson, May 26, 2009
- P 48 - Email to Eig and Kim from Mortenson, May 27, 2009
- P 49 - Examples of Student Work
- P 50 - Resume of Dr. Eric Levine
- P 51 - Resume of Karen Duncan

20 documents were disclosed and filed by the Respondent on June 11, 2009. There were no objections raised to the admission of any of the disclosed documents and they were all admitted as exhibits into the record. (R 1 – R 20). Respondent's exhibits are as follows:

- R 1 - Occupational Therapy Observation Report, January 23, 2007 (Cross reference (XR) P 11)
- R 2 - Summary and Score Report, March 11, 2008 (XR P 18)
- R 3 - Student Report, SY 2007-08
- R 4 - Consent to Evaluate, October 2, 2008 (XR P 21)
- R 5 - IEP Team meeting notes, October 2, 2008 (XR P 21)
- R 6 - Comprehensive Psychological Reevaluation, November 1, 2008 (XR P 22)
- R 7 - IEP Team meeting notes, November 14, 2008 (XR P 24)
- R 8 - Comprehensive Psychological Reevaluation, November 28, 2008 (XR P 25)
- R 9 - IEP Team meeting notes, December 2, 2008 (XR P 26)
- R 10 - Consent to Evaluate, February 19, 2009 (XR P 30)
- R 11 - Comprehensive Psychological Reevaluation, April 9, 2009 (XR P 32)
- R 12 - IEP Team meeting notes & Prior Notice, April 9, 2009
- R 13 - Resolution Session meeting notes, April 29, 2009
- R 14 - Resolution Session meeting notes, May 7, 2009 (XR P 43)
- R 15 - Special Education Progress Report, SY 2008-09
- R 16 - Individual Student Report, SY 2008-09
- R 17 - IEP Draft goals, undated
- R 18 - IEP Lead Draft goals, May 7, 2009
- R 19 - IEP, May 7, 2009 (XR P 45)
- R 20 - Report Card, SY 2008-09

II. ISSUES

1) Whether the Respondent failed to implement the Student's individualized education program (IEP)? Specifically, whether the Respondent failed to provide social skills services and keyboarding services required by the IEP, and an occupational therapy assessment agreed to by the IEP team?

2) Whether the Respondent failed to recognize and address the severity of the Student's disability? Specifically, whether the goals and objectives, as well as the statements of Present Levels, Modifications and Accommodations, and provision of

special education and related services, in the DCPS-proposed but still unfinished IEP, are sufficient to address all of the Student's academic and functional needs?¹

3) If the Student has been denied a free appropriate public education (FAPE) and a new placement is warranted, whether the _____ is an appropriate placement for the Student?

III. FINDINGS OF FACT

1. Student is an _____ year old learner who recently completed the _____ grade at _____ School within the School District. Testimony (T) of P. The Student was determined eligible for special education and related services under the definition of specific learning disability (SLD) in March, 2006. P 9, T of P. Her SLD consists of Dyslexia (reading disorder) and Dysgraphia (written language disorder). P 32². The Student is "verbally gifted" and this strength mitigates some of the problems she has with academics due to her SLD. P 32. Her verbal strengths may cause teachers to believe her reading, writing, and processing difficulties are due to a lack of effort as opposed to her disability. P 32.
2. The Student also suffers from Attention Deficit Hyperactivity Disorder (ADHD) and has been medicated for this condition. P 32. Her ADHD affects her by

¹ This issue was clarified by the Petitioner, with the agreement of the Respondent and approval of the IHO, between the time of the prehearing order and the hearing.

² P 32 is relied on for much of the description of the Student because it is a relatively recent evaluation report that was created by DCPS staff and heavily relied upon by Petitioners in their arguments. Also, the evaluator reviewed and compiled data from many recent previous evaluations in constructing the thorough report.

impacting her executive functioning. P 32, T of P, T of E.L. She is “anxious in the classroom setting around completion of tasks, moving from one area to the next and being on time.” P 32. The Student “is somewhat withdrawn when she is unsure of her response, and appears to daydream during tasks.” P 32. She “may be lacking confidence in her abilities thereby making her appear at odds with her classroom and home environments as well as having physical signs of illness/health concerns. These are consistent with both the Learning Disability and Attention Deficit Disorder.” P 32. She does “have some ability to inhibit responses that are counterproductive and instead perform other responses that are necessary[,]” although she is “not making this type of decision in the classroom consistently.” P 32. People with ADHD often “cannot manage without support and compensatory strategies” the ability “to regulate and utilize memory and organization skills consistently in a variety of settings[.]” P 32.

3. The School Psychologist who completed the most recent comprehensive psychological reevaluation of the Student noted the heightened scores for depression, somatization, and withdrawal and recommended this data be shared with the Student’s physician to ensure these issues were not “symptomatic side effects of her medication.” P 32.
4. The Student is performing well, academically, in school and is largely proficient in the core academic areas of mathematics, reading, and written language, with the exception of spelling. T of P, P 32, R 16, R 20.
5. The Student does not like school and struggles to get assignments completed. T of P. She interacts with peers but does not have any friends. T of P.

6. The Student's IEP was revised on April 11, 2008. P 19, P 20. That revision of the IEP does not require keyboarding or social skills services. P 20. The Student received social worker services as part of her initial IEP dated March 2, 2006. P 9.
7. The Student's IEP was revised again on October 2, 2008. P 21. That revision of the IEP does not require keyboarding or social skills services. P 21.
8. The Petitioners did consent to a motor skills/physical development assessment on October 2, 2009. P 21, R 4. This assessment was never completed. T of P.
9. An IEP team meeting was held November 14, 2008. Keyboarding and social skills services were not added to the IEP at that time. P 23, P 24, R 7.
10. An IEP team meeting was held December 2, 2008. Keyboarding and social skills services were not added to the IEP at that time. P 26 R 9.
11. The Respondent sent an IEP (the IEP) to the Petitioners dated May 7, 2009. P 45, R 19. The IEP includes a social support group ("Behavioral Support Services") which is provided outside of the general education setting for 30 minutes per week. P 45, R 19. These behavioral support services were anticipated to occur April 29, 2009 through April 29, 2010³. P 45, R 19.
12. The statements of present levels of academic achievement and functional performance in the IEP describe how the Student's dyslexia, dysgraphia, and ADHD affect her involvement and progress in the general education curriculum. P 45, R 19.

³ It is not clear why the IEP proposed on May 7, 2009, included a start date for new services that was prior to the date of the IEP proposal.

13. The IEP does not include appropriate statements of measurable annual academic achievement and functional performance goals designed to meet the Student's needs that result from her disabilities to enable her to be involved in and make progress in the general education curriculum and meet each of her other needs that result from her disabilities⁴. P 45, R 19, T of E.L. There are thirty one goals in the IEP. P 45, R 19. None of the goals has short-term objectives or benchmarks. P 45, R 19. The goals cover three core academic areas - mathematics, reading, and written expression – and one functional area, social emotional, social, and behavioral development. P 45, R 19. The first two “math” goals deal with note-taking (organization skills) and written expression, not specifically math skills. P 45, R 19. The third math goal does deal with math skills (computing problems) but is not measurable, because it is vague and not aligned with District of Columbia content standards. P 45, R 19. There are seven “reading” goals, four of which deal with spelling. P 45, R 19. It is not clear that these four spelling goals are aligned with the seventh-grade spelling standards. P 45, R 19. The first “reading” goal is nearly identical to the first “math” goal which is about note-taking (organizational skills). P 45, R 19. The sixth “reading” goal is also about note-taking. P 45, R 19. The seventh reading goal, concerning figures of speech, is aligned with eleventh grade content standards⁵. P 45, R 19. There are 13 “written expression” goals, six of which concern spelling. P 45, R 19. The first

⁴ Nearly all of the goals are written in the style typically used for short-term objectives or benchmarks.

⁵ Figures of speech are also part of seventh grade writing standards. The District of Columbia Writing standards are a subset of the Reading standards.

written expression goal is aligned with second grade content standards. P 45, R 19, The second and fifth written expression goals are aligned with fourth grade spelling standards. P 45, R 19. The third written expression goal is aligned with fifth grade spelling standards. P 45, R 19. The fourth, sixth, eighth, ninth, tenth, and eleventh written expression goals are vague, not measurable and/or not aligned with any content standards. P 45, R 19. The seventh written expression goal is identical to the second “math” goal and it does not align with any writing content standards⁶. P 45, R 19. The 12th written expression goal is aligned with third through fifth grade writing content standards. P 45, R 19. The 13th written expression goal is loosely aligned with sixth grade research and writing content standards⁷. P 45, R 19. There are nine goals under the area of emotional, social, and behavioral development. All of the goals are vague, not measurable, or otherwise unclear⁸. P 45, R 19.

14. The IEP includes an increase of special education services from three hours per week to seven and a half hours per week. P 21, P 45, R 19. The special education services are to be provided in the general education setting. P 45, R 19. The

⁶ This may be because this goal is functional in nature (organization skills) and not academic (writing skills).

⁷ The sixth grade research standards refer to the standards in the writing strand.

⁸ Functional goals, by definition, cannot align with academic content standards.

proposed beginning date of the special education services was May 7, 2009, and was anticipated to continue through May 6, 2010⁹.

15. In March, 2009, the Petitioners applied to enroll the Student, and the Student was accepted for the fall of 2009, in a private school designed exclusively for average to high-functioning students with learning disabilities. T of P, T of I.W. This segregated setting will likely provide the Student an appropriate education, although not in the least restrictive environment because it does not include students without disabilities. T of P, T of E.L., T of I.W.
16. Students who attend _____ in _____ grade typically advance to _____ School in _____ grade. T of P. The Petitioners do not think the Student should go to Deal because of its size and classroom structure. T of P.

IV. CONCLUSIONS OF LAW

1. In order to receive a free appropriate public education (FAPE) special education and related services must be provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§ 300.320 through 300.324. 34 C.F.R. § 300.17(d).
2. The Student's IEP, during the 2008-09 school year did not require keyboarding or social skills services. There is no denial of a FAPE on the basis of not providing keyboarding or social skills services in conformity with the IEP.
3. A reevaluation must be provided when a parent requests. 34 C.F.R. § 300.303, D.C. Mun. Regs. tit. 5, § 3005.7. In this case the parent consented to a motor

⁹ It is not clear why the proposed start date is the same date as the IEP. One would reasonably expect the start date to be at a future point after the parents had an opportunity to review the proposed IEP and prior written notice.

skills/physical development assessment which was never provided. A School District must either conduct the assessment consented to or, rather than providing written notice proposing the assessment, provide written notice refusing the assessment. *See*, 34 C.F.R. § 300.503, D.C. Mun. Regs. tit. 5, §§ 3024, 3025. The Respondent failed to conduct an agreed to motor skills/physical development (occupational therapy) assessment.

4. 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).

- 5. District of Columbia law additionally requires measurable annual goals to include benchmarks or short-term objectives. D.C. Mun. Regs. tit. 5, § 3009.1(c).
- 6. Students must be educated, to the maximum extent appropriate, with children without disabilities. 34 C.F.R. § 300.114. This is referred to as the least restrictive environment (LRE).
- 7. Federal Regulations at 34 C.F.R. § 300.148(c) provide:

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.

Emphasis added. “[W]hat is ‘appropriate’ must be determined in light of the Act’s broad purpose of providing children with disabilities a FAPE, including through publicly funded private-school placements when necessary.” Forest Grove Sch. Dist. V. T.A. 557 U.S. ___, (p.7)(2009), *citing Burlington v. Dept. of Ed. of Mass.* 471 U.S. 359, 369 (1985). “When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted.” Id. at (p.17).

8. The proposed IEP is not appropriate. It is strikingly deficient with regard to the annual academic achievement and functional performance goals. This IEP was proposed following the filing of the complaint in this matter. It appears that the Respondent attempted to woo the Petitioners, who were already dissatisfied, with quantity over quality. 31 goals for a disabled, yet relatively high-functioning student, is cause for pause, especially when they focus on academic achievement, which is not currently the Student's most significant challenge. The Respondent argued, and the IHO agrees (as do, to an extent, the Petitioners) that the Student is doing very well academically. There are a limited number of academic skills that need to be addressed, particularly spelling. Her academics really need appropriate specialized instruction so she can continue to progress and be involved in the general education curriculum. This IHO is not persuaded that a segregated setting in which the Student is to begin in the fall of this year is required. While the Petitioners are free to chose such a school for their child at their own expense, the Respondent still has the opportunity to put together and deliver an individualized education program than will continue to provide educational benefit like the Student has enjoy until this point.
9. The kind of specialized instruction to be utilized with the Student, and the supports for her and her teachers to accomplish that, must be specified in the IEP. In line with this, the Student's annual goals must be focused on functional performance and improving her coping with her executive functioning challenges and socialization. The instructional method and supplementary supports and services, based on peer-reviewed research to the extent practicable, must be

specified in the Student's IEP as a remedy for the inappropriate program most recently proposed. In considering the equities, the Student is not yet participating in a private school which taking her out of may cause harm. Indeed, the Student is at a natural transition point between elementary school and middle school.

Furthermore, the Student's involvement in and progress in the general education curriculum has been very good at this point. The Petitioner's challenge of the IEP was well founded. However, there is time before the fall for the errors in the IEP to be corrected so that the Student will remain involved in and be able to progress in the general education curriculum. Thus, the remedy in this case is appropriately a correction of the IEP rather than placement in a private segregated setting at public expense.

V. DECISION

1. The Respondent did not fail to implement the IEP with regard to social skills services and keyboarding services. The Respondent did fail to conduct an occupational therapy assessment or some assessment of the Student's motor skills for which consent had been provided in October 2008.

2. The Respondent failed to propose an IEP reasonably calculated to provide educational benefit, denying the Student a free appropriate public education.

3. Despite being denied a FAPE as a result of the faulty proposed IEP, the Student has not suffered educational harm which would warrant an order for placement in a fully segregated private special education school at public expense.

VI. ORDER

1. The Respondent must complete an occupational therapy assessment no later than July 31, 2009.
2. The IEP team must revise the IEP consistent with the findings and conclusions of this Hearing Officer's Decision (HOD) including but not limited to:
 - a. Measurable annual academic goal(s), including short-term objectives or benchmarks, in the area of spelling and any other core academic content standards strand in which the Student's disability is directly preventing her from achieving proficiency without special education and related services.
 - b. Measurable annual functional goals, including short-term objectives or benchmarks, designed to meet her executive functioning needs that affect her ability to be involved in and make progress in the general education curriculum and meet each of her other educational needs that result from her disability. Her functional goals must be focused on what strategies and techniques the Student will learn in order to overcome or compensate for the ways her executive functioning challenges impact her learning and socialization.
 - c. The special education services to be provided to the Student must be specified to include: a multimodal approach in the classroom; incorporate visuals into every lesson and be repetitive; provide hands-on experience whenever possible; balance between cooperative learning and independent work; teacher or paraprofessional to check frequently with Student to

make sure Student is getting the information she needs; and deliver curriculum material in small “chunks.”

- d. Incorporate any related services necessary to accomplish paragraphs a, b, and c.
- e. The supplementary aids and services to be provided in the classroom and at school must include: graphic organizers and the instruction and continuing support in using them; instruction and assistance in taking good notes and storing and using them (Student’s ability to take good notes may be reflected in a functional goal); the use of checklists and the instruction and assistance in using them; use of backwards timelines for longer assignments; support in using metacognition; assistive technology that the Student is willing to use and instruction and support in her using it, particularly for spelling; praise for being on-task and doing work; close proximity seating to the teacher; and breaks for physical movement during structured activities.
- f. The special education and related services, and supplementary aids and services must start no later than the first day of school at the start of the 2009-2010 school year.
- g. The IEP team must determine and document in the IEP plan the educational setting. This is not the same as the location of services (i.e. what school she attends) but rather the level of segregation from non-disabled peers that will be required, if any.

h. All IEP requirements not specifically mentioned here must be adhered to. This order provides the minimum elements that must be included in the IEP. The IEP team may determine additional items are necessary, including a more restrictive educational placement than the Student had during grade.

3. If the Petitioners believe the resulting proposed IEP has not complied with this order, or other requirements of this order have not been complied with, they are 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. Nothing in this order is intended to restrict the IEP team from making other changes to the program and placement appropriate and necessary for the Student to be provided a FAPE. All notice and other due process requirements not specifically mentioned here must be complied with.
5. The Respondent must provide the Petitioners with at least three alternative times to meet (not all consecutive) and inform them of the date the IEP team will meet if they fail to select one of the proposed times. The meeting must occur no later than July 31, 2009. Their attorney must be copied on any correspondence or other notices sent or delivered to the Petitioners, unless directed otherwise by the Petitioners.
6. When the revised IEP is proposed to the Petitioners, the Respondent must include in the IEP, or as part of the written notice, the school the Student will be attending at the start of the 2009-10 school year.

7. The proposed IEP and prior written notice must be served on the Petitioners no later than August 7, 2009¹⁰.

IT IS SO ORDERED.

Dated this 30th day of June, 2009.



Jim Mortenson, Esq.
Independent Hearing Officer

¹⁰ If the OT assessment report is not completed by the time the IEP team meets to revise the IEP, the IEP team will simply have to reconvene to consider the results of that assessment and review and revise the IEP accordingly at a later time.

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).