

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

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

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AUG 02 2010

[Parent], on behalf of,
[Student],¹

Petitioner,

v

District of Columbia Public Schools (DPCS),

Respondent.

Date Issued: August 2, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: July 27, 2010 Room: 5a

HEARING OFFICER DETERMINATION

I. BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on July 27, 2010, in hearing room 5a, and concluded on that date. The due date for the Hearing Officer's Determination (HOD) is August 2, 2010, pursuant to 34 C.F.R. § 300.515. This HOD is issued on August 2, 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. The hearing was closed to the public.

Present at the due process hearing were:

Domiento Hill, Esq., Petitioner's Counsel

Laura George, Esq., Respondent's Counsel

¹ Personal identification information is provided in Appendix A.

Petitioner, Student's Grandmother

Lynn Barganier, Respondent Representative

Five witnesses testified at the hearing for the Petitioner:

Petitioner (P), Student's Grandmother

Dr. James Moses Ballard, III (J.B.), Chief of Psychological Services, Interdynamics, Inc.
(admitted as expert on psychological and neurological assessments)

Kevin Carter (K.C.), Educational Advocate, James E. Brown & Associates

Director of Admissions,

Administrator,

Two witnesses testified at the hearing for the Respondent:

Special Education Coordinator,

Dr. Lynn Barganier, School Psychologist, DCPS

The complaint in this matter was filed on June 16, 2010. An agreement to waive the resolution meeting was made on June 18, 2010. A prehearing conference was held on June 25, 2010, and a prehearing order was issued on that date. A response to the complaint was filed on June 25, 2010. The District filed a motion in limine, on June 25, 2010, to preclude the Petitioner from raising an issue not alleged in the complaint but for which requested relief was noted in the prehearing order. Petitioner's Counsel responded that the relief at issue in the motion, a speech and language assessment, was included in the complaint, thus the prehearing order, in error and was not being sought. The order on the motion, issued July 2, 2010, noted as such.

The Petitioner is seeking as relief: placement of the Student at a non-public school for students with learning disabilities in Maryland; an individualized education program (IEP) with full-time special education in a small classroom with a low student to teacher ratio,

out of the general education environment; and compensatory education for 14 weeks of denial of FAPE noted in a prior HOD.

31 documents were disclosed and offered by the Petitioner. (P 1 – P 31). All of the documents were admitted into evidence.² The Petitioner’s exhibits are:

- | | | | | |
|------|---|-------------------|---|--|
| P 1 | - | June 15, 2010 | - | Due Process Complaint Notice |
| P 2 | - | December 4, 2008 | - | Case #2009-1341 Hearing Officer’s Determination (HOD) |
| P 3 | - | July 31, 2009 | - | Case #2009-0874 HOD |
| P 4 | - | December 29, 2009 | - | Psychiatric Evaluation |
| P 5 | - | January 4, 2010 | - | Comprehensive Psychological Evaluation |
| P 6 | - | January 4, 2010 | - | Neuropsychological Evaluation |
| P 7 | - | January 22, 2010 | - | Occupational Therapy Evaluation |
| P 8 | - | January 29, 2010 | - | Letter from Hill to Nyankori |
| P 9 | - | January 17, 2010 | - | Letter from to |
| P 10 | - | February 18, 2010 | - | Letter from to |
| P 11 | - | April 7, 2010 | - | Letter of Invitation to a Meeting |
| P 12 | - | April 7, 2010 | - | Letter from Hill to |
| P 13 | - | April 7, 2010 | - | Letter of Invitation to a Meeting |
| P 14 | - | April 8, 2010 | - | Letter from Hill to |
| P 15 | - | April 9, 2010 | - | Letter from to Hill |
| P 16 | - | April 9, 2010 | - | Letter from Hill to |
| P 17 | - | April 16, 2010 | - | Letter from Hill to |
| | | April 9, 2010 | - | Letter from to Hill |
| P 18 | - | May 11, 2010 | - | Letter from to |
| P 19 | - | May 17, 2010 | - | Letter from to Hill |
| P 20 | - | May 18, 2010 | - | Letter from Hill to |
| P 21 | - | July 16, 2010 | - | Letter from to |
| P 22 | - | April 18, 2007 | - | Individualized Education Program (IEP) and meeting notes |
| | | May 18, 2007 | - | Specific learning Disability Eligibility Determination Form |
| | | April 18, 2007 | - | Prior Notice |
| P 23 | - | September 9, 2009 | - | IEP, meeting notes, Analysis of Existing Data, Prior Written Notice-Evaluation |
| P 24 | - | February 17, 2010 | - | IEP, meeting notes |
| P 25 | - | February 17, 2010 | - | Prior Written Notice |
| P 26 | - | February 17, 2010 | - | Multidisciplinary Team (MDT) Meeting Notes |
| P 27 | - | June 11, 2010 | - | IEP, meeting notes |

² Respondent requested note be taken of several documents, consisting of correspondence between the Petitioner’s Counsel’s office and the Respondent, that they not be treated as evidence of the truth of the matter asserted in the correspondence.

P 28	-	March 31, 2010	-	Letter from	to Hill
P 29	-	undated	-	Curricula Vitae of	
P 30	-	undated	-	Curricula Vitae of	
P 31	-	undated	-	Curricula Vitae of Dr. James Moses Ballard,	II

Four documents were disclosed and offered by the Respondent. (R 1 – R 4) All four were admitted into the record. Respondent’s exhibits are:

R 1	-	June 11, 2010	-	IEP
R 2	-	June 11, 2010	-	Meeting Notes
R 3	-	April 13, 2010	-	Review of Independent Educational Evaluation
R 4	-	April 14, 2010	-	Analysis of Existing Data

II. ISSUE

Whether the Respondent failed to offer or provide an IEP reasonably calculated to provide educational benefit when it proposed an IEP with 15 hours per week of specialized instruction at _____ and refused placement at either the _____ or _____

III. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer’s Findings of Fact are as follows:

1. The Student is a _____ year old child who was determined to be eligible for special education and related services under the category of specific learning disability (SLD) in April 2007.³ The Student attends _____ has done so since kindergarten, and recently completed _____ grade there.⁴ The Student received additional

³ R 1, R 3.

⁴ Stipulation, Testimony (T) of P, T of

support at the school via one to one assistance from volunteers, when available, in math, science, reading, and other language arts.⁵

2. A prior HOD required the Respondent to arrange and pay for four assessments including: 1) a comprehensive psychological assessment; 2) a psychiatric assessment; 3) an occupational therapy (OT) assessment; and 4) a neuropsychological assessment.⁶ These assessments were completed in December 2009, and January 2010.⁷
3. The psychiatric assessment resulted in no specific recommendations for educational programming.⁸ The other three assessments resulted in detailed recommendations.⁹
4. The Student has dyscalculia and dyslexia, which are learning disabilities in the areas of mathematics and reading/writing, respectively.¹⁰ The Student's verbal reasoning abilities are much better developed than nonverbal reasoning abilities: such as sustaining attention, concentrating, and exerting mental control.¹¹ His ability to process visual material quickly is also a weakness relative to his verbal reasoning ability.¹²
5. The Student has deficits in the areas of visual motor and visual perceptual skills, which impact his progress in reading and writing.¹³ He also has low muscle tone which leads him to tire easily when standing or holding a particular body position.¹⁴ He needs to: increase grip strength in a dynamic tripod grasp to improve efficiency in handwriting; increase finger dexterity and speed in fine motor manipulative tasks; increase central stability and posture as a base of support for fine motor tasks and handwriting; improve

⁵ T of

⁶ P 2.

⁷ P 4, P 5, P 6, P 7.

⁸ P 4.

⁹ P 5, P 6, P 7.

¹⁰ P 4, P 5, T of

¹¹ P 5, R 3.

¹² P 5.

¹³ R 4, P 7.

¹⁴ R 4, P 7.

figure ground, spatial and memory skills; and develop keyboard skills as an alternative to handwriting.¹⁵

6. The Student has deficits in the areas of: cognitive flexibility; processing speed; memory for large groups of stimuli; difficulty with using hands to imitate sequences; poor spatial reasoning abilities; reading words while leaving one sound out of the word; performing tasks under a time constraint; and utilizing short term memory to reproduce designs and to remember salient information from stories.¹⁶
7. The Student is functioning between the first and fourth grade level in mathematics and between the third and fifth grade levels in reading.¹⁷ His precise performance level is difficult to ascertain due to his complex neurological issues.¹⁸ The Student is functioning about the third grade level in writing.¹⁹
8. IEP team meetings were recently held on February 17, 2010 and on June 11, 2010.²⁰ At both meetings the Respondent recommended the Student receive 15 hours of special education services at _____ The Respondent's reasoning was stated as being based on the review of the recent assessments completed in December and January, even though the Comprehensive Psychological assessment specifically stated 15 hours of special education services would not be sufficient for the Student.²² The School Psychologist's position is that even though the Student was performing below grade

¹⁵ P 7.

¹⁶ P 6, R 3.

¹⁷ R 1, R 4, P 24, T of _____ T of _____

¹⁸ T of _____

¹⁹ R 1.

²⁰ Stipulation.

²¹ T of _____ T of _____ T of _____ R 1, R 2, P 24, P 25.

²² P 5, P 25.

level, he was making progress at his current school without special education services from the Respondent, so the addition of 15 hours of such service would be appropriate.²³

9. The Student's baseline of academic performance in the proposed IEP is approximately grade.²⁴ The academic goals proposed require performance of about the third grade level.²⁵ The Petitioner did not object the to the proposed goals.²⁶

10. offers 5 hours per week each of special education services in each of the following subjects: reading, writing, and mathematics (15 hours total per week).²⁷ If students require more, they can get up to two hours after school.²⁸ In addition, the regular education staff provide special attention to Students and there is resource/tutoring help available.²⁹ These additional services or special attention were not proposed or specified in the Student's IEP.³⁰

11. The Student's academic performance on State standards is to be assessed using the DC-CAS (the regular Statewide assessment) with accommodations.³¹ The Student can perform on grade level curriculum with proper interventions.³² The Student requires a "full-time" IEP with the related services, supplementary aids and services, and program modifications listed in the recent Comprehensive Psychological, Neuropsychological, and

²³ T of . (This position is unconvincing given the detail and data in the assessment reports supporting the Petitioner's position, and because it summarily disregards that detail and data. Also, the Student's prior IEP included 15 hours of special education. P 22, P 23)

²⁴ R 1, P 24, P 27

²⁵ R 1, P 24, P 27.

²⁶ T of

²⁷ T of T of

²⁸ T of

²⁹ T of T of

³⁰ R 1, P 24, P 25.

³¹ R 1, P22, P 23, P 24.

³² T of

Occupational Therapy assessments to enable him to be involved in and progress in the general education curriculum.³³

12. On May 11, 2010, the _____ offered the Student the opportunity to attend for the 2010-2011 school year, following a review of his education records and a two day visit to the school by the Student.³⁴ Every teacher at _____ the Student met with thought he would be a good fit for the school.³⁵ _____ is a school for students with language based learning disabilities in fifth through 12th grade.³⁶ Literacy remediation is a focus, and various related services such as: OT; speech and language; counselors; and physical therapy are provided.³⁷ There are three to eight students to a teacher in the classes at the school, depending on the class.³⁸ The school can provide the services recommended in the Student's Neuropsychological assessment, and can address his math learning disability using a multisensory approach.³⁹ The school is located in Silver Spring, Maryland, and provides students with curriculum from the State they are from.⁴⁰ Nearly half of the School's current student body is from the District of Columbia

³³ R 3, P 5, P 6, P 7, P 26, T of _____ T of _____ T of _____ T of _____ (A "full-time" IEP is a term of art used in the District of Columbia to describe an IEP that provides special education and related services for the entire school day. Also, While _____ disagreed that the Student required more than 15 hours of special education per week, she did agree with all of the other recommendations of the assessments and found the data contained therein to be valid. The Respondent also argued that _____ "always" testifies that a student requires a full-time IEP without any supporting evidence. In this case there is significant un-refuted data in the assessment reports to back up that position, while the Respondent's position that 15 hours is sufficient appears to be based primarily on the programming offered at the school as opposed to the Student's needs.)

³⁴ P 18, T of _____

³⁵ T of _____ (All of _____ testimony was uncontroverted.)

³⁶ T of _____

³⁷ T of _____

³⁸ T of _____

³⁹ T of _____

⁴⁰ T of _____

and a DCPS placement specialist works with the School.⁴¹ The 2010-2011 school year runs from August 23, 2010 to June 16, 2011.⁴²

IV. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined 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.

34 C.F.R. § 300.17. 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). It is within this legal context we must examine the case at hand.

⁴¹ T of

⁴² T of

2. “Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability[.]” 34 C.F.R. § 300.39(a)(1). Federal

Regulations at 34 C.F.R. § 300.39(b)(3) defines “specially designed instruction” as:

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.

3. An IEP must include:

(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); . . .

(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; . . .

(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), *see also*, D.C. Mun. Regs. tit. 5, § 3009.1.

4. The key question is: What will it take to help the Student reach the annual measurable goals, be involved in and make progress in the general education curriculum, participate in extracurricular and other nonacademic activities, and to be educated and participate with other students with disabilities and nondisabled students? *See*, 34 C.F.R. § 300.320(a)(4). The Respondent's reason for proposing 15 hours of special education was that because the Student had been progressing without any special education before, 15 hours would be enough now. This appears to be an arbitrary guess. It wasn't. The underlying reason 15 hours was proposed is because that is the amount available at

On the other hand, the Petitioner wants a full time IEP at a segregated school for children with learning disabilities because the assessments advised that 15 hours of special education would not be enough. Ironically, the Petitioner agreed with the proposed goals in the IEP. Those goals will have to be reexamined by the IEP team in order to ensure the IEP is reasonably calculated to provide a FAPE.

5. The evidence demonstrates it is more likely than not that the 15 hours of special education proposed is not sufficient to enable the Student to be involved in and make progress in the general curriculum (the same curriculum as his peers). The proposed IEP will only enable the Student to do third grade work which, according to the IEP, is his baseline of performance already. So, even though the goals may reasonably be expected to be met with the proposed 15 hours of special education and related services, the goals and services are not designed to close the gap between the Student's present levels of academic performance and the performance expected of his same-aged peers. Thus denying the Student the opportunity of being involved in and making progress in the general education curriculum and, therefore, denying him a FAPE.

6. The Student has been accepted at _____ It is a fully segregated special education school for students with learning disabilities. It has a low student to teacher ratio. The staff there work with DCPS, provide District of Columbia curriculum, and believe they can effectively educate the Student. The evidence shows this school is, more likely than not, an appropriate placement for the Student, despite the fact it is a fully segregated facility.
7. Because the Student was denied a FAPE and because the Parent's proposed placement is appropriate, the Student will be placed at _____ for the 2010-2011 SY, and the IEP revised pursuant to the order below.

V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. The Petitioner prevails because the Respondent has denied the Student a FAPE as concluded above.
2. The Respondent will place the Student at _____ for the 2010-2011 school year and will provide or pay for transportation to and from the school.⁴³
 - a. After 20 days of school at _____ but before 31 days of school at _____ the IEP team, including staff from _____ will review and revise the Student's IEP to include annual measurable academic goals designed to meet the Student's needs that result from his disability to enable him to be involved in and progress in the general education curriculum. Because the Student is so far behind, it may not be reasonable to expect this learning gap between the Student's current level of academic performance and his grade level to be closed within one year. Thus,

⁴³ No additional compensatory education is awarded as this placement and services are expected to put the Student on track to be involved in and progress in the general education curriculum.

in designing the annual goals, the IEP team must calculate a trajectory for closing the gap over several years, and write goals consistent with moving the Student forward on that trajectory. The IEP will also be revised to include full-time special education services and make other such revisions pursuant to: the January 10, 2010, Comprehensive Psychological Evaluation; the January 4, 2010, Neuropsychological Evaluation; and the January 15, 2010, Occupational Therapy Evaluation. The IEP team may require any other special education and related services, supplementary aids and services, or program modifications and staff supports they believe are necessary to permit the Student to close his achievement gap in his performance on the District of Columbia curriculum standards over the next several years.

- b. If the Respondent does not agree with the IEP developed by the Petitioner with the assistance of _____ staff, it may challenge the IEP in a due process hearing, pursuant to 34 C.F.R. § 300.507.

IT IS SO ORDERED.

Date: August 2, 2010



Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).