

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

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

RECEIVED

AUG 04 2010

[Parent], on behalf of,
[Student],¹

Petitioner,

v

District of Columbia Public Schools (DPCS),

Respondent.

Date Issued: August 4, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: July 26, 2010 Room: 1

HEARING OFFICER DETERMINATION

I. BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on July 26, 2010, in hearing room 1, and concluded on that date. The due date for the Hearing Officer's Determination (HOD) is August 5, 2010, pursuant to the Blackman/Jones Consent Decree, paragraph 34(c). This HOD is issued on August 4, 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, however the parties permitted observation by interns from the Office of General Counsel and the Bazelon Center for Mental Health Law for training purposes.

Present at the due process hearing were:

¹ Personal identification information is provided in Appendix A.

Katherine Zeisel, Esq., Petitioner's Counsel (Children's Law Center)

Linda Smalls, Esq., Respondent's Counsel

Petitioner, Student's Parent

Lauren Onkeles, (Children's Law Center)

Murti Patel, (Children's Law Center)

Educational Consultant

Three witnesses testified at the hearing for the Petitioner:

Petitioner (P), Student's Parent

Educational Consultant (testified as expert in special education programming)

Admissions Director, The

The Respondent did not present any witnesses.

The complaint in this matter was filed on June 11, 2010. A response to the complaint was filed on June 21, 2010. A prehearing conference was held on June 30, 2010, and a prehearing order was issued on that date. The District's Response included a partial motion to dismiss which the IHO permitted to be briefed by the parties. A motion decision granting the partial motion, narrowing the issue for hearing, was issued on July 14, 2010.

32 documents were disclosed and offered by the Petitioner. (P 1 – P 32). Of those documents, P 3 and P 5 – P 24 were admitted into evidence. The Petitioner's exhibits are:

P 3	-	March 4, 2008	-	Individualized Education Program (IEP)
P 5	-	February 18, 2009	-	IEP
P 6	-	February 17, 2010	-	IEP
P 7	-	April 1, 2010	-	Letter from Zeisel to
P 8	-	April 14, 2010	-	IEP and meeting notes
P 9	-	May 11, 2010	-	Letter from Zeisel to
P 10	-	April 14, 2010	-	Consent for Initial Evaluation/Reevaluation
P 11	-	October 22, 2007	-	Child/Youth Clinical Diagnostic (0-5 years)
P 12	-	September 28, 2009	-	Treatment Plan and Progress Notes

II. ISSUE²

Whether the Respondent has proposed a revision to the individualized education program (IEP) for the 2010-2011 school year that is reasonably calculated to provide the Student with educational benefit when the IEP lacks appropriate services to address the Student's attention needs?

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 child with a disability, qualifying under the category of emotionally disturbed, and is _____ years of age.³ He was in the _____ grade and will be in the _____ grade for the 2010-2011 school year.⁴
2. The Student attended the _____ during the 2009-2010 school year.⁵ The _____ was a therapeutic setting that provided small group instruction and deals with children with behavioral issues.⁶ The District of Columbia Community Services Agency (DCCSA) provided emotional/behavioral/psychiatric services to children at _____ including the Student.⁷ Included in those DCCSA services, at the conclusion of the 2009-2010 school year, were:⁸

² The issue was narrowed upon a motion order determining that the dispute over the Student attending Center was one over location, not placement, for reasons set forth in that order of July 14, 2010.

³ Stipulated Fact (SF).

⁴ R 6.

⁵ SF.

⁶ P 5, Testimony (T) of P.

⁷ P 11, P 12, P 13, P 14, P 15, T of _____ T of P.

⁸ P 15. (Of these, the Petitioner, through S.I. insisted that medication management by a therapeutic psychiatrist was the most important because the Student's heart murmur could be affected by the medication he takes. The Petitioner argues that this service is a related service for prescription or diagnostic purposes. The testimony and argument are unpersuasive. While the Student may, in fact, need to be monitored by a psychiatrist, that is not a related service the Respondent is responsible for. The only medical services the Respondent is responsible for are those "provided by a licensed physician to determine a child's medically related disability that results in the child's need for special

- Annual comprehensive assessment
 - Crisis service as needed
 - Group psychotherapy for one hour every two weeks
 - Group skills training for one hour daily
 - Medication Education/Training for one hour monthly
 - Medication review of 90 minutes per month
 - Psychiatric Diagnostic Interview for 90 minutes quarterly
 - Service coordination for 90 minutes weekly
 - Treatment Planning and Review for two hours quarterly
 - Individual skills training for one hour every two weeks
 - Individual Psychotherapy for one hour daily five day per week
3. An IEP team meeting was held on February 17, 2010, and the Parent was notified that the Student would be located at _____ the following school year due to the closing of the _____. The _____ is also a therapeutic environment.¹⁰
- A subsequent IEP team meeting was held on April 14, 2010, to review additional assessment data and the determination to locate the Student, with his full-time IEP, at _____ did not change.¹¹
4. An occupational therapy assessment of the Student was completed in March, 2010.¹² The Student is in the low to below average range for a child his age in visual motor and perceptual motor skills.¹³ To address this in school the Student requires:¹⁴
- A routine for optimal classroom output
 - Positive verbal cues with difficult tasks
 - Encouragement of writing and perceptual motor age appropriate play
 - Extra time to complete written assignments
 - Preferential seating close to the instructor
 - 45 minutes per week of occupational therapy

education and related services.” 34 C.F.R. § 300.34(a) and (c)(5). The services of the psychiatrist, in this case, are not for diagnosing a disability, but medical monitoring. (T of S.I.)

⁹ SF.

¹⁰ R 4.

¹¹ SF.

¹² P 18.

¹³ P 18.

¹⁴ P 18.

5. A speech and language assessment of the Student was completed in March, 2010.¹⁵ The Student has age appropriate intelligible articulation, and average receptive and expressive vocabulary skills.¹⁶ His receptive language skills are in the low average range and expressive language skills are below average.¹⁷ The Student's auditory processing skills are functioning significantly below average and listening, following directions, and completing classroom assignments are problems for the Student.¹⁸ To address these challenges in school the Student requires:¹⁹

- Monitoring of comprehension of language used during instruction, verbal responses to indicate comprehension (restate-rephrase) and encouragement of feedback from the Student to check for understanding
- Consistent review of any lesson before introducing new information
- Highlighting or underlining of important concepts to be learned in the text of material
- Use of varied methods when presenting new material and using repetition, simpler explanations, and modeling
- Written directions to supplement verbal directions
- Slow rate of presentation
- Familiarizing with new vocabulary before beginning the lesson
- Visual aids such as charts and graphs
- Reduced time pressure and extra thinking time if he cannot respond immediately

6. A psycho-educational assessment of the Student was completed in April 2010.²⁰ This assessment examined the Student's cognitive, academic, and behavioral functioning.²¹ His cognitive abilities and academic achievement are functioning in the low average range.²² The Student has particular difficulty with tasks involving short and long-term

¹⁵ P 19.

¹⁶ P 19.

¹⁷ P 19.

¹⁸ P 19.

¹⁹ P 19.

²⁰ P 20.

²¹ P 20.

²² P 20.

memory, reading and phonics based tasks, and mathematical calculation.²³ He exhibits impulsivity and hyperactive and inattentive symptoms, consistent with Attention Deficit Hyperactivity Disorder – Combined Type.²⁴ To address these challenges in school the Student requires:²⁵

- Individual therapy for at least 30 minutes per week to enhance coping skills including impulse control, anger management, and social skills.
 - Weekly school-based group counseling for at least 30 minutes in order to improve his social and emotional functioning in the areas of anger management, rule compliance, and fostering peer relationships.
 - A positive behavior modification program that rewards and reinforces appropriate behavior and provides consequences for noncompliant and impulsive behaviors.
 - Specialized instruction delivered in a small class setting to allow for increased individualized attention and instruction.
 - A classroom environment with structure and consistency, with clear rules and expectations along with consequences, low noise levels, and a desk area free of unnecessary distractions.
 - Eye contact must be made with the Student before giving instructions or making requests.
 - Frequent short breaks between tasks along with frequent praise and encouragement for efforts and persistence.
7. The Student’s IEP was revised on April 14, 2010.²⁶ The IEP includes both academic and functional annual goals.²⁷
8. There are five math goals in the IEP.²⁸ The first and fifth math goals are based on District of Columbia Math Standards (DCMS) 2.NSO-N.1 and 2.NSOP-N.3, respectively (These are second grade standards, skills the Student should know and be able to do by the end of second grade).²⁹ The second and third math goals are based on DCMS 1.NSO-C.8 and

²³ P 20.

²⁴ P 20.

²⁵ P 20, T of

²⁶ R 2, P 8.

²⁷ R 2, P 8. (While the complaint is about services, goals must be examined because services are provided to a student, in part, to “advance appropriately toward attaining the annual goals[.]” 34 C.F.R. § 300.320(a)(4)(i).)

²⁸ R 2, P 8.

²⁹ R 2, P 8.

- 1.M.4, respectively (These are first grade standards).³⁰ The fourth math goal is based on DCMS K.M.6, a kindergarten math standard.³¹
9. There are four reading goals in the IEP.³² The first reading goal is based on District of Columbia Reading/English Language Arts Standards (DCRS) 3.BR-P.4, a third grade reading standard.³³ The second reading goal is based on DCRS 1.BR-P.18, a first grade reading standard.³⁴ The third reading goal refers to “predictions about text he has read” which is nonsensical (one does not make predictions about things in the past).³⁵ The fourth reading goal is based on DCRS K.IT-E-E.2, a kindergarten standard.³⁶
10. There are two writing goals in the IEP.³⁷ Writing goals are also part of the DCRS, and the first goal is based on DCRS 1.EL.4, a first grade standard.³⁸ The second writing goal is based on DCRS 2.EL.2, a second grade standard.³⁹
11. There are functional goals in the IEP in the areas of: communication/speech language; emotional, social, and behavioral development; and motor skills/physical development.⁴⁰ There are six annual goals in the area of communication/speech language, none of which include (even with consideration of the statement of the Student’s present level of functional performance) enough information to make them measurable in any meaningful way.⁴¹

³⁰ R 2, P 8.

³¹ R 2, P 8.

³² R 2, P 8.

³³ R 2, P 8.

³⁴ R 2, P 8.

³⁵ R 2, P 8.

³⁶ R 2, P 8.

³⁷ R 2, P 8.

³⁸ R 2, P 8.

³⁹ R 2, P 8.

⁴⁰ R 2, P 8. (Functional goals are not based on any State standards because there are no such standards.)

⁴¹ R 2, P 8. (S.I. testified that the IEP was internally inconsistent because on the IEP, under the statement of the Student’s present level of functional performance for communication/speech language, the IEP says the Student should receive therapy for 30 minutes. However, under the list of special education and related services, the IEP

12. There are six annual goals in the IEP in the area of emotional, social, and behavioral development, none of which include enough information to make them measurable in any meaningful way.⁴²
13. There are four measurable annual goals in the IEP in the area of motor skills/physical development.⁴³
14. The special education and related services in the IEP include specialized instruction for 26.5 hours per week, occupational therapy for one hour per week, speech-language pathology for one hour per week, and behavioral support services for one hour per week, all had an end date of February 18, 2010.⁴⁴ The IEP also requires consultation for occupational therapy and speech-language pathology for 30 minutes per month each.⁴⁵
15. The IEP states that the Student requires a therapeutic setting with small group instruction.⁴⁶
16. The Student will be assessed academically with the regular Statewide assessment, the DC-CAS, with accommodations.⁴⁷
17. Supplementary aids and services for the Student, referred to as “classroom accommodation” on the IEP, include:⁴⁸

states the Student will receive speech-language pathology for one hour per week. While this may be sloppy construction of the IEP, it does not, in itself, render the IEP non-compliant. A more serious error, however, may be that the projected date for the beginning of the services and duration reflect start and end dates as February 18, 2009 to February 18, 2010. The prior written notice from the February 17, 2010, IEP team meeting seems to indicate an intention to continue to provide special education services during the 2010-2011 school year. Also, because like the is a full-time therapeutic setting, the IEP drafted in April likely contains errors with regard to the start date and duration of services.)

⁴² R 2, P 8, T of S.I.

⁴³ R 2, P 8.

⁴⁴ R 2, P 8. (Again, the evidence suggests, and this IHO finds, the start and duration of services was listed in error on the IEP.)

⁴⁵ R 2, P 8. (Interestingly, these services clearly reflect a start date and duration from April 14, 2010 to April 13, 2011.)

⁴⁶ R 2, P 8.

⁴⁷ R 2, P 8.

⁴⁸ R 2, P 8. (These are also the Student’s accommodations for Statewide assessment.)

- Repetition of directions
- Simplification of oral directions
- Calculators
- Preferential seating
- Small group testing
- Flexible scheduling

18. Extended school year (ESY) services were to be provided to the Student during the summer for 2 hours per day for four weeks to work on math and reading goals.⁴⁹

19. The Petitioner rejected the proposed IEP in April and advised the Respondent she wanted her child enrolled at one of two possible non-public schools: the _____ or the _____

20. The Student was offered a placement by the _____ in Chillum on June 29, 2010.⁵¹ The _____ is a day school for children with disabilities exhibiting severe behaviors.⁵² The school is a non-public school certified by the Office of the State Superintendent of Education (OSSE).⁵³ Students are placed based on their age and grade.⁵⁴ A scientifically based behavior program is used at the school.⁵⁵ The Student will be in a classroom with two certified teachers, a clinical social worker, a dedicated aide, and eight other children.⁵⁶ A psychiatrist works with staff and is available for medication management.⁵⁷ The school uses District of Columbia and Maryland curricula, and adapts

⁴⁹ R 2, P 8. _____ did not believe this was sufficient. However, this is not examined because the complaint did not raise allegations of insufficient ESY services, and a review of ESY services is not necessary for the analysis here.)

⁵⁰ P 9.

⁵¹ P 24, T of _____. (None of _____ testimony was contradicted.)

⁵² T of _____

⁵³ T of _____

⁵⁴ T of _____

⁵⁵ T of _____

⁵⁶ T of _____

⁵⁷ T of _____

the curriculum to meet the needs of students.⁵⁸ Student progress is tracked via testing at the end of the year.⁵⁹ The school year at the _____ begins August 27, 2010.⁶⁰

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.

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 —

⁵⁸ T of

⁵⁹ T of

⁶⁰ T of

- (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. In reviewing this determination, a court's inquiry will be "twofold. First, has the State complied with the procedures set for in the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Board of Educ. v. Rowley, 458 U.S. 176, 206-207 (1982). Thus, the IHO should also utilize this two part test in analyzing the facts.
5. Whether the procedural requirements were complied with requires an examination of the IEP and whether it was created in compliance with 34 C.F.R. § 300.320. (*See, Id.* at 206,

fn 27 (1982).) In this case, the requirements of 34 C.F.R. § 300.320 were not complied with.⁶¹

6. The IEP includes goals in three academic areas and three functional areas. Despite going into grade for the 2010-2011 school year, the mathematics goals (there are five) range from kindergarten skills to second grade skills. Thus, the goals are not designed to enable the child to be involved in and make progress in the general education curriculum grade), given that the Student's academic performance is to be assessed using the regular statewide assessment. One of the Student's reading goals is based on a third grade standard, one is based on a kindergarten standard, and one is based on a first grade standard. A fourth is nonsensical in that it calls for the Student to make predictions on material he has read. (To be fair, this could have been a typographical error, but there is no evidence to support that. Early elementary standards from kindergarten through third grade call for children to make predictions on text features such as title, captions, and illustrations.) The two writing goals are based on first and second grade standards, respectively. The functional goals in the IEP are not measurable, but for the motor skills/physical development goals. Thus, because the goals were not developed in accordance with 34 C.F.R. § 300.320(a)(2), the IEP is not reasonably calculated to provide the Student educational benefit and denied the Student a FAPE.
7. The special education and related services and supplementary aids and services in the IEP do not reflect the recommendations in the occupational therapy assessment, speech and language assessment, or the psycho-educational assessment reports. There is no evidence

⁶¹ It can be found that the IEP was not reasonably calculated to enable the child to receive educational benefits. The two Rowley questions are closely intertwined in a case like this because an IEP that is not developed in accordance with the procedures, specifically those pertaining to IEP content, are not reasonably calculated to provide educational benefit, as this case demonstrates.

to show why the recommendations not include were excluded (such as the prior written notice). Thus, concerning services, the evidence shows it is more likely than not that the IEP is not reasonably calculated to provide the Student with educational benefit and denied the Student a FAPE.⁶²

8. A hearing officer may require a school district to reimburse parents for the cost of a unilateral private placement when the school district has failed to make a FAPE available to their student in a timely manner prior to that enrollment. 34 C.F.R. § 300.148(c).
9. The _____ is an appropriate placement for the Student because it can, and is willing, to provide the Student with special education and related services to meet his educational needs resulting from his disability. The Student was enrolled there at the end of June, more than two months following the Petitioner's notice to the Respondent that she was rejecting the proposed IEP and sought one of two possible private placements. Reimbursement (or in this case direct payment, since no evidence was offered that the Parent had yet incurred expenses) is appropriate to remedy the denial of FAPE.

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 Student will be placed at the _____ for the 2010-2011 school year, with transportation provided or paid for by the Respondent. The _____ may bill the Respondent directly and the Respondent is responsible for timely payment of the

⁶² Even if the services had been sufficient to enable the Student to make progress toward the goals, because the goals are not developed in accordance with IDEA, the IEP remains deficient.

Student's tuition and related services at _____ as determined by the Petitioner and the
(Related services do not include medical services that are for anything but "services
provided by a licensed physician to determine a child's medically related disability that
results in the child's need for special education and related services." 34 C.F.R. §
300.34(c)(5). Medication management by a licensed physician, including a psychiatrist, is
not a related service under IDEA.)

IT IS SO ORDERED.

Date: August 4, 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).