

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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| <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 style="text-align: center;">HEARING OFFICER'S DETERMINATION</p> <p>May 26, 2009</p> <p><u>Representatives:</u></p> <p>Zachary Nahass, Petitioner</p> <p>Tanya Chor, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p> |
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 STUDENT HEARING OFFICE
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I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on May 19, 2009. The hearing concluded on that date and the record closed on May 20, 2009, following receipt of written closing statements. The due date for the Hearing Officer's Determination (HOD) is May 28, 2009, in accordance with the Blackman/Jones Consent Decree. This HOD is issued on May 26, 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, Zachary Nahass, Esq.

Respondent's Counsel, Tanya Chor, Esq.

Petitioner, Student's Mother

Petitioner's Education Advocate, Shelly Nichols

Four witnesses testified at the hearing:

Petitioner (P)

Petitioner's Education Advocate (S.N.)

Special Education Coordinator at the school

Student's special education teacher at the school

The complaint in this matter was filed on April 9, 2009. The Respondent agreed to waive the resolution session on April 13, 2009. A prehearing conference was held on April 17, 2009, and a prehearing order was issued on that date. An untimely response was filed by the Respondent on April 22, 2009, as was a notice of insufficiency. The Complaint was found sufficient by the IHO in an order issued April 30, 2009. A second prehearing conference was held on April 22, 2009, and a second prehearing order was issued on that date, requiring a comprehensive psychological evaluation of the Student to be completed by May 7, 2009.

14 documents were disclosed and filed by the Petitioner on May 12, 2009. All were all admitted as exhibits into the record. (P 1 – P 14), including one document over the objection of the Respondent (P 8). Petitioner's exhibits are as follows:

- P 1 - HOD #2008-1029, January 26, 2009
- P 2 - Due Process Complaint, April 9, 2009
- P 3 - Prehearing Order, April 17, 2009
- P 4 - Respondent's Response to the Complaint, April 21, 2009
- P 5 - Second Prehearing Order, April 22, 2009
- P 6 - Initial Occupational Therapy Evaluation Report, January 23, 2009
- P 7 - Classroom Observation notes, January 14, 2009
- P 8 - Report of Psychological Evaluation, May 6, 2009

- P 9 - Individual Education Program (IEP), revised February 6, 2009
- P 10 - MDT (IEP Team) notes, February 6, 2009
- P 11 - Eligibility Meeting Report, May 7, 2009
- P 12 - Service Tracker forms, October 14, 2008 through April 9, 2009
- P 13 - Pre-Kindergarten Report Card, School Year 2008-2009
- P 14 - Student Report of Progress, April 7, 2009

Seven documents were disclosed and filed by the Respondent on May 12, 2009.

There were no objections raised to the admission of any of the disclosed documents, and they were all admitted into the record. (R 1 - R 7). Respondent's exhibits are:

- R 1 - Respondent's Response to the Complaint, April 21, 2009
- R 2 - Due Process Complaint, April 9, 2009
- R 3 - Letter of Invitation/Notice to a Meeting of the IEP Team, April 20, 2009
- R 4 - Student Report of Progress, April 7, 2009
- R 5 - Service Tracker forms, February 8, 2009 through April 9, 2009
- R 6 - IEP cover sheet, revised August 25, 2008, and IEP, revised February 6, 2009
- R 7 - Consent to Evaluate, November 13, 2008

II. ISSUES

1. Whether the Respondent failed to timely conduct an agreed upon evaluation? Specifically, whether DCPS's alleged failure to complete an agreed upon evaluation prior to May 7, 2009, resulted in the inability of the IEP team to review and revise the IEP to be reasonably calculated to provide educational benefit?
2. Whether the Respondent failed to implement the Student's IEP? Specifically, whether DCPS failed to provide the speech and language services required by the IEP?

III. FINDINGS OF FACT

1. The Student is a year old learner. He attends an early childhood program at School. The Student was identified as a child with a developmental delay (DD). P 8, P 9, Testimony (T) of P, T of The Student has been diagnosed with attention deficit hyperactivity disorder (ADHD) and autism. P 11, T of P, T of
2. An IEP team meeting for the Student was held on February 6, 2009. P 9, P 10, T of P, T of T of The team agreed at that meeting that additional assessment of the Student was necessary to determine the cause of the Student's challenging behaviors in the classroom. P 10, T of P, T of T of
3. The Student's socialization skills, sensory issues, and impulsivity are affecting his availability for learning. T of T of The Student's overall academic progress has been slow. P 13, P 14, T of The Student requires much prompting and would benefit from a dedicated aide in the classroom. P 8, P 13, T of
4. A prior HOD concerning these parties, dated January 26, 2009, required in part:

If the IEP team determines additional assessments are necessary to adequately identify the Student's needs, a proposal for assessments to be conducted must be presented to the Parent within 5 calendar days of that determination in order to obtain consent from the Parent. The Parent is expected to provide consent within 5 days to any proposed assessments in order to ensure the Student's educational and functional needs are known to the IEP team.

P 1. Thus, the last possible date for consent for the reevaluation was February 16, 2009¹.

5. The reevaluation was conducted on April 17 and 20, 2009. P 8. The evaluation report was completed on May 6, 2009, and shared with the IEP team the following day. P 8, T of P, T of T of T of
6. The Student required one hour of speech and language services per week since, at least, October 25, 2008. R 6, P 9. These services were substantially provided except in December, when the Student was absent for half of his sessions (missed 1.5 of 3 hours due), and February, when the speech and language provider was not available for half of his sessions (missed 2 hours of 4 hours due as a result of provider unavailability). P 12.
7. The Petitioner believes the Student has not made any progress in speech due to how the Student sounds when he speaks. T of P. It is not possible to determine progress on the goal written in the IEP because there is no baseline or outcome articulated and no short-term benchmarks or objectives (the goal states: “[Student] will improve receptive and expressive language skills.”). P 9. The only other evidence of progress on speech and language, a Period 3 progress report, states the Student is progressing and:

¹ No evidence of written notice or informed consent was provided by either party. testified that no written notice of the reevaluation had been received by the Petitioner. This testimony was neither confirmed by other evidence nor denied by the Respondent. As likely as it is that the Respondent failed to provide written notice of the reevaluation and consent, the evidence is not well born out. Thus, for the purpose of examining this issue, the IHO relies on the last possible dates for what was required to occur, whether it actually did or not.

[Student] is able to label objects with 70% accuracy given moderate cues, follow 1-2 step directions given moderate prompting, answer wh/how questions 70% min cues, ID opposites given a target with 75% accuracy [given] moderate cues, and use new vocabulary with 70% consistency with moderate cues.

P 14. This comment provides information about how the Student was performing at that time, but without context (a specific measurable goal) does not indicate whether or not progress was being made. It is also not known what the prior speech and language goal was.

IV. CONCLUSIONS OF LAW

1. Federal regulations at 34 C.F.R. § 300.17 define a free appropriate public education (FAPE) as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

2. A re-evaluation of a Student must be conducted within a reasonable time and “a delay in responding to a reevaluation request can be reasonable when no exigencies are present.” Herbin v. District of Columbia 362 F.Supp.2d 254, 261 (D.D.C.,2005).

3. In this case, the reevaluation was not begun until two months following the last possible date the Petitioner could have provided consent under the prior HOD. The Respondent provided no explanation for this, except in closing argument citing evidence not in the record. The Student is a year old struggling with school. His behaviors are impacting his acquisition of academic and functional skills and he needs assistance managing. It is generally known that the younger the child, the more important it is to address learning and behavioral problems quickly and accurately because a child's achievement gap can grow exponentially as the child ages without proper interventions. In addition, this case involved an IEP team decision to conduct the assessment. Thus, there was an agreement that more or better data was necessary to program for the Student. Therefore, this IHO concludes the delay between the IEP team meeting on February 6, 2009, where it was determined additional assessment was necessary, and the IEP team meeting on May 7, 2009, where the assessment results were discussed, was an unreasonable delay.

4. A failure-to-implement an IEP claim must be analyzed looking at:

whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material."

Catalan v. District of Columbia, 478 F.Supp.2d 73, 75 (D.D.C.,2007).

5. In this case the Student was not provided half of the speech and language services to which he was entitled in two separate months, December and February. The December shortfall was due to Student absence. The February shortfall was a result of school staff not being present. Thus, for the month of February, there was a material deviation (half of the speech services determined necessary not

provided) from the IEP. This deviation from the IEP was impermissible. Because real progress data is lacking and because the IEP was last revised in February, and is in process of being revised further, it is not clear what impact this denial of service had on the Student's educational progress. The speech and language goal in the current IEP must be revised to be specific and measurable and must include required objectives or short-term benchmarks consistent with 34 C.F.R. § 300.320(a)(2), D.C. Mun. Regs. tit. 5, § 3009.1(c), and the January 26, 2009 HOD.

V. DECISION

1. The Respondent failed to timely conduct a reevaluation of the Student following the February 6, 2009, IEP team meeting resulting in the inability of the IEP team to review and revise the IEP to be reasonably calculated to provide educational benefit.
2. The Respondent failed to ensure the Student's speech and language services were provided in conformity with the IEP.
3. The IEP continues to not meet the requirements of 34 C.F.R. § 300.320 and D.C. Mun. Regs. tit. 5.

VI. ORDER

1. The IEP must be revised no later than June 12, 2009. The Petitioner's attorney or education advocate must be copied on any correspondence or other notices sent or delivered to the Petitioner, as directed by the Petitioner.

2. The IEP team must revise the IEP consistent with the findings and conclusions of this HOD including but not limited to: clear and accurate statements of present levels of academic achievement and functional performance including how the Student's disability affects his involvement and progress in the general education curriculum (the same curriculum as for nondisabled children); measurable annual academic and functional goals, including short-term objectives or benchmarks, designed to meet his needs that result from his disability to enable him to be involved in and make progress in the general education curriculum and meet each of his other educational needs that result from his disability; a description of how the Student's progress toward meeting the annual goals will be measured and when periodic reports on the progress he is making toward meeting the annual goals will be provided; and the anticipated frequency, location, and duration of special education and related services and supplementary aids and services. All IEP requirements not specifically mentioned here must be adhered to.
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. The level of special education and related services must be designed to assist the Student to reach the annual goals. The IEP must include a dedicated aide to work with the Student one on one when he is in an inclusion setting.
5. Nothing in this order is intended to restrict the IEP team from determining a different educational placement for the Student.

IT IS SO ORDERED.

Dated this 26th day of May, 2009.

A handwritten signature in black ink, consisting of a stylized initial 'J' followed by a long horizontal line.

Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).