

**DC Office of the State Superintendent of Education**  
 Office of Review & Compliance  
 Student Hearing Office  
 1150 5<sup>th</sup> Street, SE  
 Washington, D.C. 20003  
 CONFIDENTIAL

<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 8, 2009</p> <p><u>Representatives:</u></p> <p>Donovan Anderson, Petitioner</p> <p>Tanya Chor, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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OSSE  
STUDENT HEARING OFFICE

**I. PROCEDURAL BACKGROUND**

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 1:00 p.m. on May 1, 2009. The hearing concluded on that date. The due date for the Hearing Officer's Determination (HOD) is May 8, 2009, in accordance with the Blackman/Jones Consent Decree. This HOD is issued on May 8, 2009.

The hearing in this matter was conducted and this decision is written pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

Present at the due process hearing were:

Petitioner's Counsel, Donovan Anderson, Esq.

Respondent's Counsel, Tanya Chor, Esq.

Petitioner, Student's Grandmother

Two witnesses testified at the hearing: the Student's Grandmother, Petitioner (P) and general education teacher at

The complaint in this matter was filed on March 24, 2009. A prehearing conference was held on March 30, 2009, and a prehearing order was issued on that date. A response was filed by the Respondent on April 3, 2009.

Six documents were disclosed and filed by the Petitioner on April 22, 2009. There were no objections raised to the admission of any of the disclosed documents, and they were all admitted into the record. (P 1 – P 6). Petitioners' exhibits are as follows:

- P 1 - Due Process Complaint, March 24, 2009
- P 2 - Individualized education program (IEP), March 19, 2009
- P 3 - IEP, September 26, 2007
- P 4 - Psychological evaluation report, September 18, 2007
- P 5 - Report card for the 2008-2009 school year
- P 6 - witness statement

Two documents were disclosed and filed by the Respondent on April 22, 2009. There were no objections raised to the admission of either of the disclosed documents, and they were both admitted into the record. (R 1 and R 2). Respondent's exhibits are:

- R 1 - Provisional Due Process Notice, undated
- R 2 - Respondent's response, April 3, 2009, including the following attachments:
  - a. Respondent's "Notice of Insufficiency to Parent's Due Process Complaint"
  - b. IEP, March 19, 2009

## II. ISSUE

Whether the Student's individualized education program (IEP) is reasonably calculated to provide educational benefit? Specifically, whether the Student's failure to progress in the general education curriculum requires a revised IEP?

### III. FINDINGS OF FACT

1. The Student is a        year old learner currently enrolled in the        grade at        School. P 2, R 2, Testimony (T) of P. The Student has been identified as a child with a specific learning disability (LD). P 2, R 2.
2. The Student's IEP, initially written September 26, 2007, did not include appropriate statements of present levels of academic achievement and functional performance. P 3. The only information the initial IEP gives us about the impact the Student's disability has on his involvement and progress in the general curriculum is: her "decoding and comprehension skills adversely impact on her Reading ability"; Assessment scores show she was only about a half-year behind in reading; and she "is significantly below grade level and requires intensive/individualized instruction." P 3.
3. There were two annual academic goals as part of her initial program. P 3. The first goal was: "[Student] will demonstrate one-year's growth in Reading skills by mastering the short-term objectives with 80% accuracy." P 3. The objectives addressed the following skills: word attack, sight word vocabulary, memory, predicting story elements, and identifying main ideas. P 3.
4. The second goal addressed writing, even though that was not identified in the present level of performance statement, as an area impacted by her learning disability. P 3. The goal states: "[Student] will increase her Written Expression skills as evidence (*sic*) by completing the following objectives with 80% accuracy." P 3. The objectives include: proper printing, printing simple sentences properly, appropriate capitalization, accurate copying, writing simple narratives

with correct components, and writing monthly book reports with four complete sentences. P 3.

5. The IEP was revised on March 19, 2009. P 2, R 2. The statement of her present level of academic achievement with regard to the Student's reading skills states: "[Student] can recognize some sight words. She can recognize contractions. Reading comprehension and fluency are areas of weakness. These weaknesses impact her academic success on grade level." P 2, R 2.
6. There are six reading goals. P 2, R 2. Two of the goals are closely aligned with three of the previous objectives: making predictions and memory of facts and details. P 2, R 2, P 3. Four of the goals deal with new skills: comparing and contrasting literary elements; describing characters' traits, relationships, and feelings; using context to determine meanings of words; and using dictionaries and thesauri to determine meanings and other features of words. P 2, R 2. Five of the reading goals are based on second grade reading standards for the District of Columbia and one is based on a third grade reading standard. P 2, R 2.
7. The revised statement of her present level of academic achievement with regard to the Student's writing skills states: "[Student] can formulate written sentences given verbal prompts and cues. [Her needs are sentence] formulation and structure. These weaknesses impact her academic success on grade level." P 2, R 2.
8. The revised goals for writing are: "Write information on a topic. . .that includes a clear focus, ideas in sensible order, and sufficient supporting details with 80% accuracy[.]" and "Write interpretations or explanations of a literary or

informational text that organize ideas and use evidence from the text as support with 80% accuracy.” P 2, R 2. These are based on third grade and second grade writing standards, respectively. P 2, R 2.

9. The revised IEP also addresses math skills, which were not identified as an area of need previously. P 2, R 2. The statement of her present level of academic achievement with regard to the Student’s math skills states: “[Student] can complete simple addition and subtraction problems with number line. Her present overall math skills are found to be on the 1<sup>st</sup> grade level. [She needs to learn] to count to 100 by tens, learning the meaning of the ones and tens place, practice addition and subtraction facts for sums to 19 and adding/subtracting two digit numbers without regrouping. These weaknesses impact her success on grade level.” P 2, R 2.
10. There are eight math goals addressing the following math skills: reading and interpreting whole numbers and decimals, including relating to money; addition and subtraction with up to five-digit numbers; adding and subtracting fractions; understanding what fractions represent; using, understanding, and explaining patterns of numbers; basic geometry; division; and measuring length. P 2, R 2. Six of the math goals are based on third grade standards and two are based on second grade standards. P 2, R 2.
11. None of the goals in the revised IEP include objectives or benchmarks. P 2, R 2. There are no descriptions of how the Student’s progress toward any of the goals in the revised IEP will be measured or when reports on progress will be provided. P 2, R 2.

12. The revised IEP states the Student will receive “specialized instruction” outside of the general education setting for 15 hours per week. P 2, R 2. This is the same amount and location of specialized instruction that was required by the initial IEP. P 3. The Student is receiving specialized instruction from her teachers within the general education classroom. T of
13. The Student requires specialized instruction during times when school is not in session (extended school year services, or ESY) pursuant to the revised IEP. P 2, R 2. The IEP also states the Student requires “compensatory education services for missed specialized instruction hours during the school year.” P 2, R 2. Neither the ESY services nor compensatory education services are elaborated on in the IEP (e.g. when the services will be provided, including during which breaks for ESY, or the specifics of the compensatory education services). P 2, R 2.
14. The Petitioner does not think the Student can reach the annual academic achievement goals in math and reading at her current school. T of P.
15. The Student began 4<sup>th</sup> grade with academic skills below the 4<sup>th</sup> grade level. T of  
She is working at a 2<sup>nd</sup> to 3<sup>rd</sup> grade level currently. T of P 2, R 2.
16. The Student’s teacher recommended to the Petitioner that the Student receive tutoring afterschool. T of The Petitioner has been obtaining tutoring for the Student. T of P.
17. The Student has been accepted to a private school for children with disabilities,  
and would receive educational benefit in that setting.

Stipulation of the Parties.

#### 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. Special education and related services were not provided in conformity with the Student's IEP. The IEP requires 15 hours of specialized instruction outside of the general education setting. The Respondent has been providing specialized instruction in the general education setting, at least during the past year. (The evidence is based on the testimony of the Student's current teacher.)
  
3. 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).

4. District of Columbia law additionally requires, with regard to IEP goals:

A statement of measurable annual goals, including benchmarks or short-term objectives related to:

- (1) Meeting the child's needs that result from the child's disability, to enable the child to be involved in and progress in the general curriculum; and
- (2) Meeting each of the child's other educational needs that result from the child's disability.

D.C. Mun. Regs. tit. 5, § 3009.1(c).

5. The IEP does not meet the requirements of 34 C.F.R. § 300.320(a)(1). The revised IEP tells of the Student's strengths in reading. Then it tells that her reading comprehension and fluency are areas of weakness and that these weaknesses impact her academic success on grade level. It does not tell *how* her

disability affects her involvement and progress in the general education curriculum, only that it does. Specifics about where her comprehension and fluency skills are at, in order to be aware of and establish a baseline from which to determine annual goals and measure progress toward those goals, are required. This is necessary to meet the requirement for a statement that includes a description of how the child's disability affects the child's involvement and progress in the general education curriculum, under 34 C.F.R. § 300.320(a)(1). The written language and math areas similarly lack appropriate statements of present levels of performance.

6. The IEP lacks measurable annual goals that include benchmarks or short-term objectives. The initial IEP, while its goals were rather vague, included specific monthly objectives. The goals in the revised IEP, however, lack any benchmarks or short-term objectives which are used to gauge the Student's progress toward reaching each annual goal. *See*, Fed. Reg. Vol. 71, No. 156, p. 46663 (Monday, August 16, 2006) (“[B]enchmarks and short-term objectives were originally intended to assist parents in monitoring their child's progress toward meeting the child's annual goals[.]”). In fact, the revised IEP lacks any description of how the Student's progress toward the annual goals will be measured, as required by 34 C.F.R. § 300.320(a)(3). Furthermore, while the revised goals are appropriately based on the District of Columbia's educational standards, they are not based on the curriculum standards of the Student's fourth grade peers. The goals the Student is expected to reach by March of her 5<sup>th</sup> grade year are second and third grade standards. Thus, either these goals do not meet the State standards for a

fourth grader, or the Student is not receiving a appropriate elementary education because she was promoted to the grade despite not having met key third grade standards. Based on the evidence, this IHO determines the Student is not receiving an appropriate elementary education because she has not yet met the standards for a third grader<sup>1</sup>.

7. While Petitioner has demonstrated the Respondent has denied the Student a FAPE by not providing special education and related services in conformity with the Student's IEP, that the Student's IEP did not meet State standards, and did not include an appropriate elementary school education, she did not demonstrate that these deficiencies could not be resolved in the present placement or that the Student requires a private placement.

## V. DECISION

The Student's IEP is not reasonably calculated to provide educational benefit and the Student's failure to progress in the general education curriculum requires a revised IEP.

## VI. ORDER

1. The Respondent must convene the IEP team no later than May 22, 2009. The Respondent must provide the Petitioner with at least three alternative times to

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<sup>1</sup> The purpose of special education is to enable a child with a disability to access the educational opportunities that are available to nondisabled students. The term "specially designed instruction" is defined under the regulations as follows:

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.*

34 C.F.R. § 300.39(a)(3) (emphasis added).

meet (not all consecutive) and inform her of the date the IEP team will meet if she fails to select one of the proposed times. Her attorney must be copied on any correspondence or other notices sent or delivered to the Petitioner, unless directed otherwise by the Petitioner.

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: statements of present levels of academic achievement and functional performance including how the Student's disability affects her involvement and progress in the general education curriculum (the same curriculum as for nondisabled children); measurable annual academic goals, including short-term objectives or benchmarks, designed to meet her needs that result from her disability to enable her 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; a description of how the Student's progress toward meeting the annual goals will be measured and when periodic reports on the progress she is making toward meeting the annual goals will be provided and the projected date for the beginning of the extended school year services and compensatory education services, and the anticipated frequency, location, and duration of those 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.
5. The Student must be retained in the \_\_\_\_\_ grade, at least one year, while academic goals to raise her achievement to the standards expected of a \_\_\_\_\_ grader are worked on. The IEP must be reviewed and, if the Student is not making progress as expected according to the benchmarks or short-term objectives, revised to increase or alter the level of: specially designed instruction; related services; supplementary aids and services; supports for teachers; or the Student's placement. This review (IEP team meeting) must occur within seven days of a progress report noting a lack of expected progress, whether or not the Petitioner chooses to participate following proper notice.
6. Nothing in this order is intended to restrict the IEP team from determining a more restrictive placement, or a specialized private placement, is appropriate and necessary for the Student to be provided a FAPE.

**IT IS SO ORDERED.**

Dated this 8th day of May, 2009.



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Jim Mortenson, Esq.  
Independent Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).