

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

<p>[Parent] ¹, 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>September 25, 2009</p> <p><u>Representatives:</u></p> <p>Domiento Hill, Petitioner</p> <p>Blair Matsumoto, 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 September 11, 2009. The hearing concluded and the record closed on September 16, 2009, upon the filing of post-hearing briefs. The due date for the Hearing Officer's Determination (HOD) is September 26, 2009. This HOD is issued on September 25, 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.

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

Present at the due process hearing were: Petitioner's Counsel, Domiento Hill, Esq.; Respondent's Counsel, Blair Matsumoto, Esq.; and The Petitioner's Education Advocate,

[REDACTED]

Four witnesses testified at the hearing:

[REDACTED] Clinical Psychologist, St. Elizabeth's Hospital/D.C. Dept. of Mental Health John Howard Pavilion (P.O.)

[REDACTED] Education Advocate, James E. Brown & Associates (K.C.)

Director of Admissions,

Special Education Coordinator,

The complaint in this matter was filed on July 27, 2009. The resolution period expired on August 26, 2009. Attempts to convene a resolution meeting with the Petitioner were unsuccessful, but no motion to dismiss the complaint was made. (See R 4 and R 5). The Respondent failed to respond to the complaint within 10 days as required by 34 C.F.R. § 300.508(e) and (f). As a result, the facts alleged in the complaint are treated as uncontested, despite the untimely response filed on September 3, 2009. A prehearing conference was held on August 13, 2009, and a prehearing order was issued on August 14, 2009.

27 documents were disclosed by the Petitioner on September 3, 2009. (P 1 – P 27) All of the disclosed documents were admitted into the record. The exhibits are:

- P 1 - Due Process Hearing Notice
- P 2 - Administrative Due Process Complaint Notice, July 27, 2009
- P 3 - Resolution Meeting Confirmation, printed August 3, 2009
- P 4 - Letter from Mortenson to Hill and Matsumoto, August 7, 2009
- P 5 - Individualized education program (IEP) and meeting notes, September 2, 2009
- P 6 - Student Discipline Report, August 26, 2008 to September 2, 2009
- P 7 - Manifestation Determination

- P 8 - Manifestation Determination
- P 9 - Letter of Understanding, September 2, 2009
- P 10 - Transcript, September 2, 2009
- P 11 - Letter from [REDACTED] August 26, 2009
- P 12 - Speech and Language Evaluation, June 5, 2009
- P 13 - Confidential Psychological Evaluation, March 20, 2009
- P 14 - Psychological Evaluation, May 4, 2009
- P 15 - Letter from Hill to [REDACTED] March 6, 2009
- P 16 - Letter from Hill to [REDACTED] June 19, 2009
- P 17 - Letter from Hill to [REDACTED] June 26, 2009
- P 18 - Letter from Hill to Office of Special Education, May 7, 2009
- P 19 - Hearing Officer Decision (HOD), March 9, 2009
- P 20 - Letter from Hill to [REDACTED], with evaluations (See P 17, P 14, P 13, & P 12), June 26, 2009
- P 21 - IEP, February 11, 2008
- P 22 - Psycho-educational Report, April 19, 2005
- P 23 - Student Discipline Report, September 1, 2008 to December 3, 2008
- P 24 - Report to Parents on Student Progress, October 24, 2008, and Attendance Summary, August 18, 2008 to December 3, 2008
- P 25 - IEP, May 2, 2006
- P 26 - IEP, February 14, 2007
- P 27 - Curricula Vitae of Dr. [REDACTED]

Eight documents were disclosed by the Respondent on September 4, 2009. (R 1 – R

8) All of the disclosed documents were admitted into the record. The exhibits are:

- R 1 - Administrative Due Process Complaint Notice, July 27, 2009
- R 2 - DCPS Response, September 4, 2009
- R 3 - Prehearing Order, August 14, 2009
- R 4 - Due Process Complaint Disposition, August 10, 2009
- R 5 - Due Process Complaint Disposition, August 19, 2009
- R 6 - IEP September 2, 2009
- R 7 - Justification and Plan for Dedicated Aide, September 2, 2009
- R 8 - RSM and MDT notes, August 26 and September 2, 2009

II. ISSUES

1. Whether the Student was harmed by the Respondent's failure to implement the March 9, 2009 Hearing Officer Decision (HOD) when it did not convene the

individualized education program (IEP) team to meet within 10 school days of receipt of the last assessment reports on June 26, 2009?

2. Whether the IEP and placement is reasonably calculated to provide educational benefit to the Student?

III. UNCONTESTED FINDINGS OF FACT²

1. The Student is a year old learner with a disability determined eligible for special education and related services under the definition of mental retardation.
The Student currently attends
2. The Student's IEP, at the time the complaint was filed, was due to be revised no later than February 11, 2009. The IEP required the Respondent to provide the Student with special education and related services for a total of 27.5 hours per week.
3. A due process hearing was convened on behalf of the Student on or about February 27, 2009. As a result of the hearing, the independent hearing officer (IHO) presiding over the matter issued a decision on March 9, 2009, ordering the Respondent to convene a manifestation determination meeting on behalf of the Student within 10 school days of the issuance of the order, fund the Parent's independent speech and language, psycho-education, and comprehensive psychological evaluation, and to reconvene the Student's IEP team to meet within 10 school days of receipt of the last of the completed evaluations and modify the IEP as appropriate.

² All of the following facts are drawn from the complaint filed July 27, 2009.

4. The Student's psychological evaluation was conducted on or about May 2, 2009, and a report prepared on or about May 4, 2009. The Student demonstrated, among other things, difficulty with sustaining attention when given a specific task to complete, unless verbal prompting was provided. He continued to meet criteria as being eligible for special education and related services as a result of his being mentally retarded. He would be an appropriate candidate for placement that would assist him with functional, vocational, academic, and social skills. He requires an updated adaptive behavior scales assessment and individual therapy.
5. The Student's psycho-educational evaluation was conducted on or about March 18, 2009, and a report prepared March 20, 2009. The Student, according to the report, requires an updated adaptive Vineland behavior scales assessment, and has severe deficits in intellectual and academic functioning, as well as behavioral difficulties. He requires, according to the report, a placement in a therapeutic program with trained teachers and aides, as well as a strong behavior system component and crisis management, small student to teacher ratio, a VAKT instructional approach, school based intervention, and a mentor.
6. The Student's speech and language assessment was completed on or about June 5, 2009. The Student was unable to remember information in a sentence as the information became more complex. He has difficulty expressing himself through the use of complete sentences and may have difficulty learning new word meaning. He demonstrated decreased ability to assemble sentences when given words and phrases, decreased ability to understand semantic relationships,

decreased expressive and receptive skills, difficulty completing phonemic awareness tasks, and problems with word identification.

7. A copy of the completed evaluations were provided to the Respondent on June 26, 2009, along with a letter requesting that the IEP team be reconvened. Ten school days from June 26, 2009, was July 13, 2009, because summer school was in session as of June 29, 2009.³ No IEP team meeting was held within this time period.

IV. FINDINGS OF FACT

8. The IEP team was convened on August 26 and again on September 2, 2009.⁴ A new IEP was written on September 2, 2009.⁵
9. The Student's academic performance is assessed using the DC-CAS with accommodations.⁶
10. The IEP created on September 2, 2009, does not include statements of present levels of academic achievement and functional performance based on the most recent evaluation data.⁷ The June 5, 2009, speech and language assessment

³ The late response from the Respondent states the meeting should have been held by July 6, 2009, pursuant to the HOD. (R 2). The Respondent then asserts in its closing brief that the 10 school day period would not begin until August 24, 2009. Given the facts in the complaint were not timely challenged, the Petitioner's assertion that July 13, 2009, was the deadline pursuant to the HOD is deemed as true.

⁴ T of K.C., R 8, P 5.

⁵ R 6, P 5.

⁶ P 5. (R 6 is the same IEP, but that IEP indicates the Student will take the DC-CAS without accommodations. No explanation for the difference in the IEPs provided by each party of the same date was offered at hearing. In any event, the Student has been determined to be no so severely cognitively delayed that he must be assessed using an alternate assessment.)

⁷ R 6, P 5, P 12, P 13, P 14.

provides data on the Student's present levels of functional performance with regard to speech and language, including recommendations for addressing his needs in this area.⁸ The IEP includes no statement of the Student's present levels of functional performance of speech and language, but it does incorporate the recommendations in the report into annual goals.⁹ The psychoeducational evaluation assessment report of March 20, 2009, provides comprehensive data on the Student's present levels of academic achievement and functional performance as well as recommendations for meeting his needs.¹⁰ The results of this assessment were not incorporated in any obvious way in the IEP.¹¹ The psychological evaluation assessment report of May 4, 2009, provides comprehensive data on, primarily, the Student's cognitive functioning skills.¹² The results of this assessment were not incorporated in any obvious way in the IEP.¹³

11. The IEP lacks appropriate measurable postsecondary goals based on age appropriate transition assessments.¹⁴

⁸ P 12.

⁹ R 6, P 5.

¹⁰ P 13.

¹¹ R 6, P 5.

¹² P 14.

¹³ R 6, P 5.

¹⁴ R 6, P 5.

12. The Student is not successful academically or functionally in the mainstream high school, but has the potential to make academic progress with appropriate services.¹⁵ He is failing courses, has had to repeat the grade, is often suspended, and often avoids classes.¹⁶
13. can meet the Student's functional and academic needs.¹⁷ The School is a segregated special education school for children with mild mental retardation (such as the Student), learning disabilities, and emotional disturbances.¹⁸ There is a low student to adult ratio and a comprehensive behavior program.¹⁹ The School is in session for 11 months of the year and offers courses in vocational skills as well as academics.²⁰ The Student may begin attending as soon as possible.²¹

CONCLUSIONS OF LAW

1. A failure to implement a hearing officer's decision (HOD) creates a rebuttable presumption of harm under the Blackman/Jones consent decree, pp. 38-39, paragraph 74 (July 2006). The presumption of harm has not been overcome. The

¹⁵ Testimony (T) of P.O., T of T.W., P 23, P 24.

¹⁶ T of T.W., T of K.C., P 23, P 24.

¹⁷ T of D.D.

¹⁸ T of D.D.

¹⁹ T of D.D.

²⁰ T of D.D.

²¹ T of D.D.

overwhelming evidence in this case demonstrates the Student is failing to be involved in or to progress in the general education curriculum, and the failure to meet and revise the IEP appropriately in a timely manner has only exacerbated this.

2. 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 peerreviewed 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.
- (b) Transition services. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include —

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 C.F.R. § 300.320, See also, D.C. Mun. Regs. tit. 5, § 3009.1.

3. A free appropriate public education (FAPE) is provided when special education and related services are:

- (a) . . . 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.

4. “[A]n IEP that focuses on ensuring that a child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.” Fed. Reg. Vol. 71, No. 156, Monday, August 14, 2006, p. 46662.
“Academic content standards are statements of the knowledge and skills that schools are expected to teach and students are expected to learn.” *Modified Academic Achievement Standards*, Non-Regulatory Guidance, USDOE, July 20, 2007, p. 12. “IEP goals based on grade-level academic content standards are goals that address the skills specified in the content standards for the grade in which a student is enrolled.” *Id.* at 29 “[T]he 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, 203-04 (1982).

5. The Student's IEP is not reasonably calculated to provide educational benefit because it lacks the required content and is not based on the most recent data about the Student's academic achievement and functional performance. The Respondent has not shown that the recent assessments were not valid and should not have been relied on in revising the IEP. Furthermore, it can only be concluded that the Student's continued placement in the setting at _____ will not be appropriate for the 2009-2010 school year. Thus, the IEP and placement will be changed.

6. _____ is an appropriate educational setting that is consistent with current requirement in the IEP for 27.5 hours of special education services outside of the mainstream setting. It is compensatory in nature because the Student has not been involved in and has not participated in the general education curriculum for sometime and is not able to legitimately pass from grade to grade (and, in fact, did not do so), and thus educational benefit has not been provided. Furthermore, _____ was the only alternative placement proposed by either party to the IHO. Finally, the recommendations in assessment reports must be used to appropriately revise the IEP. These revisions are not more specific here, since the staff at _____ are expected to constitute the majority of the IEP team with only a representative from the Respondent participating to ensure proper public supervision. Thus, the combination of putting the Student in a new and desired school, while revising the IEP in accordance with the assessment reports, will put the Student on track to be

involved in and make progress in the general education curriculum, hopefully by the conclusion of his secondary education.

V. DECISION

1. The Student was harmed by the Respondent's failure to implement the March 9, 2009 Hearing Officer Decision (HOD) when it did not convene the individualized education program (IEP) team to meet within 10 school days of receipt of the last assessment reports on June 26, 2009.
2. The IEP and placement are not reasonably calculated to provide educational benefit to the Student.

VI. ORDER

1. The Student's IEP must be corrected to include the following:
 - a. A statement of the Student's present levels of academic achievement in reading, mathematics, and written expression, based on the most recent data available (the assessment reports of 2009), as well as a statement of present levels of functional performance in the areas of communication/speech and language and social/emotional/behavioral skills. The statements of the Student's present levels of academic achievement and functional performance must clearly indicate the affect the Student's disability has on his involvement and progress in the general education curriculum, the academic content standards for ninth grade in the District of Columbia.

- b. A statement of measurable annual academic goals designed to meet his academic needs.
 - c. A description of how the Student's progress toward meeting the annual goals will be measured and when periodic written reports on the Student's progress will be provided to the Student's parents.
 - d. 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, which must include, at a minimum, those recommended in the 2009 assessment reports.
 - e. Appropriate measurable postsecondary goals (as opposed to annual academic or functional goals) based on age appropriate transition assessments related to training, education, employment, and independent living skills, and the transition services, including courses of study, needed to assist the Student in reaching those post secondary goals.
2. The IEP team must meet and revise the IEP, in accordance with this order no later than October 9, 2009. Three alternate times for an IEP team meeting must be provided to the Petitioner including the time the IEP team will meet if she does not respond or is unable to attend any of the proposed times. The IEP must begin no later than October 12, 2009, and must continue through September 1, 2010, unless the parties agree to change it sooner based on data collected about the Student.

3. Any disagreement over the IEP thus required may be resolved by filing a complaint with the SEA, pursuant to 34 C.F.R. §§ 300.151 – 300.153, or any other appropriate dispute resolution mechanism.
4. The Student must be placed and transported to School for the remainder of the 2009-2010 SY, beginning no later than October 1, 2009. While at the Student's special education program must remain under public supervision, pursuant to 34 C.F.R. § 300.17 and this order. If fails to adhere to compliance requirements as directed by the Respondent (not to exceed local or Federal law) or this order, the Respondent must find a comparable willing private placement for the Student for the remainder of the school year.
5. All other due process required under IDEA and DCMR must be followed in the completion of this order.

IT IS SO ORDERED.

Dated this 25th day of September, 2009.



Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Independent Hearing Officer is final, except that any party aggrieved by the findings and decision of the Independent 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).