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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STUDENT HEARING OFFICE
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[Parent], on behalf of [Student], Petitioner, v. District of Columbia Public Schools, Respondent.	Case #2009-1274 HEARING OFFICER'S DETERMINATION November 29, 2009 Representatives: Domiento Hill, Petitioner Daniel Kim, Respondent Independent Hearing Officer: Jim Mortenson

I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 1:00 p.m. on October 29, 2009, and continued at 1:00 p.m. on November 20, 2009. The hearing concluded on November 20 and the record closed on November 24, 2009, following receipt of written closing statements. The due date for the Hearing Officer's Determination (HOD) is November 30, 2009, in accordance with a continuance order issued in response to Petitioner's motion, on November 6, 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, Domiento Hill, Esq.

Respondent's Counsel, Daniel Kim, Esq.

Petitioner, Student's Grandmother (Day 2)

Petitioner's Education Advocate, [redacted] (Day 1)

Petitioner's Education Advocate, [redacted] Day 1)

Seven witnesses testified at the hearing: the Student's Grandmother, Petitioner (P); [redacted] Education Program Supervisor, [redacted] (L.C.); Petitioner's Education Advocate, [redacted]; Petitioner's Education Advocate, [redacted] DCPS Psychologist, [redacted]; Special Education Teacher, [redacted]; and Teacher, [redacted]

The complaint in this matter was filed on September 9, 2009. A prehearing conference was held on September 23, 2009, and a prehearing order was issued on that date. An untimely response was filed by the Respondent on September 23, 2009.

20 documents were disclosed and filed by the Petitioner on October 22, 2009. There were no objections raised to the admission of any of the disclosed documents and they were all admitted as exhibits into the record. (P 1 – P 20). Petitioner's exhibits are as follows:

P 1	-	Student Hearing Office, Due Process Hearing Notice
P 2	-	Administrative Due Process Complaint, September 8, 2009
P 3	-	District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice, September 23, 2009
P 4	-	Letter from IHO Mortenson to [redacted], September 11, 2009
P 5	-	Prehearing Order, September 23, 2009 (See R 18)
P 6	-	Case #2009-0933 Hearing Officer's Determination (HOD), August 7, 2009
P 7	-	Education Evaluation Report, July 14, 2009 (See R 10)
P 8	-	Clinical/Psycho-Educational Evaluation, August 29, 2009 (See R 9)
P 9	-	Social History Evaluation, July 27, 2009

P 10 - Individual Education Program (IEP) (See R 11), Multidisciplinary Team (MDT) Meeting Notes (See R 12), and Parent/Guardian Consent to Evaluate, September 3, 2009
P 11 - IEP (proposed) and meeting notes, October 15, 2009 (See R 13)
P 12 - Review of Independent Assessment, October 15, 2009 (See R 9)
P 13 - Letter from [redacted] September 28, 2009
P 14 - Service Tracker, October 1, 2009 (See R 15), and student work samples
P 15 - Due Process Complaint Disposition, September 24, 2009
P 16 - Service Tracker, October 6, 2009 (See R 16)
P 17 - Report to Parents on Student Progress, January 16, 2009
P 18 - Summary and Score Report, May 14, 2009
P 19 - Letter from [redacted] to [Petitioner], October 6, 2009
P 20 - Educational Evaluation, October 24, 2007

18 documents were disclosed and filed by the Respondent on October 22, 2009. There were no objections raised to the admission of any of the disclosed documents and they are all admitted into the record. (R 1 - R 18). Respondent's exhibits are:

R 1 - IEP (in part), January 11, 2008
R 2 - IEP, June 12, 2009
R 3 - Student Report of Progress, June 12, 2009
R 4 - Letter from [redacted], June 16, 2009
R 5 - Letter from [redacted], July 7, 2009
R 6 - The Psychoeducational Re-Evaluation Report, September 20, 2007
R 7 - Educational Evaluation, October 24, 2007
R 8 - Speech and Language Re-Evaluation Report, August 27, 2007
R 9 - Review of Independent Assessment, October 15, 2009 (See P 12), Clinical/Psycho-Educational Evaluation, August 29, 2009 (See P 8)
R 10 - Education Evaluation Report, July 14, 2009 (See P 7)
R 11 - IEP, September 3, 2009 (See P 10)
R 12 - MDT Meeting Notes, September 3, 2009 (See P 10)
R 13 - IEP (proposed) and meeting notes, October 15, 2009 (See P 11)
R 14 - Teacher Progress Statements, October 15, 2009
R 15 - Service Tracker, October 1, 2009 (See P 14)
R 16 - Service Tracker, October 6, 2009 (See P 16)
R 17 - [redacted]urriculum Vitae
R 18 - Prehearing Order, September 23, 2009 (See P 5)

II. ISSUES

1) Whether the Respondent failed to provide an IEP reasonably calculated to provide the Student with educational benefit? Specifically, whether the Respondent should have incorporated the recommendations of a recent educational evaluation into the IEP in order to provide an appropriate program?

2) Whether the Respondent failed to provide an appropriate educational placement for the Student? Specifically, whether the Student requires a full-time special education school in which to implement her IEP?

3) Whether the Respondent failed to fully evaluate the Student in all areas related to the suspected disability? Specifically, whether a recommended neuropsychological assessment must be provided in order to appropriately address the Student's needs?

FINDINGS OF FACT

1. The Student is a [redacted] year old learner currently enrolled in the [redacted] grade at [redacted] The Student has been identified as a child with a specific learning disability (LD).[2]

2. An IEP team meeting was held on September 3, 2009, and resulted in an IEP proposed on that date.[3] The IEP addresses the areas of mathematics, reading, communication/speech language, and motor skills/physical development.[4] Three

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[1] Testimony (T) of P, P 10/R 11.

[2] T of P, P 10/R 11.

[3] P 10/R 11.

[4] P 10/R 11.

of the annual goals for mathematics are based on fifth grade standards, and one each are based on sixth, seventh, and eighth grade standards.[5] All of the reading goals are based on seventh grade standards.[6] All of the goals in the September proposal appear in the October 15, 2009, IEP proposal.[7]

3. The services in the October 15 revision of the IEP are in a more inclusionary setting than the September 3 revision.[8] Specialized instruction outside of the general education setting was reduced from a proposed ten hours per week to three hours per week.[9] Specialized instruction within the general education setting was increased from a proposed seven and one half hours per week to fourteen and one half hours per week.[10] Occupational therapy (OT) was reduced from one hour per week to one hour per month.[11] Speech and language services were reduced from 45 minutes per week to one hour per month.[12]

4. Three assessment reports were generated for the Student over the summer of 2009.[13] The first was an educational assessment, completed through Thrive, Inc.,

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[5] P 10/R 11.

[6] P 10/R 11.

[7] P 10/R 11, P 11/R 13.

[8] P 10/R 11, P 11/R 13.

[9] P 10/R 11, P 11/R 13.

[10] P 10/R 11, P 11/R 13.

[11] P 10/R 11, P 11/R 13.

[12] P 10/R 11, P 11/R 13.

[13] P 7/R 10, P 8/R 9, P 9.

by [redacted], and written July 14, 2009.[14] The second was a social history evaluation completed through LearningSolutions, Inc., by [redacted], and written on July 27, 2009.[15] The third was a clinical/psycho-educational evaluation also completed LearningSolutions, Inc., by [redacted] and written on August 29, 2009.[16] The educational and clinical/psycho-educational assessments included very thorough recommendations for educational programming for the Student, based on comprehensive assessments.[17] The social history was more limited and its brief recommendations were consistent with those of the other two assessments.[18]

5. The Student's academic skills are weak and are delayed from between two and four years behind her peers.[19] She suffers from mild but chronic stimulus overload (she suffers from attention deficit hyperactivity disorder, combined type) which results in recurrent episodes of anxiety, tension, nervousness, and irritability.[20] She is impulsive and needs to be taught strategies to help her remember to slow down and make sure her responses make sense.[21] The Student has significant

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[14] P 7/R 10.

[15] P 9.

[16] P 8/R 9.

[17] P 7/R 10, P 8/R 9.

[18] P 9.

[19] P 7/R 10, P 8/R 9.

[20] P 8/R 9.

[21] P 7/R 10.

delays in phonics skills, sight word vocabulary, written language, ability to recall text, and ability to follow directions.[22] Her calculation skills are difficult to determine because she successfully completes problems in the classroom but demonstrates difficulty in testing situations.[23]

6. While [redacted] recommended a neuropsychological assessment to determine if more neurological factors are contributing to her scattered assessment scores, such an assessment is not necessary at this time to create an appropriate education program for the Student.[24]

7. The Student has been accepted into [redacted], a non-public school for children with learning disabilities and emotional disorders.[25] [redacted] has been approved by the District of Columbia to provide education to children from the District of Columbia.[26]

8. Little, if any, good data on the Student's academic progress, or lack thereof, was presented.[27] This is not an important fact since the most recent IEP revision occurred less than two weeks prior to the start of the hearing and so little data

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[22] P 7/R 10.

[23] T of N.B., T of M.R., P 7/R 10, R 14.

[24] P 8/R 9, T of M.B.

[25] T of L.C., P 19.

[26] T of L.C.

[27] The only evidence on current academic performance came from testimony of the Petitioner, Special Education Teacher and Math Teacher. The conflicting testimony all appears to be rather self-serving, and with some objective corroboration, such as curriculum based assessments or work product, is not given much weight. P 14 included several of the Student's worksheets but they were not accompanied by any testimony that clearly explained the significance of the documents and so were not given much weight.

would have been available by the disclosure due date.[28] The Student does require to have her executive functioning and other social/emotional needs addressed.[29]

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.

The Supreme Court, in Rowley has guided us stating:

> 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).

2. 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;

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[28] P 11/R 13.

[29] T of D.C., T of K.C., T of M.R., T of N.B, R 14.

(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).

3. The IEP includes academic goals that are designed to meet the Student's needs that result from her disability and to enable her to be involved in and progress in the general curriculum. While only one math goal is based on an eighth grade standard, the series of goals, taken together, demonstrate an effort to address the Student's deficits in mathematics skills. Likewise, her reading goals are all based on seventh grade standards which are not so far removed from what eighth

graders are expected to accomplish. The Respondent is cautioned that while it may take more than one year to get the Student involved in and progressing in the general curriculum in math, reading, or any other core academic subject, the requirement of the IDEA is to provide the services necessary to close the achievement gap between where she is performing and grade level standards so that the Student can be involved in and progress in the general curriculum, the same curriculum as her peers. This is the purpose of providing special education and related services.

4. Despite the good academic goals, the IEP does not meet the requirements of 34 C.F.R. § 300.320(a). The IEP lacks statements of present levels of functional performance that describe how the Student's ADHD and depression affects her involvement and progress in the general education curriculum (the same curriculum as for non-disabled children). This information is necessary to ensure the necessary services and supports are in place to help the Student reach her annual goals. It may be prudent to include functional goals designed to address skills dealing with the Student's social and emotional functioning and these will be required by this order. This failure represents a shortsighted approach to educational programming for the Student. It appears that academics are addressed only in the context of the Student's learning disabilities, and not with her social and emotional functioning in mind (although this is on the minds of some of her teachers). These errors must be corrected in order for the Student to be provided a free appropriate public education pursuant to 34 C.F.R. § 300.17.

5. Students with disabilities must be placed in conformity with the following provisions concerning the least restrictive environment (LRE):

> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
>
> (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. §§ 300.114(a)(2), 300.116(a)(2).

6. The Petitioner has not demonstrated that the Student's disability is so severe or that as a compensatory remedy a specific non-public school placement is necessary. Furthermore, but for the IEP revisions required herein, the Petitioner has not demonstrated that either of the IEP revisions from September or October 2009 were not in the LRE or required a different level of segregation.

7. When evaluating a child with a disability the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. § 300.304(c)(6).

8. A neuropsychological assessment is not required of the Student in order to identify all of her special education and related services needs. These needs have already been identified and there is sufficient data in the most recent assessment reports to appropriately program for the Student. The purpose of the recommended neuropsychological assessment was to determine if more neurological factors are contributing to her scattered assessment scores, not to identify additional special education and related services needs.

V. DECISION

1. The Student's IEP includes academic goals aligned with State standards. However, the IEP is not reasonably calculated to provide educational benefit to the extent it lack statements of present levels of functional performance concerning the Student's identified executive functioning deficits and emotional needs. It also lacks measurable annual goals and the necessary special education and related services necessary to enable the Student to reach those goals. This is a denial of a free appropriate public education.

2. The Petitioner has not demonstrated the Student requires a full time special education school in which to receive special education and related services. This determination does not preclude the IEP team from placing the Student in a more restrictive environment than has been proposed, if it is determined necessary to enable the Student to reach her goals.

3. The Petitioner has not demonstrated that a neurological assessment is necessary in order to address the Student's needs at this time. The assessment reports currently available to the IEP team include sufficient data to enable the IEP team to accurately describe how the Student's executive functioning and emotional needs impact her involvement and progress in the general curriculum, and to create measurable annual goals designed to address those needs.

VI. ORDER

1. The Respondent must convene the IEP team no later than December 15, 2009. The Respondent must provide the Petitioner with at least three alternative times to

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: 1) 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) with regard to her executive functioning and emotional skills deficits, as reported in recent assessment reports; 2) measurable annual academic goals 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, specifically executive functioning and emotional needs that impact her involvement and progress in the general curriculum; and 3) the special education and related services necessary to enable to the Student to reach those goals *by the end of the current school year*. Any recommended services and supports in the 2009 clinical/psycho-educational evaluation and the 2009 educational evaluation that are not being used should be considered if the Student is not making adequate progress to reach any of her goals by the end of the 2009-2010 school year. All other items ordered in the HOD for Case #2009-0597 remain in effect and must be complied with, to the

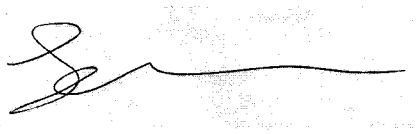
extent not modified by this decision. All IEP requirements not specifically mentioned here must be adhered to.

3. If the Petitioner believes the resulting proposed IEP has not complied with this order, or other requirements of this order have not been complied with, 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. Because this is not the first complaint concerning this IEP, it is recommended that any violation found as a result of this order result in placement at a school of the Petitioner's choice which meets, pursuant to the reviewer's analysis, D.C. requirements and is reasonably expected to provide an appropriate education for the Student.

4. Nothing in this order is intended to restrict the IEP team from making other changes to the program appropriate and necessary for the Student to be provided a FAPE.

IT IS SO ORDERED.

Dated this 29th day of November, 2009.



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).

APPENDIX A

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

Student: [redacted]

ID#:

School:

Petitioner:

[redacted]

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STUDENT HEARING OFFICE