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

[Parent], on behalf of [Student], Petitioner, v. District of Columbia Public Schools, Respondent.	Case HEARING OFFICER'S DETERMINATION January 15, 2009 Representatives: Steven Boretos, Petitioner Candace Sandifer, Respondent Independent Hearing Officer: Jim Mortenson

I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, on January 7, 2009, and concluded on the same date. The due date for the Hearing Officer's Determination (HOD) is January 19, 2009, in accordance with the prehearing order and the Blackman/Jones Consent Decree, because the record closed on January 9, 2009, following receipt of Respondent's post-hearing brief. This HOD is issued on January 15, 2009.

Present at the due process hearing were:

Petitioner's Counsel, Steven Boretos, Esq.

Respondent's Counsel, Candace Sandifer, Esq.

Two witnesses for the Petitioner testified:

The Petitioner, Student's mother (P)

Education Advocate

No witnesses testified for the Respondent.

The Petitioner filed her due process complaint, through counsel, on November 14, 2008. A prehearing conference was conducted on December 10, 2008, and a prehearing order was issued on December 15, 2008. Petitioner's Counsel and Respondent's Counsel participated in the prehearing conference.

A response to the complaint was filed by the Respondent on November 26, 2008. The Respondent filed a notice of insufficiency which was denied in the prehearing order of November 24, 2008.

Attempts by the parties to convene a resolution session were unsuccessful.

Documents for disclosure were filed by the Petitioner and the Respondent on December 30, 2008. All of the Petitioner's 11 exhibits (P 1 – P 11) were admitted into evidence. The Petitioner's exhibits are as follows:

P 1 - Provisional Due Process Hearing Notice, November 19, 2008
P 2 - Due Process Complaint Notice, November 13, 2008
P 3 - IEP, , May 22, 2008
P 4 - IEP Meeting Notes, PR Harris, May 22, 2008
P 5 - Prior to Action Notice, May 22, 2008
P 6 - IEP, , NC, March 8, 2007
P 7 - Psycho-educational Re-evaluation, Angela Jefferson, February 9, 2006
P 8 - Psychological Evaluation, Candrice A. Thul, March 15, 2004
P 9 - Psychological Evaluation, Gabe Cazell, April 2, 2001
P 10 - Disciplinary paperwork, February 6, 2008
P 11 - Retainer Agreement/Power of Attorney, February 5, 2008

All of Respondent's four disclosed documents were admitted (R 1 – R 4). The Respondent's exhibits are as follows:

R 1- IEP, , May 22, 2008
R 2- IEP Meeting Notes, , May 22, 2008
R 3- Letter of Invitation to Resolution Session, November 19, 2008
R 4- IEE Letter, November 26, 2008

II. ISSUES

At the December 10, 2008, prehearing conference the following issues were identified for the IHO to resolve:

1) Whether the 2008 individualized education program (IEP) and placement was inappropriate for the Student? Specifically, whether the IEP was based on incomplete or insufficient evaluation data?

2) Whether the Respondent implemented the 2008 IEP or related agreement from May 22, 2008? Specifically, whether an authorization and funding for Parent's choice of a private school placement was provided?

3) Whether the Respondent made an accurate manifestation determination on February 5, 2008?

III. FINDINGS OF FACT

1. Student is a year old learner in the grade. P 3, Testimony (T) of P. Until he was recently incarcerated and placed at the Student was enrolled at T of The Student enrolled in DCPS in December 2007 and was at until the end of the 2007-08 school year.

T of P and T of The Student had been enrolled in a North Carolina Public School prior to his December 2007 enrollment in DCPS. P 6.

2. The Student has been determined to be eligible for special education and related services under the category specific learning disability. P 3, P 6, T of

3. In January 2008, while at , the Student was engaged in a fight with several other students. P 10. The Principal recommended expulsion as a consequence, and this recommendation was held in abeyance "until a due process hearing is held on the parent's challenge to the manifestation determination." P 10. A hearing officer stopped a disciplinary hearing until the manifestation determination was complete. T of There is no evidence the Student was expelled or otherwise disciplined inappropriately as a result of the behavior incident in January 2008.

4. An IEP team meeting was held on May 22, 2008, and a revised IEP resulted. P 3. The IEP does not include statements of the Student's present levels of academic achievement and functional performance. P 3.

5. The IEP includes two goal statements. One goal concerns reading and one concerns math. P 3. The reading goal includes three objectives at the third grade level, four objectives at the fourth grade level, three objectives at the fifth grade level, and one objective at the sixth grade level[1]. P 3. The goal calls for "one years growth with language development and reading comprehension skills. . . ." P 3. The math goal includes six objectives at the fifth grade level and three objectives

[1] The objectives are State education standards which come from various strands in the subject matter or reading and math. The State education standards are grade-based in the District of Columbia.

at the sixth grade level. P 3. The goal calls for "one years growth in math reasoning and math computation skills. . . ." P 3.

6. The IEP states that the Student cannot be educated in the general education setting. P 3. The explanation for this is because "Student requires behavior interventions and modifications that cannot be met within the general education classroom." P 3. The placement is not specified and the behavior interventions and modifications are not specified. P 3.

7. The IEP team determined, as reflected in the meeting notes, that:

> [b]ased upon his behaviors [Student] has not made a tremendous amount of progress. Most of his behaviors take place outside of the classroom. The team agrees that a more structured setting is required. His IEP will be updated and his hours increased. Counseling should be considered. DCPS will seek to place in 30 days, if this placement is not provided counsel (advocate) has the privilege to place in an alternative setting. Tutoring services are recommended.

P 4/R 2.

8. The most recent evaluation data concerning the Student is from an evaluation report completed by DCPS on February 9, 2006. P 7.

IV. CONCLUSIONS OF LAW

1. The Petitioner is entitled to a due process hearing pursuant to 34 C.F.R. § 300.511. This Independent Hearing Officer's Decision (HOD) is issued as a result of a due process hearing under Part B of the Individuals with Disabilities Education Improvement Act (IDEA) initiated by the Student's Parent.

2. An individualized education program (IEP) for a student with a disability 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);

34 C.F.R. § 300.320(a)(1).

3. The Supreme Court, in Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 48 U.S. 176, 206-07 (1982), gave Courts a two part test in examining cases brought under IDEA and determining appropriate remedies. This test is useful for independent hearing officers examining the issues at the administrative level. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Id.

4. The Student's May 2008 IEP failed to include a statement of the Student's present levels of academic achievement and functional performance, including how his disability affects his involvement and progress in the general education curriculum. Without this fundamental building block of the IEP, the subsequent components have no foundation to stand on. Thus, the IEP was not developed using the procedures under the Act and therefore, as a matter of law, cannot be reasonably calculated to enable the Student to receive educational benefits.

5. An IEP for a student with a disability must also include:

> (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;

34 C.F.R. § 300.320(a)(2).

6. Because the IEP lacks a statement of present levels of academic achievement and functional performance, it cannot be determined the goals are designed to meet the Student's needs that result from his disability. Goals are based on the statement of present levels of academic achievement and functional performance. *See,* 34 C.F.R. § 300.320(a)(2). Additionally, given that the Student is in the grade, the goals to increase the student's performance by one year from third, fourth, fifth, and sixth grade levels in the various strands for reading and math does not reasonably enable the Student to be involved and progress in the general education curriculum his peers are engaged in. Finally, the IEP and IEP meeting notes indicate the IEP team believes the student has additional needs concerning behavior. Yet there are no functional goals to address these needs. Thus, the IEP is not reasonably calculated to provide educational benefits based on the academic goals and lack of functional goals.

7. An IEP for a student with a disability must include:

> (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;

34 C.F.R. § 300.320(a)(4).

8. Despite concluding the Student required "behavior interventions and modifications" the IEP does not include these special education and related services, supplementary aids and services, and program modifications or supports for school personnel for the benefit of the Student.

9. Finally, an IEP for a student with a disability must include "the anticipated frequency, location, and duration of those services and modifications." 34 C.F.R. § 300.320(a)(7).

10. Despite concluding "a more structured setting is required" the Student was enrolled in a mainstream setting, in the fall of 2008. Thus, the special education and related services were not "provided in conformity with an [IEP] that meets the requirements of §§ 300.320 through 300.324." 34 C.F.R. § 300.17.

11. The current Federal Regulations clarify Rowley by specifying:

> a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.
> (2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies —
> (i) Impeded the child's right to a FAPE;
> (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
> (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a).

12. The Student has been denied a FAPE on substantive grounds: the IEP was not reasonably calculated to provide educational benefits and special education and related services were not provided in conformity with an IEP meeting federal requirements. Conversely, to the extent any of the above conclusions are determined to show a purely procedural violation, such a violation impeded the child's right to a FAPE for the foregoing reasons and caused a deprivation of educational benefit as evidenced by failure to create academic goals that close the Student's academic achievement gap between his performance and the required academic standards for students his age and the lack of functional goals concerning his behavioral needs.

13. The requirement for a FAPE also includes special education and related services that are "provided at public expense, under public supervision and direction, and without charge[.]" 34 C.F.R. § 300.17(a).

14. The IEP team's apparent delegation to the Parent or her advocate to select the placement of the child violated the requirement to provide services under public supervision and direction. That "DCPS will seek to place in 30 days, if this

placement is not provided counsel (advocate) has the privilege to place in an alternative setting" is an invitation for the present dispute. An IEP team does not make recommendations. Rather, the team makes decisions and the educational agency must implement them. 34 C.F.R. § 300.17. While this Hearing Officer does not suggest a dispute over special education cannot be resolved by permitting a parent to enroll his or her child in a private placement of his or her choice at public expense, the responsibilities of an IEP team (which includes the parent and staff from the education agency) under IDEA, and as specified under 34 C.F.R. § 300.17, require it to, in the first instance, propose a placement, pursuant to 34 C.F.R. § 300.503 in order to not run afoul of 34 C.F.R. § 300.17. When a dispute arises or a proposal or refusal, then it may be resolved by the delegation that was prematurely attempted here. See, e.g. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993), Sch. Comm. of the Town of Burlington, Mass. V. Dept. of Educ. Mass., 4 U.S. 359 (1985). Because there was no dispute at the time of the IEP meeting, a specific proposal for a public or private placement was required. This did not occur.

15. Federal law requires:

> Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—
> (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
> (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.
> (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.
(f) *Determination that behavior was a manifestation.* If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—
(1) Either—
(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

34 C.F.R. § 300.530(e).

16. While the evidence shows there was an event that led to a proposed expulsion, the expulsion, a change in placement, was never perfected. Furthermore, the evidence is not clear on when a manifestation determination occurred and what the determination was. Thus, there is no way for this Hearing Officer to determine whether the Respondent made an accurate manifestation determination.

V. DECISION

1. The Respondent denied the Student a free appropriate public education when it failed to develop an individualized education program reasonably calculated to provide the Student with educational benefit.

2. The Respondent denied the Student a free appropriate public education when it failed to provide special education and related services in accordance with a properly developed individualized education program and failed to propose a placement for the Student.

3. The issue with regard to the alleged manifestation determination is dismissed.

VI. ORDER

1. The Respondent must provide the Student with a comprehensive educational evaluation that will show all of the Student needs resulting from any disabling conditions. This evaluation must be completed by March 2, 2009, unless any or all of it is conducted by an independent private provider. This order shall not excuse a delay in any evaluation arrangements already made or in process.

2. The IEP team must create an evaluation report upon completion of assessments and review of assessment reports as required by D.C. Mun. Regs. tit. 5, § 3006.5. The meeting to review the evaluation report must be held within 7 calendar days of the end of assessing, or the receipt of assessment reports from independent providers if any or all of the evaluation is done independently. The IEP team meeting must be held at a mutually agreeable place and time within the deadlines described herein and pursuant to 34 C.F.R. § 300.322. The Respondent must document at least three alternative dates and times[2] for the IEP team to meet. If the Parent fails to agree to at least one of the proposed dates and times, the IEP team must meet during one of the proposed times and make its eligibility determination and inform the Parents and their Counsel that it will proceed at that time.

3. The IEP must include all of the required components, pursuant to 34 C.F.R. § 300.320. Any academic goals must strive to close the Student's achievement gap in reading and mathematics. This is not a requirement to close the gaps within one year, but rather to narrow and not maintain or permit the gaps to grow during that time. Special education and related services, supplementary aids and supports

[2] Proposed times to meet cannot be within consecutive hours.

must be designed and provided to reach the goals, as required by 34 C.F.R. § 300.320.

4. The IEP team must make the placement determination. The determination will be based on one of three options presented by the Parent, and may include private placements. The placement may last, minimally, until the end of the 2009-10 school year. Only the Parent may remove the Student from the determined placement. This does not preclude the IEP team from determining to maintain the placement in subsequent school years.

5. The IEP must immediately be revised to include counseling and tutoring, the specifics to be determined by the IEP team, as this was "recommended" although not implemented by the IEP team in May 2008. The IEP team must meet to perfect this revision by January 28, 2009. The procedures as outlined in Order number 2 must be followed for scheduling the team meeting.

6. The Respondent must follow all necessary State and Federal regulations, including but not limited to notice requirements, in the accomplishment of the above orders.

IT IS SO ORDERED.

Dated this 15th day of January, 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. § 415(i)(2).