

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent/Guardian], on behalf of,
[Student],¹

Petitioner,

v

District of Columbia Public Schools (DPCS),

Respondent.

Date Issued: January 19, 2011

Hearing Officer: Jim Mortenson

Case No:

2011 JAN 19 PM 2:48
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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION
ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on December 8, 2010. A response to the complaint was filed on December 18, 2010. The Petitioner is represented by Domiento Hill, Esq., and the Respondent is represented by Daniel McCall, Esq. A prehearing conference was held with counsel on December 21, 2010, and a prehearing order was issued on that date. The hearing was scheduled for February 3, 2011. The parties agreed in writing, later on December 21, 2010, that no settlement could be reached and that the 45 day hearing timeline begin. Pursuant to 34 C.F.R. § 300.510(c) and the December 21, 2010, prehearing order, the Independent Hearing Officer (IHO) changed the hearing date to January 21, 2011, to permit sufficient time to issue a determination following the hearing. The Petitioner moved for summary

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

judgment on or about January 12, 2011, with 30 exhibits. The Respondent filed a reply on about January 14, 2011, with about four unnumbered exhibits.

II. JURISDICTION

This hearing process was initiated and 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. As such, the IHO has declined to hear any contract disputes (e.g. whether a settlement was breached or not) and is not considering issues outside of those clarified at the prehearing conference.

III. STANDARD FOR SUMMARY JUDGMENT

This Hearing Officer Determination (HOD) is made upon the granting of the Petitioner's motion for summary judgment. There are no specific rules for the handling of motion for summary judgment under the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and the local laws governing special education due process hearings, D.C. Mun. Regs. tit. 5, Chap. 30. However, Standard Operating Procedure² (SOP) § 600.1 provides:

The Hearing Officer has the authority and responsibility to conduct the hearing with integrity and dignity; ensure the rights of all parties are protected; rule on procedural matters; take actions necessary to complete the hearing in an efficient and expeditious manner; to be fair and impartial, and to render a final independent administrative decision.

In ensuring a fair and efficient hearing process, this IHO looks to the Federal Rules of Civil Procedure regarding summary judgment. Under Rule 56(c) of the Federal Rules of Civil

² The Standard Operating Procedures, while not law promulgated pursuant to 34 C.F.R. § 300.165, are generally accepted procedures that have arisen from the class action lawsuit titled Blackman/Jones, and arise from a consent decree entered on July 26, 2006 (*See* CA 97-1629). These SOPs are relied on here for guidance in managing the hearing process regarding issues not specifically delineated in the law.

Procedure summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, “show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); see also Moore v. Hartman, 571 F.3d 62, 66 (D.C. Cir. 2009).

Whether a fact is “material” is determined in light of the applicable substantive law invoked by the action. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In light of the applicable substantive law, in this case the IDEA and governing State law, a “genuine issue of material fact” is a fact that is determinative of a claim or defense, and therefore, affects the outcome of the case. *See*, Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), Anderson, 477 U.S. at 248. The moving party bears the initial burden of demonstrating that no genuine issues of material fact are in dispute. Upon such a showing, the burden then shifts to the non-moving party to demonstrate that genuine issues of material fact are in dispute. SOP § 400.1 (C)(5) provides guidance for a non-moving party to respond to a motion within three business days of the date the motion was filed. The tribunal is precluded from weighing evidence or finding disputed facts and must draw all inferences and resolve all doubts in favor of the non-moving party. *See*, Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). These standards are appropriate to use in this proceeding, pursuant to the IHO’s discretion under 34 C.F.R. §§ 300.507-300.515, and the SOP.

Based upon the pleadings, filings, and all arguments of counsel, and pursuant to the Order below, this IHO grants the Petitioner’s motion for summary because the Petitioner has met her burden of showing there are no genuine issues of material fact in dispute. Furthermore, the substantive law demonstrates the Student was denied a free appropriate public education (FAPE) as described in the Findings and Conclusions below.

IV. ISSUES AND RELIEF SOUGHT

The issues to be determined by the IHO are:

- 1) Whether the Respondent failed to timely review the assessment reports from the Student's independent clinical psychological assessment and _____ assessment?
- 2) Whether the Respondent failed to offer or propose an individualized education program (IEP) reasonably calculated to provide educational benefit when it did not include daily reading intervention for four hour per day, five day per week?

The substantive requested relief is:

- 1) A revised IEP that includes:
 - a) _____ program for 200 to 240 hours of clinical instruction for 10 to 12 weeks, including transportation;
 - b) individual therapy;
 - c) family therapy; and
 - d) a mentor.
- 2) Requirement that the Respondent consider recommended additional programming following the conclusion of the 10 to 12 weeks of the _____ program.

V. FINDINGS OF FACT

After considering the exhibits in the light most favorable to the non-moving party, the Respondent, and finding no genuine disputes over material facts, this Hearing Officer's Findings of Fact are as follows:

1. The Student is an _____ year old learner with disabilities who attends the _____ grade in a private school in Maryland.³ The Student was placed by the Respondent.⁴

³ Complaint.

⁴ Complaint.

2. An independent clinical psychological assessment was completed of the Student in June 2010, and an assessment report was created June 25, 2010.⁵ This report was provided to the Respondent on June 28, 2010, with a request to review the report.⁶
3. At the time the Student was assessed in the summer of 2010 (there is no current contradicting evidence) he was experiencing increased symptoms of Adjustment Disorder with mixed Anxiety and Depression that is likely the result of increased contact with his mother.⁷ These symptoms are not directly affecting his academic performance, but they are contributing to the context in which he is expected to perform academically.⁸ As a result, behavior support services remain necessary at school.⁹ Community-based therapeutic support for the Student and his family has been recommended and they are encouraged to obtain it.¹⁰
4. A _____ assessment was conducted of the Student on July 12, 2010, and a report written on July 14, 2010.¹¹ The report was provided to the Respondent on July 14, 2010, with a request to review the report.¹²
5. The Student was functioning between the kindergarten and second grade levels in most academic areas when assessed in the summer of 2010.¹³ In order to advance sufficiently to close the performance gap with where his expected level of performance is, the Student requires intervention to develop his language and literacy skills as well as

⁵ Complaint, Petitioner's Exhibit (P) 20.

⁶ Complaint, P 21.

⁷ P 20.

⁸ P 20.

⁹ P 20. (Goals and services to help the Student reach them are already being successfully provided, see Finding of Fact #8.)

¹⁰ P 20. (Community-based therapeutic support for the Student and his family are services beyond the education system's responsibility for a free appropriate public education.)

¹¹ Complaint, P 22.

¹² Complaint, P 23.

¹³ P 22.

mathematical concepts and computation skills.¹⁴ This will require daily instruction for four hours per day, five days per week, for an initial 10 to 12 weeks, with the following specific programs:

imagery; The

program to provide sensory cognitive development of concept imagery; and

math program to provide sensory-cognitive development of numeral imagery and concept imagery.¹⁵

6. No meeting to review the two assessment reports was convened and a complaint was filed that resulted in settlement agreement on September 24, 2010.¹⁶ As of the filing of the complaint in this matter, on December 8, 2010, the evaluations still had not been reviewed, and no meeting to review them is expected to occur until January 21, 2011.¹⁷
7. Of the Student's reading, writing, and math goals, he is progressing on about half of them.¹⁸ The goals are to be achieved by May 2011.¹⁹
8. The Student has four social/emotional goals which align with the recommendations in the independent clinical psychological assessment.²⁰ The Student is progressing on all four goals.²¹

¹⁴ P 22.

¹⁵ P 22.

¹⁶ Complaint, P 24, P 25 (See also Respondent's identical exhibit, unnumbered).

¹⁷ DCPS' Response in Opposition to Petitioner's Motion for Summary Judgment, Respondent's exhibit Confirmation of Meeting Notice, January 13, 2011. Respondent argues that the Petitioner was to blame, at least in part, for the failure to convene the meeting sooner. As evidence of this, Respondent points to a Letter of Invitation sent to the Petitioner on or about November 4, 2010, seeking to meet on either November 8, 9, or 12, 2010. Unlike the January Confirmation Meeting Notice, however, the November Letter of Invitation does not purport to be for the purpose of reviewing reevaluation data. Rather, the purposes of the meeting were to review the IEP and discuss compensatory education and transportation services. Thus, even reviewing the evidence in the light most favorable to the Respondent, it cannot be ignored that the Respondent's evidence does not show what the Respondent states it shows and there is no genuine dispute.

¹⁸ Respondent's exhibit IEP Progress Report – Annual Goals, November 4, 2010. This is the Respondent's best evidence of the Student's progress.

¹⁹ Respondent's exhibit IEP Progress Report – Annual Goals, November 4, 2010.

²⁰ P 20, Respondent's exhibit IEP Progress Report – Annual Goals, November 4, 2010.

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. Evaluation data must be reviewed by the individualized education program (IEP) team and other qualified professionals in order to determine, among other things:

Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

34 C.F.R. § 300.305(a)(2)(iv).

2. The regulations provide no specific timeline within which evaluation data must be reviewed. However, the overarching theme of the IDEA is to ensure timely planning, service, and dispute resolution. *See, e.g.:* 34 C.F.R. §§ 300.301(c)(60 days to conduct initial evaluations), 300.323(c)(initial IEP meeting to be held within 30 days of determination of need for service, and services must be provided "as soon as possible following development of the IEP"), and 300.515 (hearing decision must be issued within 45 days of end of 30 day resolution period). When a reevaluation is requested (as opposed to completed) the United States Department of Education has opined that the reevaluation must be completed within a reasonable time or without undue delay. Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 IDELR 1127, 1129 (1995), *See also, Herbin v. District of Columbia*, 362 F.Supp. 2d 254, 259 (D.D.C. 2005). Also, IEPs must be in effect for students with disabilities "[a]t the beginning of each school year[.]" 34 C.F.R. § 300.323(a).

²¹ Respondent's exhibit IEP Progress Report – Annual Goals, November 4, 2010.

3. The two assessment reports in question here were completed and provided to the Respondent in June and July, respectively. It is reasonable the reports would have been reviewed and any revisions to the IEP made before the start of the new school year. The failure to do so has resulted in an IEP that is not permitting the Student to progress toward the academic goals in the IEP which are essential to providing him the opportunity to be involved in and progress in the general education curriculum, as evidenced by the significant performance gap between his grade level (sixth) and performance level (Kindergarten to second), and showing progress on only about half the academic goals.

4. 34 C.F.R. § 300.17 provides:

- Free appropriate public education or FAPE means 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.

5. An IEP must include, in relevant part:

- (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;

.....
34 C.F.R. § 300.320(a)(4).

6. Because the Student is not advancing appropriately toward the annual goals, and is so far behind as to not be involved in and making progress in the general education curriculum, the Student is not receiving an appropriate education under the current IEP.

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. The IEP will include, effective January 31, 2011, specialized instruction in language and literacy skills as well as math skills. The instruction will be provided by the program for four hours per school day, five days per week (exclusive of breaks occurring during weeks in the regular school year, but inclusive of summer break, if necessary, but for one week following the end of the regular school year) for 12 weeks. The specific programs to be used, pursuant to the determinations of staff working with the Student, are the program, the program; and the math program.
2. The IEP team will meet and review the Student's present levels of academic achievement and functional performance within one week of the final week of these specified services. Any determinations or disputes arising at that time are beyond the purview of this HOD.

IT IS SO ORDERED.

Date: January 19, 2011



Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).