

**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]<sup>1</sup>, 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 2, 2009</p> <p><u>Representatives:</u></p> <p>Donovan Anderson, Petitioner</p> <p>Harsharen Bhueller, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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STUDENT HEARING OFFICE  
2009 SEP -3 PM 12:35

**I. PROCEDURAL BACKGROUND**

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 1:00 p.m. on September 1, 2009. The hearing concluded and the record closed on that date. The due date for the Hearing Officer's Determination (HOD) is September 10, 2009. This HOD is issued on September 2, 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.

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<sup>1</sup> 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, Donovan Anderson, Esq.; the Petitioner; the Student's Sister; and Respondent's Counsel, Harsharen Bhuller, Esq.

Four witnesses testified at the hearing:

Petitioner, the Student's Mother (P)

Student's Sister, (S)

Admissions Director, of D.C.  
Special Education Coordinator,

The complaint in this matter was filed on July 20, 2009. The resolution period was waived on July 27, 2009. A response to the Complaint was filed by the Respondent on July 30, 2009. A prehearing conference was held on August 11, 2009, and a prehearing order was issued on that date.

4 documents were disclosed by the Petitioner on August 25, 2009. (P 1 – P 4) All of the disclosed documents were admitted into the record. The exhibits are:

- P 1 - Due Process Complaint Notice, July 20, 2009
- P 2 - Psychoeducational Evaluation, January 29, 2008
- P 3 - Individualized Education Program (IEP), March 13, 2009
- P 4 - Letter from Stith-Twine to Anderson, July 28, 2009

No documents were disclosed by the Respondent. A witness list was disclosed on August 24, 2009, and amended on August 28, 2009.

## II. ISSUE

Whether the Student's individualized education program (IEP) can be implemented at Dunbar Senior High School?

### III. FINDINGS OF FACT

1. The Student is a \_\_\_\_\_ year old learner with a disability currently enrolled at \_\_\_\_\_  
The Student is a high-functioning child eligible for special education and related services under the definition of mental retardation (MR).<sup>3</sup> The Student was enrolled at \_\_\_\_\_ during the 2008-09 school year.<sup>4</sup>
2. The Student's current IEP was written in March, 2009.<sup>5</sup> The IEP states the Student will receive specialized instruction, outside of the general education setting, for 25.5 hours per week.<sup>6</sup> In addition, the IEP requires 60 minutes per week of behavioral support services and 60 minutes per week of occupational therapy (OT).<sup>7</sup>
3. The IEP states the Student "will participate in the Alternate Assessment" regarding State-wide academic achievement testing.<sup>8</sup> The IEP does not include short-term objectives or benchmarks.<sup>9</sup>

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<sup>2</sup> P 3, Testimony (T) of P, T of S.

<sup>3</sup> P 3, T of

<sup>4</sup> T of P, T of S.

<sup>5</sup> P 3, T of

<sup>6</sup> P 3.

<sup>7</sup> P 3.

<sup>8</sup> P 3.

<sup>9</sup> P 3.

4. The Respondent has not implemented the IEP since the start of the current school year on August 24, 2009.<sup>10</sup> The Respondent claims to be able and is willing to implement the IEP at ]
5. The Student has been accepted at The Academy is a private segregated special education school designed for students with learning disabilities and mental retardation.<sup>13</sup> The Student can be provided services in a set of classes for students who are higher functioning MR.<sup>14</sup> The related services in the Student's IEP can be provided at the Academy.<sup>15</sup>

#### IV. CONCLUSIONS OF LAW

1. 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. The Supreme Court has stated that:

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<sup>10</sup> T of P, T of S, T of M.B. (The Special Education Coordinator, M.B., confirmed the assertions by the Petitioner and the Student's Sister that the IEP was not being implemented at

<sup>11</sup> T of M.B.

<sup>12</sup> P 4, T of

<sup>13</sup> T of

<sup>14</sup> T of

<sup>15</sup> T of

if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Board of Educ. V. Rowley, 458 U.S. 176, 189 (1982).

2. An IEP requires benchmarks or short-term objectives for Students who take alternate assessments. 34 C.F.R. § 300.320(a)(2)(ii).
3. Since the Student began school on August 24, 2009, at School she has not been provided an education pursuant to her IEP. Additionally, the IEP has not been formulated in accordance with the Act as it lacks, on its face, short-term objectives or benchmarks (which are required because the IEP team determined the Student's academic progress would be measured with an alternate assessment). These violations are direct denials of a free appropriate public education as the "checklist" is not satisfied. The Respondent's argument that it can *now* provide the services in the IEP is too late to be an appropriate remedy as explained in the memorandum below. The violations will be remedied in accordance with the Petitioner's supported position.

## **V. DECISION**

1. The Respondent failed to provide special education and related services in conformity with the Student's IEP at
2. The Respondent failed to offer or provide the Student with an IEP reasonably calculated to provide educational benefit because it lacks the required short-term benchmarks or objectives required for a student taking an alternate State-wide assessment.

## VI. ORDER

1. The Student will be placed at \_\_\_\_\_ for the 2009-2010 school year at the expense of the Respondent, including related services and transportation between the school and home. The Student must begin attending on September 8, 2009, or the first day of school at \_\_\_\_\_ which ever is later.
2. The Student's IEP must be corrected to include a statement of measurable annual academic and functional goals designed to meet her academic and functional needs and which include short-term objectives or benchmarks because her academic achievement is to be measured on an alternate assessment.
2. The IEP team must meet and revise the IEP, in accordance with this order no later than September 17, 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 Respondent remains responsible for the due process and supervision of the program, in accordance with 34 C.F.R. § 300.17(a). The IEP team must be devised of \_\_\_\_\_ staff, in accordance with 34 C.F.R. § 300.321, and must include a representative of the Respondent. Any failure of \_\_\_\_\_ to comply with the due process requirements, as directed by the Respondent or this Order, may result in a change of placement to a comparable private special education school for the remainder of the school year.

3. Any disagreement over the IEP thus required or between the agencies 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.
5. All other IEP and due process requirements under IDEA and DCMR must be followed in the completion of this order.

**IT IS SO ORDERED.**

Dated this 2nd day of September, 2009.



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Jim Mortenson, Esq.  
Independent Hearing Officer

#### **MEMORANDUM**

This is a case that never should have been. The complaint in this matter was filed on July 20, 2009, long before the start of the new school year. It was the *prediction* of the Petitioner that the IEP could not be implemented at the Student's new school, [REDACTED]. On its face, this position was tenuous because it was based on a future event (or lack thereof). Yet, the Respondent agreed to waive the opportunity to meet in a resolution meeting. Had it intended to deliver a FAPE to the Student this would not be a surprising approach.

Taking care to fortify its position by ensuring the Student was provided FAPE when school began was disregarded by the Respondent. The school year started a week before the due process hearing and instead of ensuring its legal position was solid, and that FAPE was being provided, the Respondent did what the Petitioner and the Student's sister testified at hearing that they feared it would do. It ignored her. No one was ensuring the IEP was implemented. It is not even clear anyone at [REDACTED] including the Special Education Coordinator who testified for the Respondent at hearing knew the Student had

an IEP. Testimony was given by the Special Education Coordinator did not know the Student, and was surprised to hear about the general education classes she was placed in. This was not necessarily her error since she was just as new to the school as the Student, but the system must be designed to ensure there are no cracks for students to fall through. The Respondent's argument and testimony that *it could* implement the Student's IEP at from now on is too little too late.

Why not let the District go ahead and implement the IEP now? What was the harm to the Student for missing a couple of weeks of specialized instruction and related services? The latter question is irrelevant due to the gross injustice that would occur if the determination were "little to none" and the matter were resolved in favor of the Respondent. The injustice comes from the fact that the Respondent could have resolved this in its own favor, and the favor of the Student, by merely implementing the IEP when school began on August 24, 2009. To wait for the pending hearing, and then effectively say "wait, we can do it!" no matter how convincingly, is to force the Petitioner to incur the cost of litigation up through the point of hearing and then do what it should have already done. This case can only be said to be one of a frivolous defense. This cannot stand and so, despite the Respondent's belated promise to do what it should have already done, the Student will be given the opportunity to progress at the school selected and vetted by her Parent. The Respondent must remember that it does not exist for its own benefit, but rather, for the benefit of the students it serves. Thus, it must pay attention to each and every one of its students and have the systems and staff in place to do so. Its failure to do so in this case has resulted in the loss of the opportunity to educate this precious child for at least a year, and at no small expense to the Respondent.

- J.R.M.

## **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).