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: November 26, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: November 18, 2010

Room: 2008

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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on November 18, 2010, in hearing room 2008, and concluded on that date. The due date for the Hearing Officer's Determination (HOD) is November 26, 2010, pursuant to 34 C.F.R. § 300.515(a). This HOD is issued on November 26, 2010.

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. The hearing was closed to the public.

The complaint in this matter was filed on October 8, 2010. The Respondent filed a response to the complaint on October 22, 2010. The parties agreed to waive the resolution period on

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

October 22, 2010. A prehearing conference was conducted on October 22, 2010, and a prehearing order was issued on that date.

The Petitioner is seeking a revised individualized education program (IEP) that includes: 27.5 hours per week of specialized instruction in a fully segregated setting; one hour per week of psychological counseling; and a behavior intervention plan (BIP). The Petitioner was also seeking placement at a fully segregated day school, specifically the but determined, during the course of the hearing, to not present additional evidence on the appropriateness of that placement for the Student. At the start of the hearing the Petitioner indicated, through Counsel, that she was no longer seeking compensatory education.

Present at the due process hearing were:

Domiento Hill, Esq., Petitioner's Counsel

Blair Matsumoto, Esq., Respondent's Counsel

Five witnesses testified at the hearing:

For Petitioner:

Petitioner (P)

Educational Advocate

Dr. Natasha Nelson, Licensed Clinical Psychologist (N.N.)

For Respondent:

Special Education Teacher

Special Education Coordinator

30 documents were disclosed and offered by the Petitioner (P 1 – P 30). P 1 – P 4 were pleadings or filings already part of the record, so they were not included as exhibits. There were

no objections to P 5 through P 30 and they were all admitted into the record. Petitioner's exhibits are:

P 5	October 12, 2010	DCPS Resolution Session Waiver
P 6	March 17, 2010	Proposed Settlement
	March 19, 2010	Due Process Complaint Disposition
P 7	August 26, 2010	Proposed Settlement
	September 6, 2010	Petitioner's Voluntary Withdrawal of the Administrative Due Process Complaint Notices Filed on July 7, 2010
P 8	February 19, 2010	Transcript
P 9	January 22, 2010	Report to Parents on Student Progress
P 10	October 8, 2010	Letter from to Hill
P 11	September 23, 2010	Email from to
	September 24, 2010	Letter from to
P 12	September 23, 2010	Email from to
P 13	September 23, 2010	Email from to Hill and
P 14	October 5, 2010	Email from Hill to "resolution.team@dc.gov"
P 15	July 1, 2010	Comprehensive Psychological Evaluation
P 16	Undated	Audiological Evaluation Report [for evaluation conducted April 14, 2010]
	May 18, 2010	Letter from Hill to
P 17	May 7, 2010	Functional Behavioral Assessment
	June 4, 2010	Letter from Hill to
P 18	Undated	Vocational Level II Evaluation [conducted April 28, 2010]
P 19	April 30, 2010	Speech and Language Evaluation
	September 14, 2010	Due Process Complaint Disposition
P 20	July 1, 2010	Letter from Hill to
P 21	January 31, 2008	Individualized Educational Program [IEP]
P 22	January 31, 2008	Multidisciplinary Team (MDT) [IEP Team] Meeting Notes
P 23	January 22, 2008	IEP
	Undated	Letter of Invitation to a Meeting [for January 15, 2010 meeting]
	Undated	[Handwritten list]
	February 19, 2010	Facsimile Transmittal [cover page]
P 24	January 15, 2010	IEP
P 25	July 26, 2010	[Handwritten meeting notes of
P 26	September 23, 2010	IEP
	September 23, 2010	[Meeting notes of
P 27	September 23, 2010	Transcript
P 28	Undated	Curricula Vitae of Dr. Natasha Nelson
P 29	Undated	Curricula Vitae of
P 30	Undated	Curricula Vitae of

11 documents were disclosed and offered by the Respondent. (R 1 – R 11) R 1 was redundant of a filing already in the record and was not admitted as evidence. There were no objections to the remaining offered documents (R 2 – R 11) and all were entered into the record. Respondent's exhibits are:

R 2	September 23, 2010	IEP
R 3	September 3, 2010	MDT Meeting Notes
R 4	September 23, 2010	MDT Meeting Notes
R 5	October 21, 2010	Final Eligibility Determination Report
R 6	November 10, 2010	Attendance Summary
R 7	October 22, 2010	Attendance Summary
R 8	June 22, 2010	IEP Progress Report – Annual Goals
R 9	January 22, 2010	Report to Parents on Student Progress
R 10	October 28, 2010	Report to Parents on Student Progress
R 11	June 18, 2010	Report to Parents on Student Progress

II. ISSUES

1) Whether the Respondent failed to offer or provide the Student with an individualized education program (IEP) reasonably calculated to provide educational benefit when it did not include: a) a behavior intervention plan (BIP); b) appropriate measurable post-secondary goals based on age appropriate transition assessments and the transition services (including courses of study) needed to assist the Student in reaching those goals; and c) special education services in a more restrictive setting as a result of the nature or severity of the Student's disabilities?

2) Whether the Respondent failed to ensure the IEP team meeting held on September 23, 2010, included a regular education teacher and a special education teacher?

III. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is a seventeen year old learner with multiple disabilities.[2] She is currently repeating the grade for the fourth time at School.[3] The Student has a 20% hearing loss in her left ear.[4] Her overall cognitive abilities are in the borderline range of functioning.[5] The Student has difficulty integrating visually presented information with graphomotor (writing) abilities.[6] She has a specific learning disability in the area of mathematics, but is a significantly strong reader.[7] The Student suffers from a mood disorder that impacts all aspects of her day as a result of impulsivity, attention difficulties, and hyperactivity.[8]
2. At the end of the first advisory of the 2010-2011 school year the Student's grades consisted of three Fs (Geometry, History, and English) and a C (Writing).[9] Final grades for the 2009-2010 school year consisted of a B- (Science), four Cs (Algebra, Reading, and two Physical Education classes), and seven Fs (English, History, Reading, Economics, Sound Production and Engineering, and Social Studies).[10]
3. The Student has significant attendance problems, rarely showing for school or, when she does, not attending class.[11] It is not conclusively known why attendance is such a

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[2] R 2/P 26, P 15, Testimony (T) of P.
[3] Undisputed Fact (UF), R 2, P 26, T of P
[4] P 15.
[5] P 15.
[6] P 15.
[7] P 15.
[8] P 15, T of
[9] R 10.
[10] R 9, R 11.
[11] R 6, R 7, P 21, T of P, T of T of T of

significant problem for the Student and whether it is a result of any of her disabilities.[12] Her lack of attendance is a primary factor for her low grades and need to repeat ninth grade for the fourth time.[13] Attendance has been addressed by calls and notices home, but not in a BIP, although it was to be addressed in the BIP following the September 23, 2010, IEP team meeting.[14]

4. A series of assessments of the Student were completed during 2010, including: 1) An audiological evaluation, conducted April 14, 2010; 2) A speech and language evaluation, conducted April 21, 2010; 3) A vocational level II evaluation, conducted April 28, 2010; 4) An FBA, report date May 7, 2010; and 5) A comprehensive psychological evaluation, report date July 1, 2010.[15]

5. An IEP team meeting was held on September 23, 2010, and no regular education teacher was present.[16] There was no written agreement of excusing the regular education teacher.[17] The Student's special education teacher was present and did participate.[18]

6. The IEP team agreed that a BIP was necessary for the Student, but did not complete one for the IEP.[19]

7. The IEP resulting from the September 23, 2010, IEP team meeting included two postsecondary goals: one to attend a four year institution to obtain a degree in Business Administration, and the other to seek employment as a culinary artist or secretary full-

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[12] P 17 (The functional behavioral assessment (FBA) of April 2010 did not directly address attendance), T of P (will not attend due to teasing), T of (attendance issues due to pregnancy and unwillingness or choosing not to attend), T of . (mood disorder impacts everything in Student's life), T of S.S. (Student's problems at home impacting her attendance, not problems at school).
[13] T of P, T of T of
[14] T of P, T of T of T of S.S., R 4, P 26.
[15] P 15, P 16, P 17, P 18, P 19.
[16] UF.
[17] T of T of . stated D.C. advised the team during the meeting that the meeting could proceed without a regular education teacher. D.C. stated that said he could provide more insight than the regular education teacher.)
[18] T of T of R 4, P 26.
[19] UF, P 26, T of P, T of T of

time.[20] Independent living skills were not addressed, despite the recent vocational assessment that stated the Student required transition assistance in higher level independent living tasks such as locating housing, household management, and managing her finances.[21] Transition services included 30 minutes per month of "Transition Workshop."[22] The specifics of what this service is are not known, although it is reasonable to expect many of the specific recommendation from the vocational assessment are addressed there.[23] The IEP does not specify the courses of study the Student must take to assist her in reaching her postsecondary goals.[24]

8. The IEP also includes five annual academic goals in math (specifically geometry), and three functional goals concerning behavior.[25] The services to reach these goals includes: 30 minutes per week of audiology services; 30 minutes per week of behavioral support services; and 15 hours per week of specialized instruction of which eight hours are to be provided within the general education setting and seven hours are to be provided outside of the general education setting.[26] The Student's requirements for specialized instruction and supplementary aids and services are listed in detail in the report from the comprehensive psychological assessment written July 1, 2010.[27]

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[20] R 2.
[21] R 2, P 18.
[22] R 2.
[23] R 2, P 18. (The Petitioner did not articulate or present any evidence directly challenging the transition services in the IEP.)
[24] R 2. (Rather, the IEP only states that the Student "will follow the DCPS course of study to ensure the ability to obtain a high school diploma.")
[25] R 2 (The IEP also include several functional annual goals under the areas of "post-secondary education and training" and "employment." It is not known why this is, given there is no requirement for annual goals directly related to transition activities under 34 C.F.R. § 300.320 or D.C. Mun. Regs. tit. 5, § 3009.
[26] UF, R 2.
[27] P 15.

9. A prior written notice was not provided with the proposed IEP resulting from the September 23, 2010, IEP team meeting.[28]

IV. 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. "Behavior Intervention Plan" or "BIP" is a term of art used to describe, with relation to problem behaviors resulting from a disability, the special education and related services, supplementary aids and services, and program modifications or supports for school personnel that will be provided to a child with a disability to assist the child in advancing appropriately toward attaining the annual goals in the student's IEP, being involved in and progressing in the general curriculum, participating in extracurricular and other non-academic activities, and to be educated with other children with and without disabilities. *See* 34 C.F.R. § 300.320(a)(4). It was determined by the Student's IEP team that a BIP was necessary, yet one was not created as part of the IEP proposed following the September 23, 2010, IEP team meeting.
2. An LEA must conduct evaluations "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). In this case, the Respondent failed, despite years of problems with attendance, to conduct a functional behavioral assessment to determine why the Student was not coming to school or remaining in class. It may be that the Student's attendance problems are a function of one or more of her disabilities, but it cannot be determined without an appropriate assessment

[28] T of . (Nor did either party include a prior written notice in their exhibits.)

pursuant to 34 C.F.R. § 300.304. Once such an assessment is complete, and if it is determined the Student's attendance problems are the result of a disability, this behavior problem can be addressed by the IEP team through the IEP. If her attendance is not related to her disabilities, then the Respondent may determine how to deal with the problem.

3. Federal regulations at 34 C.F.R. § 300.320(b) provide:

> 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.

4. An age appropriate transition assessment was completed in the spring of 2010. Based upon this assessment, the Student should have had postsecondary goals dealing not only with training, education, and employment, but also independent living skills. The IEP only includes postsecondary goals for training/education and employment. The two postsecondary goals do not appear to be congruent and should be reexamined by the IEP team to ensure they are both attainable (not one or the other). Because independent living skills were identified as an area of concern for the Student (specifically: locating housing, household management, and managing finances), a postsecondary goal or goals for independent living must be set as well.

5. The IEP includes transition services consisting of a transition workshop 30 minutes per month. The Petitioner failed to articulate or present clear evidence showing this service was not appropriate to reach the Student's postsecondary goals. However, once the postsecondary goals in the IEP are revised, transition services must be examined to determine they are appropriate to aid the Student in attaining the revised postsecondary goals. The IEP does lack a specific statement of the courses of study the Student must take to assist her in reaching her

postsecondary goals, and this must be corrected. The list of courses of study must be reevaluated at each periodic IEP review, to ensure consistency with any changes to the postsecondary goals.

6. An IEP must include:

> 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).

7. The Student's IEP includes eight hours of specialized instruction per week in the general education setting, and seven hours of specialized instruction per week outside of the general education setting. It is unknown why this particular scheme of special education was devised since there is no written notice in the record concerning the proposed IEP, the response to the complaint did not specifically address this, and the notes from the IEP meeting do not show details of any discussion about how and why the specialized instruction stated on the IEP would help the Student attain her IEP goals. Conversely, the Petitioner did not demonstrate a more restrictive educational setting was necessary. The Student's primary impediment to educational progress is her attendance. Until this problem is resolved (whether or not it is a manifestation of a disability) it will be difficult to ensure the Student makes progress in the general education curriculum so that she can reach her postsecondary goals.

8. An IEP team must include, among others, a special education teacher and a regular education teacher. 34 C.F.R. § 300.321(a). A required team member need not be present at the IEP team meeting "if the parent of a child with a disability and the public agency agree, in

writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting." 34 C.F.R. § 300.321(e)(1).

9. A special education teacher, did participate in the IEP team meeting of September 23, 2010. Furthermore, it is undisputed there was no regular education teacher at that IEP team meeting. The Respondent has asserted that the Parent, through her advocate, advised the IEP team that it was not necessary to have a regular education teacher present (a point the Petitioner disputes). Assuming the District is correct on this point, however, it is not a legitimate defense because the law requires a written agreement that the regular education teacher's attendance was not necessary because the teacher's area of the curriculum was not being modified or discussed at the meeting. There was no such written agreement. The appropriate remedy for this violation in this case is to reconvene the team for another meeting and to include the regular education teacher.

V. ORDER

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

1. The Petitioner prevails on issue 1 because the Respondent failed to include a behavior intervention plan in the Student's IEP, failed to include a postsecondary goal for independent living, and failed to include courses of study the Student will need to assist her in reaching her postsecondary goals. The Respondent did propose an appropriate level of special education in the least restrictive environment to reach the annual academic goals in the IEP.

2. The Petitioner prevails on issue 2 because the Respondent failed to include a regular education teacher at the September 23, 2010, IEP team meeting.
3. The Respondent must complete a functional behavioral assessment to examine the Student's attendance and determine, among other things, whether it is a result of her disabilities. The assessment must be completed no later than December 20, 2010. The Petitioner must ensure the Student is available per whatever reasonable instructions provided by the Respondent to complete the FBA[29]. Any delays to completing the FBA as a result of the Petitioner's or the Student's failure or inability to follow the Respondent's reasonable instructions will result in a day for day extension of the December 20, 2010, deadline.
4. The IEP team must meet within one week of the completion of the FBA, and must include all required team members. No excusal of the regular education teacher is permitted per this order. The Respondent must invite, and the Petitioner must ensure the participation of, the Student. The Respondent must propose at least three alternative times to meet within the timeline set herein, and they must not all be consecutive. The Petitioner must choose one of the proposed times. It is reasonable for the meeting to be held at Senior High since that is where the Student attends school. The Petitioner and Student are strongly encouraged to attend the meeting in person, but accommodations for alternative means of participating may be made if it is impossible for either the Petitioner or Student to be physically present at the School.
5. The IEP team, at the above meeting, will review and discuss the results of the FBA. A BIP will be developed as a component of the IEP and will include provisions to address

[29] The Respondent must respect the Student's status as an expecting or new parent, which may require accommodations such as a visit to the Student's home to complete the assessment if necessary.

the Student's attendance if the FBA shows the Student's lack of consistent attendance is a result of a disability. The IEP team must also review the postsecondary goals to ensure they are attainable (it is not clear if the Student intends to attend college and work full-time, or some other arrangement) and make changes if not. A postsecondary goal for independent living must also be added to the IEP, as this was an area of concern raised in the assessment. The courses of study the Student is to take to reach the postsecondary goals must also be specified. The IEP team may make any other changes to the IEP it determines appropriate, based on data or observations that will be recorded in the written notice that will accompany the proposed revised IEP. The Respondent must provide the Petitioner at least one week, but not more than two weeks, to consider the proposed IEP revisions before they go into effect.[30]

6. Disputes over changes to the IEP specified herein may be addressed through an SEA complaint to enforce this order, pursuant to 34 C.F.R. §§ 300.151-153. Disputes over other changes, or refusals, may be addressed through any of the dispute resolution procedures available.

IT IS SO ORDERED.

Date: November 26, 2010

Independent Hearing Officer

[30] The time for consideration will be reflected in the proposed "begin date" for services, supports, and program modifications, consistent with 34 C.F.R. § 300.320(a)(7).

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).