DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

[Parent], on behalf of [Student], Petitioner, v. District of Columbia Public Schools, Respondent.	Case # HEARING OFFICER'S DETERMINATION January 29, 2010 Representatives: Chike Ijeabuonwu, Petitioner Daniel Kim, Respondent Independent Hearing Officer: Jim Mortenson

I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 11:00 a.m. on January 21, 2010, in room 5a. The record closed on that date. The due date for the Hearing Officer's Determination (HOD) is January 31, 2010, pursuant to the Blackman/Jones Consent Decree. This HOD is issued on January 29, 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.

Present at the due process hearing were:

Chike Ijeabuonwu, Esq., Petitioner's Counsel

Daniel Kim, Esq., Respondent's Counsel[1]

Petitioner, Student's Mother

Student

Five witnesses testified at the hearing:

Petitioner (P);

Student (S);

Ogom Ijeabuonwu, Education Advocate (O.I.);

Special Education Coordinator,

Admissions Director,

The complaint in this matter was filed on December 10, 2009. A response to the complaint was filed by the Respondent on December 16, 2009. The resolution period ended December 18, 2009, when the parties agreed, in writing, that a resolution could not be reached and the matter should proceed to a due process hearing. A prehearing conference was held on December 18, 2009, and a prehearing order was issued on December 21, 2009. The prehearing order required the Respondent to provide copies of all of the Student's educational records within 10 calendar days to the Petitioner through her attorney. This order was not complied with. The IHO was not notified of this lack of compliance until the day of the due process hearing. Respondent's Counsel had no explanation for the failure and advised that all of the educational records were provided to the Petitioner with the Respondent's disclosures.

11 documents were disclosed and filed by the Petitioner on January 14, 2010. (P 1 – P 11) All of the documents were admitted as exhibits into the record. Petitioner's exhibits are as follows:

[1] Mr. Kim substituted for Laura George, Esq., the attorney of record for the Respondent, at the due process hearing.

P 1 - Resolution Meeting Notice and Due Process Complaint Disposition, December 18, 2009
P 2 - Letter from to Ijeabuonwu, December 11, 2009
P 3 - Administrative Due Process Complaint Notice, December 9, 2009
P 4 - Individualized Education Program (IEP), November 17, 2009
P 5 - IEP Meeting Notes, Ogom Ijeabuonwu, November 17, 2009
P 6 - Teacher Survey, November 16, 2009
P 7 - 2009-2010 Q1 Report Card
P 8 - Letter from Ijeabounwu to Principal, October 21, 2009
P 9 - IEP, November 6, 2008
P 10 - IEP, May 20, 2008
P 11 - Multidisiplinary [sic] Team (MDT) Meeting Notes, April 29, 2008

24 documents were disclosed and filed by the Respondent on January 14, 2010. (R 1- R 25).[2] Prior to the presentation of cases, an objection was raised to the admission of the documents on the grounds of being untimely. During the presentation of cases, the Respondent offered for admission R 5, R 6, R 21, and R 22. These documents were admitted without objection. Respondent's exhibits are as follows:

R 5 - IEP Meeting Notes, May 20, 2008
R 6 - MDT Meeting Notes, November 6, 2008
R 21 - MDT Prior Notice, December 9, 2009
R 22 - IEP Meeting Notes, December 9, 2009

The other disclosed documents (R 1 – R 4, R 7 – R 20, and R 24 and R 25) were not admitted into the record.

II. ISSUES

1) Whether the Respondent failed to provide special education and related services in conformity with the Student's individualized education program (IEP)? Specifically, whether the Respondent failed to provide the Student with 24 hours per week of

[2] There was no document labeled R 23.

specialized instruction outside of the general education setting, and counseling services, during the current school year, as required by the IEP?

2) Whether the Respondent failed to comprehensively evaluate the Student to identify all of her special education and related service needs? Specifically, whether the Respondent should have and failed to conduct: a comprehensive psychological assessment; a neuropsychological assessment; a vocational assessment; and a functional behavior assessment (FBA)?

3) Whether the Respondent failed to offer an IEP reasonably calculated to provide educational benefit when the proposed IEP lacked a behavior intervention plan (BIP)?

4) Whether the Respondent failed to convene an appropriately constituted IEP team meeting on November 17, 2009?

5) Whether the Student requires a more restrictive educational placement, including 1:1 special education services?

6) Whether the Respondent failed to provide the Petitioner, through counsel, access to the Student's educational records?

III. FINDINGS OF FACT

1. The Student is a year old learner with a disability enrolled in the grade at a Public Charter School in the District of Columbia.[3] The Student is qualified for special education and related services because her disability meets the definition of Traumatic

[3] Testimony (T) of P, T of S, P 4, P 9, P 10.

Brain Injury (TBI) under the Individuals with Disabilities Education Improvement Act (IDEA).[4]

2. In April 2008 the IEP team met and determined a neuropsychological assessment was necessary.[5] The assessment was never completed.[6]

3. The Student was to receive 24 hours of specialized instruction per week in a segregated setting during the 2009-2010 school year.[7] Only 20 hours per week of specialized instruction in a segregated setting was provided.[8] The IEP did not include a transition plan at the start of the 2009-2010 school year, even though the Student turned years old over the summer.[9]

4. The Student failed Geometry, Geometry Concepts, English I, Language and Composition I, and Earth Science in the first quarter of the 2009-2010 school year.[10]

5. The Petitioner's Advocate requested, in writing, "an opportunity to inspect and review all of [Student's] education records." (Emphasis in original.)[11] This request was repeated at the November 17, 2009, IEP team meeting.[12] The requests were never complied with.[13]

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[4] P 4, P 9, P 10.

[5] T of P, P 11.

[6] T of P. (No credible or corroborated evidence was provided indicating that either a comprehensive psychological assessment or functional behavioral assessment were either requested or determined to be necessary by staff.)

[7] P 10.

[8] T of P, T of S, P 4, Response to Complaint, December 16, 2009 (admission).

[9] P 10.

[10] T of P, T of S, P 4, P 6, P 7.

[11] P 8.

[12] P 4, P 5.

As part of the prehearing order in this matter, the Respondent was required to provide to the Petitioner's Counsel "copies of all of the Student's educational records within 10 calendar days of the date of this order."[14] The records were not provided until disclosures were filed by the Respondent on January 14, 2010.[15]

6. The IEP team convened on November 17, 2009, to review and revise the IEP.[16] A transition plan was added to the proposed IEP revision which included two post-secondary goals, one of which was based on an employment questionnaire.[17] No other age appropriate transition assessments were conducted and there were no appropriate measurable post-secondary goals related to training or independent living skills.[18] The proposed IEP revision included a goal designed to meet the Student's behavioral needs, 30 minutes of behavioral support services, and one hour per week of speech-language pathology (the IEP stated that the speech and language therapist would provide the Student with appropriate ways to respond to peers appropriately).[19] At the IEP team

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[13] T of O.I.

[14] Prehearing Order, December 21, 2009.

[15] Respondent's Disclosures, January 14, 2010; Statement of Respondent's Counsel at Hearing (While the Statement of Counsel is not typically used as a basis for a factual finding, in this instance is appropriate as an admission. No explanation for the delay was provided by Respondent's Counsel.)

[16] T of P, T of O.I., P 4.

[17] P 4. (No evidence was provided as to whether the employment questionnaire was an age-appropriate assessment, so for the purposes of this HOD, it is assumed it was. The transition plan also included two purported "Annual Measurable Goals for Post-Secondary Transition." These "annual goals" appeared to mirror the post-secondary goals, and it is not clear why they were framed as "annual goals" which are not, by definition, post-secondary goals.)

[18] P 4.

[19] P 4.

meeting were: the Petitioner; a special education teacher; a regular education teacher, the Education Advocate; and a placement specialist.[20]

7. An additional meeting was convened to discuss placement on December 9, 2009.[21] The Respondent advised the Petitioner that the Student would be moved to High School where the IEP could be implemented.[22] The Respondent framed the change as one of placement, but it was only a change in the location of services since the charter school was not implementing the IEP.[23] The Petitioner objected to the change because she did not know anything about the school.[24]

8. The Student was accepted at Academy on December 11, 2009.[25] Academy believes they can meet the Student's needs though its learning disabilities program, and the Student and Petitioner both desire the Student to attend.[26]

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[20] P 4 (O.I. testified that a school district representative and/or a special education coordinator was at the meeting, but this was not clear. The IEP is relied upon as the best evidence, which did not specify a qualified district representative was present.)

[21] T of P, T of O.I., R 21, R, 22.

[22] T of P, T of O.I., R 21, R, 22.

[23] R 21, R 22.

[24] T of P. (Petitioner also testified that she objected to because the Student did not want to go there. The Student also testified she did not want to go there. However, the Student was not aware of the proposal to send her to when the Petitioner objected at the December 9, 2009, meeting. Thus, it can only be determined that the Petitioner's reason for the objection was that she did not know enough about the school.)

[25] T of T.S., P 2.

[26] T of P, T of S, T of T.S., P 2.

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). "[A]n IEP that focuses on ensuring that a child is involved in the general education curriculum will necessarily be aligned with the State's content standards." Fed. Reg. Vol. 71, No. 156, Monday, August 14, 2006, p. 46662.

2. Pursuant to 34 C.F.R. § 300.324(b) an IEP team must:

> (i) Review[] the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
> (ii) Revises the IEP, as appropriate, to address —
> (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
> (B) The results of any reevaluation conducted under § 300.303;
> (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
> (D) The child's anticipated needs; or
> (E) Other matters.

3. The Student was not achieving passing marks and special education was not being provided in conformity with the IEP during the first months of the 2009-2010 school year. The Respondent convened the IEP team to review and revise the IEP in November. The Respondent then determined to change the location of services to ensure the IEP was implemented. These steps were appropriate to take and were done without a formal complaint being filed on behalf of the Student. It would not be fair to penalize the Respondent for a failure to provide special education and related services in conformity with the IEP where it followed the rules in attempting to correct that error prior to any complaint. Thus, the Respondent's admission that the IEP was not implemented is not a violation where it took timely and appropriate steps, pursuant to the IDEA, to remedy the problem.

4. Federal regulations at 34 C.F.R. § 300.320(b) provides:

> Beginning not later than the first IEP to be in effect when the child turns , 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.

See also, D.C. Mun. Regs. tit. 5, § 3009.1.

5. A reevaluation of a Student with a disability:

> Shall be conducted at least once every three years, or more frequently if conditions warrant reevaluation; if the child's parent or teacher requests a reevaluation; or before determining a child is no longer a child with a disability.

D.C. Mun. Regs. tit. 5, § 3005.7 (2007), 34 C.F.R. § 300.303(b).

6. Evaluations 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). Furthermore, evaluations must include "Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]" 34 C.F.R. § 300.304(c)(7). *See also*, D.C. Mun. Regs. tit. 5, § 3005.9 (2007).

7. The Parties agreed that the Student required a neuropsychological assessment in April 2008, and it was never completed. No other assessments were requested, and there is no indication that the Parent or any staff suspected that additional evaluation data was necessary to identify all of the Student's special education and related services needs. With regard to transition, an employment questionnaire was administered to the Student. This was the only transition assessment provided and no evidence was offered to show it was not an age appropriate transition assessment. No age appropriate transition assessments were provided relating to training, education, or independent living skills. Because the Student is years of age, and due to her traumatic brain injury, these assessments were required for IEP planning and were not, in violation of 34 C.F.R. § 300.320(b).

8. The Student's behavioral concerns were addressed in the proposed IEP of November 2009, and no evidence was offered to show they were not appropriate. Because the IEP in place when the child turned 16 did not include age appropriate transition assessments, the IEP was not reasonably calculated to provide educational benefit. The IEP was revised in November 2009 to address transition and still lacked appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, and, independent living skills. Without such goals, the IEP cannot be

properly formulated because the outcomes for which the special education and related services are to be provided are unknown. (The transition requirements under the IDEA make it clear that the purpose of the expenditures under the Act expect more than a diploma.) Thus, 34 C.F.R. § 300.320 was violated.

9. Pursuant to Federal Regulations at 34 C.F.R. § 300.321(a), an IEP team must include:

> (1) The parents of the child;
> (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
> (3) Not less than one special education teacher of the child, or where appropriate, not less then one special education provider of the child;
> (4) A representative of the public agency who —
> (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
> (ii) Is knowledgeable about the general education curriculum; and
> (iii) Is knowledgeable about the availability of resources of the public agency.
> (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
> (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
> (7) Whenever appropriate, the child with a disability.

10. The IEP team meeting on November 17, 2009, failed to include a district representative who was: qualified to provide, or supervise the provision of, specially designed instruction to children with disabilities; was knowledgeable about the general education curriculum; and was knowledgeable about the availability of the resources of the Respondent. This violated 34 C.F.R. § 300.321.

11. Federal Regulations at 34 C.F.R. § 300.114 require:

> (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), *See* also, 34 C.F.R. § 300.116(a)(2). According to the United States Department of Education (DOE), "placement" refers to:

> points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services.

71 Fed. Reg. 46588 (2006) (discussion on comment requesting clarification between "placement" and "location"). The DOE further explains:

> Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency my have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

Id. Additionally, there is no change of placement when "maintaining a child's placement in an educational program that is substantially and materially similar to the former placement. . . ." Id. at 46588-46589 (discussion on comment concerning when a change in program is not a change in placement). Local regulations also provide the following relevant standards:

> 3013.6 The LEA shall place each child in need of special education who requires a non-public day school in a program within the District is a suitable program is available therein. Only if there is no appropriate program within the District shall a child be placed in a program outside of the District.
>
> 3013.7 In consultation with the parent, the LEA shall place each child with a disability-requiring placement outside the LEA in the program that meets the requirements of the LEA and the child's IEP that is closest to the child's residence.

D.C. Mun. Regs. tit. 5 §§ 3013.6 & 3013.7 (2007).

12. The Respondent was within its authority to change the Student's location of services from the Charter School to High School as this was not a change in placement. This was an attempt to ensure the IEP would be implemented as written, presumably by staff under the direct authority of the Respondent. The Student's wish for a smaller school like and the Parent's lack of knowledge about the High School are not sufficient evidence to demonstrate the Student requires a more restrictive environment with 1:1 special education services. (Indeed, it does not appear

that Academy provides 1:1 special education services, although individual help is presumably provided when ever a child may need it.) The Student did require to have her IEP implemented as written, and this is what the Respondent attempted to ensure with the location change.

13. Federal Regulations at 34 C.F.R. § 300.611(b) provide:

> (b) Education records means the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA)).

FERPA defines education records as

> those records that are:
> (1) Directly related to a student; and
> (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

34 C.F.R. § 99.3.

14. Federal Regulations at 34 C.F.R. § 300.613(a) provide:

> (a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

15. Specific education records were requested by the Petitioner, through her Attorney's office, repeatedly since October 2009. The requested records were not provided. Following the complaint initiating this matter, the Respondent was ordered to ensure the records were provided within ten days of the order. Again, the records were not provided. It was not until the Respondent filed its disclosures for the due process hearing, one day late, that all of the education records were provided. This repeated disregard of the Petitioner's right to have access to educational records of her child, and the disregard of the order of the IHO, may have significantly impeded the resolution of this case, including the presentation of the Petitioner's case. An equitable remedy must be

employed in this case to ensure the Student is provided a free appropriate public education, given the damage to Petitioner's ability to present a full and clear case. The Student will be placed at the school of her Parent's choice, for the remainder of the school year.

V. DECISION

1. The Respondent prevails on Issue #1 because the District attempted to correct the failure to implement the IEP by changing the Student's school of attendance from the charter school to one of its own schools.
2. The Petitioner prevails on Issue #2 because the District failed to provide the Student with a neuropsychological assessment determined necessary in April 2008, and age appropriate assessments related to training, education, and independent living skills. There is no indication that additional assessments were necessary prior to the three year re-assessment.
3. The Petitioner prevails on Issue #3 because the Respondent failed to offer an IEP reasonably calculated to provide educational benefit. Transition was not addressed in the IEP in place when the Student turned 16 and subsequently lacked appropriate measureable post-secondary goals based upon age appropriate assessments related to training, education, and independent living skills. The IEP does address the Student's behavior needs.
4. The Petitioner prevails on Issue #4 because the Respondent failed to ensure the IEP team that met on November 17, 2009, included a district representative who: was qualified to provide, or supervise the provision of, specially designed instruction; was knowledgeable

about the general education curriculum; and was knowledgeable about the availability of resources of the district.

5. The Respondent prevails on Issue #5 because the Student's lack of educational benefit was attributable to the failure to implement her IEP, which the Respondent attempted to resolve, not because she required a more restrictive educational placement, including 1:1 special education services.

6. The Petitioner prevails on Issue #6 because the Respondent failed to timely provide to the Petitioner, through her Counsel, access to the educational records of the Student.

VI. ORDER

1. The Student will be immediately placed at for the remainder of the 2009-2010 school year, as the Student has already been accepted to the school. This is an equitable remedy for the Respondent's failure to provide requested educational records until four business days prior to the hearing, including the failure to comply with the prehearing order in this matter to correct the violation no later than December 31, 2009. The cost of the placement, transportation to and from and any other education or related services at will be at the Respondent's expense.

2. The Respondent will provide or pay for appropriate transition assessments of the Student related to training, education, and independent living. These assessments must be completed no later than February 19, 2010. An IEP team meeting must be convened within 5 school days of the completion of the last assessment to revise the IEP in accordance with the assessment results and this order.

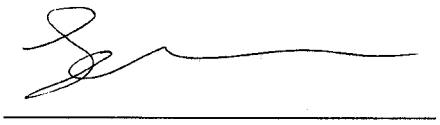
3. A neuropsychological assessment must be arranged for by the Respondent no later than February 19, 2010, and should be completed no later than April 30, 2010. The Respondent is responsible for the cost of the assessment and the Petitioner is responsible for ensuring the Student is at the location where the assessment will occur. The Respondent will not be held accountable for a delay in the completion of the neuropsychological assessment as a result of actions or inactions on behalf of the Petitioner or assessor, if the Respondent gets the assessment arranged by the February 19, 2010, deadline in this order.

4. The IEP will be revised to include appropriate measurable post-secondary goals based on age appropriate transition assessments, aforementioned. The academic goals in the IEP will be revised to align with the post-secondary goals and District of Columbia education standards for 9th grade. The special education and related services will likewise be reviewed and revised so as to be calculated to enable the Student to reach the goals by the end of the 2009-2010 school year. Progress toward the goals will be monitored and reported on at least weekly, and the IEP team must meet to review and revise the IEP if progress is not on track to reach the goals by the end of the 2009-2010 school year.

5. The IEP will be reviewed and revised within one week of the end of the 2009-2010 school year. All components of the IEP shall be reviewed and revised appropriately, including placement. The results of the neuropsychological assessment must be reviewed and considered as part of the IEP review. The location of the educational services will be determined by the Respondent, in accordance with the law.

IT IS SO ORDERED.

Dated this 29th day of January, 2010.



Jim Mortenson, Esq.
Independent Hearing Officer