

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

<p>[Student]¹,</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 11, 2009</p> <p><u>Representatives:</u></p> <p>Lawrence Huebner, Petitioner</p> <p>Kendra Berner, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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OSSE
STUDENT HEARING OFFICE

I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 1:00 p.m. on September 4, 2009. The hearing concluded and the record closed on that date. The due date for the Hearing Officer's Determination (HOD) is September 14, 2009. This HOD is issued on September 11, 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.

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution. The Student in this case is the Petitioner because she is an adult.

Present at the due process hearing were: Petitioner's Counsel, Lawrence Huebner, Esq.; the Petitioner; Petitioner's Counsel's Legal Assistant, Carol Morgan; Respondent's Counsel, Kendra Berner, Esq.; and Community Support Specialist, [REDACTED]

Two witnesses testified at the hearing:

[REDACTED] Child Guidance Clinic, District of Columbia Superior Court (R.M.)

[REDACTED] MAT, Educational Expert, (C.D.)

The Respondent presented no witnesses.

The complaint in this matter was filed on July 24, 2009. The resolution period was waived on July 31, 2009. A prehearing conference was held on August 5, 2009, and a prehearing order was issued on that date. The regulatory due date for a response to the complaint was August 3, 2009². At the time of the prehearing, no response had been filed. The IHO ordered the Respondent to file a compliant response by 5:00 p.m. on August 12, 2009, and that the failure to do so may result in a determination that the facts alleged are not in dispute.³ No response was filed by August 12, 2009.⁴ The Petitioner filed simultaneous motions for summary judgment and default judgment on August 21, 2009. The IHO issued an order concerning the motions on August 28, 2009.

² 34 C.F.R. § 300.508(e) and (f).

³ Prehearing Order Paragraph 7.

⁴ A Response to the complaint was sent by the Respondent to the Student Hearing Office (SHO) on August 24, 2009. It was not sent to the IHO, as directed by the IHO in a letter sent July 29, 2009, directing the parties on how to file documents to ensure they are timely received and acted upon. The Response was not received by the IHO until the date of the Hearing. In any event, the Response was not considered as it was grossly untimely.

The motion for default judgment was denied, while the motion for summary judgment was granted, in part. The reasons for the determination are contained in that order and are generally based on the uncontested facts in the complaint. The IHO determined a hearing was still required to present evidence of harm to the Petitioner for the violations found based on the complaint and motion, and evidence concerning the appropriate remedy. The order also required the Respondent to conduct a functional behavioral assessment (FBA) and to share the assessment report with the Petitioner and her Counsel no later than September 11, 2009. The IEP team was to meet within five school days of the report to consider it and create an appropriate behavior intervention plan (BIP) to include in the individualized education program (IEP). The order was amended, on the record, as a preliminary matter at the due process hearing, without objection by the Petitioner. The amendment changed the due date for the FBA report to September 25, 2009.

Three documents were disclosed by the Petitioner on September 2, 2009. (P 1 – P 3)

All of the disclosed documents were admitted into the record. The exhibits are:

- P 1 - Due Process Complaint Notice, July 24, 2009, with Psychological Assessment, February 24, 2009
- P 2 - Curriculum Vitae, [REDACTED] Psy.D., Licensed Psychologist, Child Guidance Clinic, District of Columbia Superior Court
- P 3 - Curriculum Vitae, [REDACTED] MAT, Ed.D. Candidate

Four documents were disclosed by the Respondent on September 2, 2009. (R 1 – R 4)

All of the disclosed documents were admitted into the record. The exhibits are:

- R 1 - IEP, May 1, 2009
- R 2 - Meeting Notes, May 1, 2009
- R 3 - Meeting Notes, March 18, 2009
- R 4 - Review of Evaluation, March 17, 2009

II. ISSUES

The Respondent was found in violation of the following four issues upon the Petitioner's summary judgment motion:

- 1) Whether the Respondent conducted an agreed upon functional behavioral assessment (FBA)? (It did not.)
- 2) Whether the Respondent appropriately revised the Student's individualized education program (IEP) to include a behavior intervention plan (BIP), post secondary goals, and transition services? (It did not.)
- 3) Whether the Respondent provided counseling services in conformity with the IEP? (It did not.)
- 4) Whether the Respondent issued a prior written notice following the IEP team meeting of May 1, 2009? (It did not.)

III. UNCONTESTED FINDINGS OF FACT

1. The Petitioner (Student) is years of age and a student at School in the Respondent School District (District).
2. The Student is eligible for special education and related services under the definitions of both emotional disturbance (ED) and specific learning disability (SLD). An individualized education program (IEP) team made this determination on March 18, 2009.
3. The IEP team recommended the Student receive a Functional Behavior Assessment (FBA) and Behavioral Intervention Plan (BIP) to support her least restrictive environment (LRE) placement in the neighborhood school environment.

4. The Respondent has not conducted the FBA nor created and implemented a BIP.⁵
5. The Respondent has not implemented the Student's initial IEP, including but not limited to, one hour of counseling per week.
6. The Student's transition plan was not completed, and therefore not appropriate.⁶
7. The Student is not making educational progress.
8. The Respondent has not monitored the school placement.
9. The Respondent has not issued a prior written notice.⁷

IV. FINDINGS OF FACT CONCERNING HARM AND APPROPRIATE

REMEDY

1. Student's academic performance is six years behind where she should be.⁸ She has only 5.5 credits toward graduation.⁹
2. The Student has a specific learning disability in the area of mathematics.¹⁰ She requires help in the areas of calculation, applied math/word problems, and algebra.¹¹ She also suffers from post traumatic stress disorder.¹²

⁵It is not specifically clear, from the complaint, whether the Petitioner provided consent for the FBA. However, because the Respondent has failed to inform the IHO of its version of the facts, taken as a whole, the complaint implies, and it is taken as an uncontested fact, that the Respondent had a duty to complete the assessment.

⁶ It is noted that the IEP for a Student years of age or older is a transition plan as it is to be designed to enable the Student to reach her post secondary goals. *See*, 34 C.F.R. § 300.320(b).

⁷ The complaint also asserts the "Student's least restrictive environment is in violation." However, even considering the entirety of the complaint, it is not clear if the Petitioner is asserting her placement is too restrictive or needs to be more restrictive.

⁸ Testimony (T) of R.M., T of C.D., P 1.

⁹ T of C.D.

3. She requires direct individualized instruction in order to learn math content and one on one tutoring daily to reinforce and help her retain those skills.¹³

4. The Student requires assistance to keep her engaged in class during the course of the school day.¹⁴ She also requires support to deal with anxiety in certain situations, such as test taking and task completion.¹⁵ Additional time to complete tests and tasks would be an effective way to assist her in this way and is already included in her IEP.¹⁶ Intensive counseling for at least one hour per week, broken into three 20 minutes sessions, conducted one on one by a doctorate level therapist trained to work with youth who have experienced trauma and cognitive behavior therapy is necessary to ensure the Student does not relive her traumatic experiences and cause harm.¹⁷ Family counseling will also help the Student benefit from special education.¹⁸

¹⁰ T of R.M., P 1.

¹¹ T of C.D.

¹² T of R.M., P 1.

¹³ T of R.M., T of C.D.

¹⁴ T of R.M.

¹⁵ T of R.M.

¹⁶ T of R.M, R 1.

¹⁷ T of R.M.

¹⁸ T of R.M.

5. Assistive technology, such as a calculator and a computer with academic software will aid in the improvement of her academic performance, and are included in her current IEP.¹⁹ Training to effectively use the software will be important for the assistive technology to be effective.²⁰ The Student would also benefit from visual aids in the classroom.²¹
6. The Student requires a BIP based on a FBA that will enable the staff to see what is causing behavior and inform them on what to do about the behavior.²² The BIP will have to be constantly monitored by appropriate staff, such as a social worker or behavior therapist, and adjustments made to ensure it remains effective.²³
7. Appropriate transition assessments were not done with the Student.²⁴
8. The Student's IEP was written on May 1, 2009, and does not include statements of her present levels of academic achievement and functional performance that describe how the Student's disability affects her involvement and progress in the general curriculum.²⁵ The Student's IEP lacks statements of measurable annual

¹⁹ T of R.M., T of C.D, R 1.

²⁰ T of R.M., T of C.D.

²¹ T of C.D.

²² T of R.M.

²³ T of R.M.

²⁴ T of C.D.

²⁵ R 1, (E.g. the statement concerning math states: "Math Calculations 3.9 Math Reasoning 3.3[.] [Student] is in need of support in the area of math[. Student's] limited ability in math can impact her ability to do higher level work in the area of mathematics.")

academic and functional goals that are designed to meet her needs that result from her disability to enable her to be involved and progress in the general education curriculum and meet each of the other needs that result from her disability.²⁶ The special education and related services and supplementary aids and services listed in the IEP include: specialized instruction in the general education setting for ten hours per week; behavioral support services outside of the general education setting for one hour per week; assignments broken into segments; no penalty for spelling or mechanical errors; extended time on subtests; extra time for completion of tasks, computers, and calculators.²⁷

V. 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:

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

²⁶ R 1, (E.g. the goals are statements such as “[Student] will show measurable progress in the area of mathematics” and “Student will require a conduct card to help with behavioral concerns and daily attendance.” Some goals do appear to be measurable and designed to enable her to progress and be involved in the general education curriculum, such as “[Student] will recognize special types of polygons with 80% accuracy” and “[Student] will summarize the purpose and main ideas in passages with 80% accuracy.”)

²⁷ R 1.

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 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); . . .
 - (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; . . .
 - (3) A description of —
 - (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
 - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
 - (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;
 - (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
 - (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why —
 - (A) The child cannot participate in the regular assessment; and
 - (B) The particular alternate assessment selected is appropriate for the child; and
 - (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.
- (b) Transition services. 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.

34 C.F.R. § 300.320(a).

3. The Student was denied a FAPE because personalized instruction with sufficient supportive services to permit her to benefit from the instruction was not provided. She was not provided special education and related services in conformity with an IEP that met the requirements of 34 C.F.R. § 300.320. The fact that the Student is six years behind in mathematics is the primary indicator she is not receiving personalized instruction with sufficient supportive services to permit her to benefit from the instruction. The IEP itself lacks statements of present levels of academic achievement and functional performance that describe how her disability affects her involvement and progress in the general education curriculum. Statements that simply state her current level of performance and that this level is not where it should be is not what the law requires and is not particularly informative for planning purposes because they do not tell us how the disability is affecting the Student, but rather only the current outcome. Effective teaching requires the teacher to understand the interplay of a disability with learning so this challenge can be overcome or compensated for. Not all of the goals in the IEP are measurable. For example, showing "measurable growth in the area of mathematics" is not itself a measurable goal because there is no target to which the Student is progressing. Planning for progress, which is what an IEP is about, requires a specified destination, not merely a general direction. Staff and parents need to know the target so that progress toward that target can be measured, and changes to the program made if that progress is falling short.

V. DECISION

1. In addition to the violations found in the Order of August 28, 2009, the Student was denied a free appropriate public education that must be remedied with an IEP reasonably calculated to provide educational benefit in accordance with Part B of the IDEA.

VI. ORDER

1. The Student's IEP must be corrected to include:
 - a. statements of the Student's present levels of academic achievement and functional performance, including how her disability affects her involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children);
 - b. statements of measurable annual academic and functional goals designed to meet her academic and functional needs that are designed to enable her to be involved in and make progress in the general education curriculum;
 - c. statements of special education and related services that include:
 - 1) direct individualized instruction in the areas of calculation, applied math/word problems, algebra, and any other math areas she is deficient in, for ten hours per week, outside of the general education setting;
 - 2) tutoring from a paraprofessional, or other qualified staff person, on the math skills taught, for 45 minutes per day after school, every school day math is taught;
 - 3) a BIP, to be created following the completion of the FBA, which will be monitored daily by a behavior therapist or specially trained paraprofessional, to ensure the plan is working and to recommend changes of the plan to the IEP team;
 - 4) Counseling, by someone specially trained in working with youth who have experienced trauma, three times per week, for 20 minutes per session;

- 5) Family counseling on how the Student's disability is impacting her and how she can be supported outside of school, for six, one hour sessions throughout the 2009-2010 school year;
 - 6) The support services, including assistive technology, already included in the IEP, with specification that the Student will be trained on all software provided to aid her academic work;
 - 7) Visual aids in the classroom to be employed by teachers and other staff.
2. The IEP team must meet and revise the IEP, in accordance with this order, within five school days of the FBA report. 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.
 3. Any disagreement over the IEP thus required 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.
 4. All other IEP and due process requirements under IDEA and DCMR must be followed in the completion of this order. This order does not limit the elements that may be included in the IEP, but rather sets the minimal requirements.

IT IS SO ORDERED.

Dated this 11th day of September, 2009.



Jim Mortenson, Esq.
Independent Hearing Officer

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).