

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>[Parent], 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 style="text-align: center;">Case</p> <p style="text-align: center;">HEARING OFFICER'S DETERMINATION</p> <p>June 24, 2009</p> <p><u>Representatives:</u></p> <p>Roberta Gambale, Petitioner</p> <p>Laura George, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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 STATE HEARING OFFICE

I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 1:00 p.m. on June 17, 2009 and at 1:00 p.m. on June 18, 2009. The hearing concluded and the record closed on June 18, 2009. The due date for the Hearing Officer's Determination (HOD) is June 25, 2009, in accordance with the Blackman/Jones Consent Decree. This HOD is issued on June 24, 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.

Present at the due process hearing were:

Petitioner's Counsel, Roberta Gambale, Esq.

Respondent's Counsel, Laura George, Esq.

The Petitioner, Student's Parent.

Parent's Advocate, Lore Rodriguez

Four witnesses testified at the hearing. The witnesses were:

Lore Rodriguez (L.R.)

Petitioner (P)

Assistant Educational Director,

Special Education Coordinator,

The current due process complaint is the fourth since September 2008. The first complaint was filed in September and resulted in an HOD dated November 12, 2008¹. The issues were whether Respondent failed to implement the IEP and whether Respondent failed to provide an appropriate placement. The IHO determined the IEP was being implemented with the exception of the BIP. The IHO ordered that the IEP team meet to discuss the Petitioner's concerns about the Student's sexual behaviors.

When the IEP team failed to timely meet, pursuant to the November HOD, a second complaint was filed in December 2008². That complaint alleged the November HOD had not been complied with. This IHO found that the November 2008 HOD had not been complied with and the Respondent had failed to present any evidence to rebut the presumption that the Student suffered harm as a result of the delay in complying with the HOD. The result was an order for compensatory education consisting, at a minimum, of

¹ Case

² Case

one hour per week of psychological counseling for a year in order to deal with the Student's behavioral issues.

The third complaint was subsequently filed by the Petitioner, through counsel, on January 27, 2009³. That complaint alleged the January HOD had not been complied with as well as whether the Student was denied a free appropriate public education (FAPE) as a result of the Respondent's alleged inability or unwillingness to implement the IEP as written, including, but not limited to, the Student's placement. This IHO found that the January HOD had not been complied with because the compensatory education plan did not specify the location of the Student's compensatory psychological counseling services as required by the HOD. This IHO found that there was no failure to implement the IEP.

The complaint in this matter was filed on May 8, 2009. The resolution period was waived on May 11, 2009. A prehearing conference was held on May 21, 2009, and a prehearing order was issued on that date. A response to the complaint was filed by the Respondent on May 21, 2009.

29 documents were disclosed and filed by the Petitioner on June 9, 2009. There were no objections raised to the admission of any of the disclosed documents and they were all admitted as exhibits into the record. (P 1 – P 29). Petitioner's exhibits are as follows:

- P 1 - Student Hearing Office (SHO) Due Process Hearing Notice
- P 2 - Due Process Complaint, May 8, 2009
- P 3 - Letter from Gambale to Ruff, June 3, 2009
- P 4 - Fax cover sheet from Bautista to Ross, June 3, 2009, and Email from Gambale to George, May 21, 2009, 11:22 a.m.
- P 5 - DCPS School Incidents as recorded by [Petitioner], December 9, 2008 to May 6, 2009.
- P 6 - Independent Education Program (IEP), May 4, 2009
- P 7 - Functional Behavioral Assessment (FBA), May 11, 2009

³ Case

- P 8 - IEP team meeting notes, L.R., May 4, 2009
- P 9 - Letter from L.R. to D.M., May 6, 2009
- P 10 - Email from Miskel to Vanderpool and Bautista, January 22, 2009 8:31 a.m.
- P 11 - IEP team meeting notes, Carolyn Miskel, January 21, 2009
- P 12 - IEP Continuation Page, January 21, 2009
- P 13 - MDT (IEP team) meeting notes and Prior to Action Notice, July 29, 2008
- P 14 - IEP team meeting notes, Ida Jean Holman, July 29, 2008
- P 15 - IEP, May 23, 2008
- P 16 - MDT (IEP team) meeting notes and Prior to Action Notice, May 23, 2008
- P 17 - IEP team meeting notes, Ida Jean Holman, May 23, 2008
- P 18 - Compensatory Education Plan, May 23, 2008
- P 19 - IEP, September 14, 2007
- P 20 - MDT (IEP team) meeting notes and Prior to Action Notice, September 14, 2007
- P 21 - 4th Grade Report Card (SY 2008-09) and comments, April 3, 2009
- P 22 - IEP Report Card, April 3, 2009
- P 23 - Confidential Report of the Comprehensive Psychological Evaluation, May 16, 2008
- P 24 - Comprehensive Psychological Evaluation Confidential Report, October 2, 2006
- P 25 - Observation Report, Ida Jean Holman, September 17, 2008
- P 26 - Letter from Jackson to [Petitioner], July 14, 2008
- P 27 - HOD, July 18, 2008
- P 28 - HOD, March 4, 2009
- P 29 - Resume/Vitae, Lore Rodriguez

No documents were disclosed or filed by the Respondent.

II. ISSUES

1) Whether the Respondent failed to propose an individualized education program (IEP) reasonably calculated to provide educational benefit? Specifically, whether the IEP proposed on or about May 4, 2009, included a statement of the Student's present levels of academic achievement and functional performance and a statement of appropriate measurable annual academic and functional goals? Further, whether the IEP was appropriately updated to address the Student's behavioral needs?

2) Whether the Respondent failed to provide special education and related services in conformity with the IEP? Specifically, whether the behavior intervention plan has been implemented since February 23, 2009 (the closure date of the record for Hearing [REDACTED] [REDACTED])?

3) Whether the Respondent failed to propose an appropriate placement for the Student for the 2009-2010 school year? Specifically, whether the staff at the Student's current school are unable or unwilling to implement the Student's behavior intervention plan?

III. FINDINGS OF FACT

1. Student is a [REDACTED] year old learner enrolled in the [REDACTED] grade in a segregated special education setting within the School District. P 6. This placement has not been proposed to be changed. P 6. The Student has been determined eligible for special education and related services under the definition of emotional disturbance (ED). P 6.
2. An IEP team meeting was held on May 4, 2009 for the Student. P 6, P 8, P 9, Testimony (T) of L.R., T of P, T of D.M. The meeting resulted in a proposed IEP. P 6, P 9.
3. Based on the proposed IEP (P 6), the Student's disability affects his involvement and progress in the general curriculum in the following ways:
 - a) He needs to learn his division facts and "apply previously learned skills to new skills/concepts." He is working on multiplication facts.

- b) He needs “to slow down when reading aloud and make an effort to decode unfamiliar words.” He “is able to read on the 3rd grade level” and is “continuing to learn to decode new words[.]”
 - c) He “has some reversal concerns with the letters ‘b’ and ‘d’”. He “can write simple sentences” and “dictate and recite what he wants to say.”
 - d) He lacks “appropriate coping skill and responses in [the] academic environment.” He “involves himself in issues that are of no concern[] to him. His ability to attain educational information is impacted because time is. . . spent attempting to bring student back to focus.” He is “impulsive, unable to maintain his focus and defiant when intervention takes place,”
4. His prior IEP (P 15), from the end of third grade, describes his levels of educational and functional performance at that time (May 2008) as follows:
- a) He “can recite multiplication facts from 1-10. He can divide two/three–digit number[s] by one-digit number.”
 - b) He “can read materials on the 3rd grade Level and identify main ideas and supporting details. [He] can use the dictionary to find definitions of words.”
 - c) He “loves to help and can be compliant in one to one situations.” He is impulsive, which impacts “his academic and functional performance[.]”
5. The goal statements in the proposed IEP (P 6) for the areas of reading, math, and writing are as follows:
- a) “[Student] will show 10 month’s growth in the area of reading comprehension, language development and fluency by showing mastery of the short-term objectives with 80% accuracy.”

- b) “[Student] will demonstrate a 10 month’s growth in the area of math computation and reasoning by mastering the following short-term objectives with 80% accuracy.”
 - c) “[Student] will show 10 month’s growth in the area of written expression by mastering the short-term objectives with 80% accuracy.”
6. Based on the objectives under the mathematics goal for the proposed IEP (P 6), the Student is expected to reach 3rd and 4th grade math skills standards by the end of 5th grade. In the prior IEP for 4th grade (P 15) the Student was expected to reach 3rd grade math skills standards except for one objective which was a 4th grade standard. This particular objective remained in the revised IEP (P 6).
 7. Based on the objectives under the reading goal for the proposed IEP (P 6), the Student is expected to reach one kindergarten reading skill standard (objective one), two second grade reading skill standards (objectives three and four), and one third grade reading skill standard (objective two). In the prior IEP for 4th grade (P 15) the Student was expected to reach one second grade reading skills standard (objective one), four third grade reading skill standards (objectives two, three, four, and six), and one fourth grade reading skill standard (objective five).
 8. Based on the objectives under the written expression (writing) goal for the proposed IEP (P 6), the Student is expected to reach two third grade writing skill standards (objectives one and two), one fourth grade writing skill standard (objective three), and one fifth grade writing standard (objective four). In the prior IEP for 4th grade (P 15) the Student was expected to reach third grade writing skill

standards. Two of these objectives were repeated in the revised IEP for 5th grade.
(P 6).

9. The proposed IEP does not include a measurable goal or objectives for the area of emotional, social, and behavioral development. P 6. The goal simply states:
“Student will develop a repertoire [sic] of coping skills that will assist him in negotiating his school environment.” P 6.

10. The Student’s behavior intervention plan (BIP) written in May 2008 (P 15) includes the following interventions in order to improve his “relationships with peers and adults without exhibiting aggression, oppositionality, impulsivity, deviance or disrespect that would be disruptive in the classroom”:

- a) Earning points for demonstrated positive behavior
- b) Loss of points when targeted behavior exhibited
- c) Proximity control
- d) One to one intervention when removal from classroom necessary to gain behavior control
- e) Positive reinforcement through praise and hugs

The BIP also required:

The teacher will be responsible for developing daily progress reports for home. The student’s behavior will be charted and addressed throughout the school day. The teacher/service provider(s) will make quarterly assessments of behavior strategies.

Behavior data will be collected on a daily basis. The information will be used to track student progress in a targeted area.

P 15.

11. The revised BIP proposed in May 2009 includes the following interventions:

When unable to stay focused identify what is altering his attention and discuss with service provide [sic] or adult in classroom asking for assistance to refocus on academic task on hand.

Student will get extra computer time, fun activity as well as the opportunity to participate in outside of school fun activities.

Student will loss [sic] free time, computer and outside of school activity times for inappropriate behavior.

P 7.

12. Since February 2009, the Student's behavior is essentially unchanged⁴. T of P, T of D.M., P 7. The BIP was not implemented on one occasion since February 2009 when the Student was not permitted to attend a Special Olympics event as a result of touching or striking an adult on the rear-end in early May 2009⁵. T of D.M., P 5.

14. The Parent does not like the school the Student is attending for various reasons including failure to communicate with her as much as expected, perceived retaliatory actions, and disagreements with instructional decisions. T of P, P 5. The Parent also believes the Student needs a more positive learning environment and adults working with the Student who have higher expectations. T of P. She believes he needs to be taught more and his reading and social skills improved. T of P.

⁴ The evidence ranged from testimony that Student's behavior was unchanged to better and that the Student's behavior was unchanged to worse. Based on this, and the FBA completed in the spring of 2009, it is found that the Student's behavior is unchanged.

⁵ The May 2008 BIP was in effect, which does not include the intervention of suspension from activities, as the revised BIP does.

IV. CONCLUSIONS OF LAW

1. An IEP must include the following components:
 - (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); or
 - (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
 - (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;
 - (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
 - (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 peer reviewed 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.

34 C.F.R. § 300.320(a).

2. District of Columbia law additionally requires measurable annual goals to include benchmarks or short-term objectives. D.C. Mun. Regs. tit. 5, § 3009.1(c).

3. The proposed IEP is not appropriate. It is deficient in several respects. First, the statements of present levels of academic achievement and functional performance are lacking sufficient specificity to provide a basis for determining appropriate measurable annual goals for the Student. The statements are uniformly brief in comparison to the presenting problems. For example, with regard to reading the IEP states the Student needs “to slow down when reading aloud and make an effort to decode unfamiliar words,” that he “is able to read on the 3rd grade level,” and he is “continuing to learn to decode new words.” The goal and objectives indicate a need to address comprehension, which is not apparent from the statements of present levels of academic achievement. Furthermore, despite the statement that the Student can read at the 3rd grade level, the proposed goal and objectives are focused on kindergarten, first grade, second grade, and third grade skills. No fourth grade skills, which one would expect for a child reading at the third grade level, are included for reading. Either the present level of academic achievement statement is inaccurate, or the goal and objectives are. This is a problem with the areas of mathematics and written expression as well.

4. The statements of the annual goals are also deficient. Again, using reading as an example, the goal is written so broadly that it could be applicable to any Student at any time. The objectives do provide a means to measure the goal, but there is little relationship between the myriad objectives from four different grade levels and the statement the Student will “show 10 month’s growth” in the listed areas of reading. The “10 month’s growth” is not appropriate for this Student as it projects a widening achievement gap. This Student is not a significantly cognitively

impaired student who it cannot be expected to achieve grade level academic standards. He has an emotional disorder which is interfering with his learning. The Petitioner is correct that there must be higher expectations for the Student if he is to achieve academically. Those expectations, if the Student is to be involved in and progress in the general education curriculum, must be to make more than one year's gain in the core academic areas he is currently behind in, not less than one year's gain. Based on review of the goals from last year's IEP and the proposed IEP, the goals in math and writing were not met because not all of the objectives toward reaching each goal were achieved. Thus, more intensive academic services will be necessary to aid the Student's acquisition of the core academic matter. As for the functional goal for emotional, social, and behavioral development, it simply lacks measurability or objectives and must be appropriately revised.

5. It cannot be concluded the IEP was not appropriately updated to address the Student's behavioral needs. The Student's behavior was not improving and the BIP was proposed to be changed. There is no evidence the changes are not appropriate to address the Student's needs.
6. In order to receive a free appropriate public education (FAPE) special education and related services must be provided in conformity with an IEP. 34 C.F.R. § 300.17(d).
7. The BIP was not followed when the Student was not permitted to participate in Special Olympics as a result of a behavior incident. This was a material failure

because extra curricular activities such as Special Olympics are important in the minds of young children, such as Student. The IEP team had determined that the removal of such opportunities were not appropriate when addressing behavior, but rather that the removal of “points” previously earned by the Student would be appropriate. The denial of the Student’s participation in the Special Olympics is not an insignificant event from the perspective of the child and because this was a material deviation from the IEP (BIP) this was a denial of FAPE.

8. Students must be educated, to the maximum extent appropriate, with children without disabilities. 34 C.F.R. § 300.114. This is referred to as the least restrictive environment (LRE).
7. The Petitioner has not argued that Student is not in the LRE. Rather, the Petitioner seeks placement at another segregated setting, albeit a private one. There is nothing about the failures described above that cannot be remedied at the Student’s current school, as long as the IEP team, including the Parent, continue to believe the level of segregation is appropriate. While an IEP consistent with the requirements of 34 C.F.R. § 300.320, and local law, with additional special education services is necessary, no change in placement is required by this Order.

V. DECISION

1. The Respondent failed to propose an appropriate IEP.
2. The Respondent failed to implement the IEP when the BIP was not followed.
3. The Respondent did not fail to propose an appropriate placement for the Student.

VI. ORDER

1. The Respondent must convene the IEP team no later than July 17, 2009. The Respondent must provide the Petitioner with at least three alternative times to meet (not all consecutive) and inform her of the date the IEP team will meet if she fails to select one of the proposed times. Her attorney must be copied on any correspondence or other notices sent or delivered to the Petitioner, unless directed otherwise by the Petitioner.
2. The IEP team must revise the IEP consistent with the findings and conclusions of this Hearing Officer's Decision (HOD) including but not limited to: statements of present levels of academic achievement and functional performance including how the Student's disability affects his involvement and progress in the general education curriculum (the same curriculum as for nondisabled children); measurable annual academic and functional goals, including short-term objectives or benchmarks, designed to meet his needs that result from his disability to enable him to be involved in and make progress in the general education curriculum and meet each of his other educational needs that result from his disability. All IEP requirements not specifically mentioned here must be adhered to.
3. The level of special education and related services must be designed to assist the Student to reach the annual goals. Academic goals must be aligned with D.C. content standards for the grade in which the Student is enrolled. Continued provision of special education and related services during school breaks (extended school year) is recommended. The provision of either academic tutoring or small

group (five to ten students) academic instruction in the core academic areas of mathematics, reading, and written expression is required⁶.

4. If, at the time of any progress report, the Student is not making expected progress toward a goal or goals, the IEP team must meet within one week to review and revise the IEP, including the BIP, to improve the Student's progress.
5. If the Petitioner believes the resulting proposed IEP has not complied with this order, or other requirements of this order have not been complied with, she is directed to enforce this order, including by filing a complaint with the Office of the State Superintendent of Education pursuant to 34 C.F.R. §§ 300.151-300.153.
6. Nothing in this order is intended to restrict the IEP team from making other changes to the program and placement appropriate and necessary for the Student to be provided a FAPE. All notice and other due process requirements not specifically mentioned here must be complied with.

IT IS SO ORDERED.

Dated this 24th day of June, 2009.



Jim Mortenson, Esq.
Independent Hearing Officer

⁶ The IEP team is free to determine which approach to include in the program. Any dispute between the Parent and the School District over which approach to use ought to be resolved in favor of the professional opinion of the school staff.

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the 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).