

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>Case</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>May 26, 2009</p> <p><u>Representatives:</u></p> <p>Domiento Hill, Petitioner</p> <p>Daniel Kim, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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 STUDENT HEARING OFFICE
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I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on May 18, 2009. The hearing concluded on that date and the record closed on May 21, 2009, following receipt of written closing statements and additional documents requested by the IHO. The due date for the Hearing Officer's Determination (HOD) is May 30, 2009, in accordance with the Blackman/Jones Consent Decree. This HOD is issued on May 26, 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, Domiento Hill, Esq.

Respondent's Counsel, Daniel Kim, Esq.

Petitioner, Student's Grandmother

Petitioner's Education Advocate, Dori Cook

Three witnesses testified at the hearing: the Student's Grandmother, Petitioner (P),
Petitioner's Education Advocate (D.C.), and Student's special education
teacher at

The complaint in this matter was filed on April 13, 2009. A prehearing conference
was held on April 22, 2009, and a prehearing order was issued on that date. An untimely
response was filed by the Respondent on April 28, 2009.

20 documents were disclosed and filed by the Petitioner on May 11, 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 20). Petitioner's exhibits are as follows:

- P 1 - Student Hearing Office, Due Process Hearing Notice
- P 2 - Due Process Complaint, April 11, 2009
- P 3 - Respondent's Response, April 28, 2009
- P 4 - Letter from IHO Mortenson to Hill and Kim, April 20, 2009
- P 5 - Respondent's Resolution Session Waiver, April 15, 2009
- P 6 - Individualized Education Program (IEP), January 8, 2009
- P 7 - Meeting Notes by Dori Cook, February 18, 2009
- P 8 - Report to Parents on Student Progress, January 16, 2009
- P 9 - Progress Toward IEP Goals, Advisory 1 and Advisory 2, 2008-09 school
year
- P 10 - Psychological Evaluation, October 22, 2007
- P 11 - Educational Evaluation, October 24, 2007
- P 12 - IEP, January 11, 2008
- P 13 - MDT (IEP team) Meeting Notes, January 11, 2008
- P 14 - Education Advocate's IEP meeting notes, January 11, 2008
- P 15 - Report to Parents on Student Progress (with marginalia), January 16, 2009
- P 16 - Letter from Hill to DCPS Human Resources, February 26, 2009
- P 17 - Letter from _____ to Cook, February 24, 2009
- P 18 - Letter from Cook to _____ February 20, 2009
- P 19 - Letter from Edwards to Hill, January 22, 2009

P 20 - Letter from Hill to **Edwards**, January 26, 2009

Three documents were disclosed and filed by the Respondent on May 12, 2009. There were no objections raised to the admission of any of the disclosed documents and they are all admitted into the record. (R 1 - R 3). Respondent's exhibits are:

- R 1 - IEP, January 8, 2009
- R 2 - Psycho-educational Re-Evaluation, September 20, 2007
- R 3 - Speech and Language Evaluation, August 27, 2007

The IHO requested two additional documents, one from each party, to be submitted by noon on May 21, 2009, with written closing briefs. These documents were submitted, without objection, and are part of the record as follows:

- P 21 - Letter from **Rhee** to **Carter**, December 22, 2008
- R 4 - ELIS License Status Info, May 18, 2009

II. ISSUE

Whether the Respondent failed to implement the Student's individualized education program (IEP)? Specifically, whether the Student is to receive specialized instruction from a special education teacher, and whether no special education teacher has been utilized to provide said instruction during the current school year?

III. FINDINGS OF FACT

1. The Student is a year old learner currently enrolled in the grade at (School). P 6, R 1, Testimony (T) of P. The Student has been identified as a child with a specific learning disability (LD). P 6, R 1.

2. The Student had two individualized education program plans (IEPs) in place for the 2008-09 school year. P 6, R 1, and P 12. The first IEP (P 12) was in effect from January 2008 until January 2009. P 12. The second IEP is the current IEP and has been in effect since January 2009. P 6, R 1.
3. The first IEP includes three annual academic goals covering expressive and receptive language (speech), written language (reading and writing), and mathematics¹. P 12. Each goal includes several short-term objectives by which to measure progress toward each goal. P 12. Evaluation procedures are listed for each goal. P 12.
4. Only the first IEP includes a statement of how the Student's progress toward meeting the annual goals will be measured - by virtue of the short-term objectives. P 6, P 12. Neither the first nor second IEP includes statements of how the Student's parent will be regularly informed of that progress. P 6, P 12.
5. There are two progress reports in the record, one for the first advisory of the 2008-09 school year and one for the second advisory of the 2008-09 school year². P 9. The progress report for the first advisory period includes statements about

¹ The quality of the Student's IEP was not an issue raised by the Petitioner. However, because of some glaring deficiencies in the Student's IEP and progress reports, which were put into evidence and cannot be ignored, facts and conclusions are included in this HOD concerning those deficiencies so that they may be corrected for the benefit of the Student. The IEP was not otherwise analyzed in great detail to determine appropriateness and this HOD does not address the overall quality of the IEP and the results it has had for the Student (whether it provides educational benefit), only the obvious deficiencies in its construction.

² "Advisories" are generally known in the District of Columbia Public Schools to be the units of time the school year is broken into. There were four advisory periods for the 2008-09 school year. The first two ended on October 24, 2008, and January 16, 2009, respectively. Judicial/administrative notice is hereby taken of the school calendar.

reading and writing (this is treated as one goal area) and mathematics. P 9. The objectives under the written language goal in the first IEP address: multiparagraph essays presenting effective introductions and concluding paragraphs; improving coherence and progression in writing; punctuation; grammar; and vocabulary. P 12. The relevant progress report states there is “Some improvement in the areas of reading and writing. Her ability to write coherent sentences and paragraphs have only slightly improved this academic year.” P 9. Creating outlines is a strength. P 9. She also made undefined progress in reading comprehension, but was “still significantly below grade level.” P 9. At that time she was having trouble starting paragraphs but was “able to write a paragraph with complete sentences and follow the standard paragraph format.” P 9. The report states the Student was working on punctuation and grammar but was not yet “transferring those attributes to quality work.” P 9. More time “outside of class studying her reading and writing assignments” was recommended. P 9.

6. The progress report for the second advisory states the following regarding the Student’s progress in reading:

[Student] has been a positive influence in class because of her upbeat and positive attitude. **She** has shown some improvement in the areas of reading and writing. **Her** comprehension skills have improved since the last advisory and **she** is able to read and respond to lowered level texts. [Student’s] ability to write coherent sentences and paragraphs have only slightly improved this advisory. **She** has shown moderate progress in identifying and analyzing the author’s stated purpose, main ideas, supporting ideas, and supporting evidence. [Student] is creative and unique but needs to work on transferring those attributes into quality work. While [Student] does have a great attitude towards learning and is able to participate in class, **she** needs to spend more time outside of class studying her reading and writing assignments.

³ The second IEP was only in effect for a week when the second advisory ended. P 6. Therefore, it is presumed the second advisory progress report is about the goals in the first IEP. This is not an unreasonable finding given that the progress report for the second advisory is nearly identical to the progress report for the first advisory. P 9.

P 9.

7. The objectives under the receptive language goal in the first IEP address: subordinating conjunction sentences; coordinate sentences; main ideas of paragraphs; inferences; verbalizing math definitions; and predication. P 12. The relevant progress report, which is for "RELATED SERVICES GOAL(S)" only states: "[Student] meets with the Speech-Language Pathologist once a week for one hour and with the Social Worker once a [sic] for 1 hour." P 9.
8. The progress report for the second advisory states the following regarding "RELATED SERVICES GOAL(S)":

[Student] meets with the Speech-Language Pathologist once a week for one hour and with the Social Worker once a week for 1 hour.

P 9.

9. The objectives under the mathematics goal in the first IEP address: calculating with whole numbers, positive fractions, improper fractions, mixed numbers, decimals, percentages, multi-digit numbers; prime numbers; and mathematical vocabulary. P 12. The relevant progress report states:

[Student] has made steady progress in completing word problems involving addition and subtraction but needs to improve her multiplication and division skills to be able to solve multiple types of word problems. Please insure that ~~she~~ is working on memorizing the multiplication table every night. Also, [Student] is making little progress in her understanding of the inverse relationship between multiplication and division.

P 9.

10. The progress report for the second advisory states the following regarding mathematics:

[Student's] understanding of word problems involving addition, subtraction, and multiplication have improved since last advisory. [Student] has exhibited proficiency with multiplication of multidigit numbers. [Student] still struggles with division. [Student] has made moderate progress in adding and subtracting decimals and fractions. She is able to recognize their relationships but has trouble with the calculation.

P 9.

11. The second IEP, which is the current IEP, includes several goals for each of the four areas addressed (mathematics, reading, communication/speech and language, and motor skills/ physical development). P 6, R 1. The second IEP does not include statements of the Student's present levels of academic achievement and functional performance that describe how the Student's disability affects her involvement and progress in the general education curriculum, other than vague statements concerning math and reading that the "Student is performing below grade level. . . ." P 6, R 1. There are six annual goals for math skills in the second IEP. P 6, R 1. None of the six goals are measurable as there is not an adequate present level of performance stated regarding where the Student was performing in math at the start of the second IEP and there are no clear indications of the ending level of performance expected. P 6, R 1. The goals only refer to the skills the Student will be practicing, not the level at which attainment of the goal is achieved⁴. P 6, R 1. The reading area has seven goals. P 6, R 1. The reading goals are not measureable because there is no indication of the Student's beginning level of performance for reading (other than "performing below grade level"). P 6, R 1. There are five annual goals concerning communication/ speech and

⁴ One of these goals does state the Student will "Demonstrate proficiency with. . . ." However, it is not clear from the goal what constitutes proficiency and there is no reference.

language. P 6, R 1. The communication/ speech language goals are almost measurable because they clearly indicate levels of performance anticipated. P 6, R 1. However, they are confusing because each goal lists a “baseline” which is identical to the expected outcome. P 6, R 1. If this were accurate, then the goals are meaningless. Conversely, if the listed baselines are not starting points, one cannot gauge the progress merely by knowing the ending level of performance expected. Finally, there are six annual goals concerning motor skills/ physical development. P 6, R 1. Like the communication/ speech language goals the outcomes expected are clear, but because there is no meaningful starting point (the “baseline” reflects the outcome, as with the prior set of goals) progress cannot be ascertained. P 6, R 1.

12. The first IEP required 15 hours per week of specialized instruction in a special education (segregated) setting for the Student. P 12.
13. The second IEP requires 10 hours per week of specialized instruction in a special education (segregated) setting for the Student. P 6, R 1.
14. The Student received 7.5 hours per week of specialized instruction from his special education teacher in the general education setting (the regular classroom) and another 7.5 hours per week of specialized instruction from his special education teacher in a special education (segregated) setting. T of
15. The special education teacher has a provisional non-categorical special education K-12 license that is valid through October 14, 2010. R 4.

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.

2. Local education agencies (LEAs):
 - must ensure that all personnel necessary to carry out Part B of the Act are appropriately and adequately prepared, subject to the requirements of § 300.156 (related to personnel qualifications) and section 2122 of the ESEA.

34 C.F.R. § 300.207.

3. 34 C.F.R. § 300.156 requires the State Education Agency (SEA) to:
 - establish and maintain qualifications to ensure that personnel necessary to carry out the purposes [of Part B] are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

4. D.C. Mun. Regs. tit. 5, § 1001 requires that teachers be licensed for employment in District of Columbia schools. D.C. Mun. Regs. tit. 5, § 1600 provides the specific teacher licensure qualifications.

5. D.C. Mun. Regs. tit. 5, § 1001.13 permits provisional teaching licenses, not to exceed three years.

6. The Student's IEP required the services of a special education teacher for "specialized instruction" for the Student. The Student's special education teacher has a provisional license (non-categorical special education K-12) that is valid

through October 14, 2010. Thus, there is no failure to implement the IEP as a result of a failure to have a qualified teacher since the provisional license is permitted under District of Columbia law.

7. The specialized instruction required by the IEP was not provided in conformity with the IEP. The first IEP required 15 hours of specialized instruction per week in a segregated setting. Then the IEP was changed to require only ten hours per week in a segregated setting. The special education teacher testified that he provides 7.5 hours per week in the regular education setting and 7.5 hours outside of the general education setting⁵. This is not what either revision of the IEP required and so the services were not provided in conformity with the IEP as required by 34 C.F.R. § 300.17.

8. 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 —

⁵ stated he provides this because the Student needs it. The IEP team makes the determination about the amount of special education service, not the teacher, alone. Thus, if the special education teacher continues to believe the Student requires a different amount or location of service he can raise this with the rest of the IEP team when it convenes to repair the problems with the IEP.

- (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).

9. District of Columbia law additionally requires, with regard to IEP goals:

A statement of measurable annual goals, including benchmarks or short-term objectives related to:

- (1) Meeting the child's needs that result from the child's disability, to enable the child to be involved in and progress in the general curriculum; and
- (2) Meeting each of the child's other educational needs that result from the child's disability.

D.C. Mun. Regs. tit. 5, § 3009.1(c).

10. District of Columbia law additionally requires, with regard to progress reporting:

A statement of how the child's progress toward the annual goals will be measured and how the child's parent will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their non-disabled child's progress, of:

- (1) The child's progress toward annual goals; and
- (2) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

D.C. Mun. Regs. tit. 5, § 3009.1(i).

11. The IEP does not meet the requirements of 34 C.F.R. § 300.320(a) or related local law. The IEP lacks statements of present levels of educational and functional performance that describe how the Student's disability affects her involvement and progress in the general education curriculum (the same curriculum as for non-disabled children). This failure impacts the annual academic and functional goals which are not measureable without an indication of both where the Student was performing when the services required by the IEP revision began and what the expected outcome was within a year. This is true even for the goals that are clear about the ending level of performance because without the starting point one cannot measure progress during the period of the IEP. (Progress is regularly measured so that revisions to the IEP can be made if adequate progress is not being made, or goals have been achieved more rapidly than expected. *See* 34 C.F.R. § 300.324(b).) D.C. law requires goals to include short-term benchmarks or objectives, which are required to measure progress toward annual goals. *See*, Fed. Reg. Vol. 71, No. 156, p. 46663 (Monday, August 16, 2006) (“[B]enchmarks and short-term objectives were originally intended to assist parents in monitoring their child's progress toward meeting the child's annual goals[.]”). While the first IEP included objectives, the second IEP does not. In any event, neither IEP revision included statements of how the Student's Parent would be regularly informed of the Student's progress. These errors must be corrected in order for the

Student to be provided a free appropriate public education pursuant to 34 C.F.R. § 300.17.

12. The two periodic reports fail to describe the extent to which the Student's progress is sufficient to enable her to achieve the goals by the end of the year. Progress reporting must be conducted in accordance with law in order for staff and the Parent to adequately monitor the Student's progress toward the annual goals and make changes to the IEP if necessary.

V. DECISION

1. The Student has been denied a free appropriate public education (FAPE) because special education was not provided in conformity with an IEP that meets the requirements of §§300.320 through 300.324, and local D.C. law.
2. Progress reporting was not conducted as required by 34 C.F.R. § 300.320 or local law.

VI. ORDER

1. The Respondent must convene the IEP team no later than June 12, 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 her involvement and progress in the general education curriculum (the same curriculum as for nondisabled children); measurable annual academic goals, including short-term objectives or benchmarks, designed to meet her needs that result from her disability to enable her to be involved in and make progress in the general education curriculum and meet each of her other educational needs that result from her disability; and a description of how the Student's progress toward meeting the annual goals will be measured and when periodic reports on the progress she is making toward meeting the annual goals will be provided. Progress toward annual goals must be reported, at a minimum, in writing in the middle of each advisory and at the end of each advisory. The written progress reports must be provided to the Petitioner and, unless she directs otherwise, her educational advocate, within one week of the end of the reporting period. 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.
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 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 appropriate and necessary for the Student to be provided a FAPE.

IT IS SO ORDERED.

Dated this 26th day of May, 2009.



Jim Mortenson, Esq.
Independent Hearing Officer

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. § 415(i)(2).