

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Review and Compliance**

Student Hearing Office  
Terry Michael Banks, Due Process Hearing Officer  
1150 - 5<sup>th</sup> Street, S.E.  
Washington, D.C. 20003  
(202) 698-3819  
Facsimile: (202) 698-3825  
Tmbanks1303@earthlink.net

**Confidential**

STUDENT, through the legal guardian <sup>1</sup>	)	Complaint Filed: April 2, 2009
	)	
Petitioner,	)	Prehearing Order: April 27, 2009
	)	
v.	)	Interim Order: May 22, 2009
	)	
THE DISTRICT OF COLUMBIA	)	Hearing Dates: April 28, 2009
PUBLIC SCHOOLS	)	May 13, 2009
	)	
Respondent.	)	Docket No.
	)	
Student Attending:	)	
School	)	

**HEARING OFFICER'S DECISION**

**Counsel for Petitioner:**

Zachary Nahass, Esquire  
James E. Brown & Associates  
1220 L Street, N.W.  
Suite 700  
Washington, D.C. 20005  
(202) 742-2000; Fax: (202) 742-2098

**Counsel for DCPS:**

Daniel McCall, Esquire  
Office of the General Counsel, DCPS  
825 North Capitol Street, N.E.; 9<sup>th</sup> Floor  
Washington, D.C. 20002

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<sup>1</sup> Personal identification information is provided in Attachment A.

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STUDENT HEARINGS OFFICE  
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## **Jurisdiction**

This hearing was conducted in accordance with the rights established under the Individuals With Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

## **Introduction**

Petitioner is a        year old student attending        School. On April 2, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) evaluate Petitioner in all areas of suspected disability, (2) develop an appropriate Individualized Education Program ("IEP"), (3) implement Petitioner's IEP, and (4) provide an appropriate placement. The due process hearing was convened and completed on May 13, 2009. The parties' Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing.<sup>2</sup> The Hearing Officer left the record open until May 15<sup>th</sup> for Petitioner to submit additional 2008-2009 Report Cards. Petitioner's counsel submitted Petitioner's Report Card through the second advisory period, and it will be admitted as Petitioner's Exhibit No. 16.

## **Record**

*Due Process Complaint Notice* dated April 2, 2009  
*DCPS Resolution Session Waiver* dated April 7, 2009  
*Petitioner's Motion to Compel a Response and for the Hearing Officer to Set a Hearing Date* dated April 22, 2009  
*Prehearing Order* dated April 27, 2009  
*District of Columbia Public School's Response, Notice of Insufficiency, and Motion to Dismiss Parent's Due Process Complaint Notice* dated April 29, 2009  
*Petitioner's Opposition to DCPS' Notice of Insufficiency and Motion to Dismiss* dated May 6, 2009  
*DCPS' Five-Day Disclosure* dated April 7, 2009 (Exhibit No. 1)  
*Petitioner's Five-Day Disclosure* dated April 6, 2009 (Exhibits 1-15)  
*Attendance Sheet* dated May 13, 2009  
*CD-Rom of Hearing* conducted on May 13, 2009  
*Petitioner's Exhibit No. 16* submitted May 18, 2009

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<sup>2</sup> The Hearing Officer denied Petitioner's *Motion for Default and Summary Judgment* dated April 23, 2009 and *Motion to Preclude DCPS Placement* dated *Evidence of* May 8, 2009 at the conclusion of the parties' opening statements.

### Witnesses for Petitioner

Petitioner's Mother

Senior Director,

School of Prince George's County,

Md.

### Witnesses for DCPS

None

### Findings of Fact

1. Petitioner is a        year old student attending

2. On March 3, 2008, Shadonna Jones of Interdynamics, Inc. completed a Comprehensive Psychological Evaluation of Petitioner. Ms. Jones diagnosed Petitioner with Attention Deficit Hyperactivity Disorder ("ADHD").<sup>4</sup> Ms. Jones' findings and recommendations, *inter alia*, include the following:

[Petitioner] has a school history of problematic behaviors including fighting and disobeying adults. She has exhibited fighting behavior since kindergarten. She has had problems with emotional regulation and acknowledged that she sometimes gets upset when she cannot have her way. She has been retained in one grade (1<sup>st</sup>) for performing below her grade level and behavioral problems. [Petitioner's mother] indicated that [Petitioner] is currently performing below her grade level and she is not in special education classes...

The current evaluation indicated that [Petitioner's] cognitive abilities are in the Low Average range as indicated by her Full Scale IQ standard score of 80. There was a 20-point discrepancy between her Verbal Comprehension index (VCI standard score=91) and her Perceptual Reasoning Index (PRI standard score=71). This indicates that [Petitioner] has good verbal comprehension and ability to process verbal information. She appears to have difficulties with perceptual reasoning and organization, alertness to detail, and processing visual information... [Petitioner's] scores on the WIAT-II ranged from Average to Low Average. She achieved her highest score on the Listening Comprehension subtest (Standard score=100), which identify the picture that best represents an orally presented descriptor or generate a word that matches the picture. Her Listening Comprehension score suggests that this is an area of relative strength for her. She received her lowest score on the

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<sup>3</sup> *Complaint* at 1.

<sup>4</sup> Petitioner's Exhibit ("P.Exh.") No. 3 at 9.

Written Expression subtest (Standard score=86), which required her to write the alphabet from memory, generate words within a category, generate sentences to describe visual cues, and combine sentences. Thus, [Petitioner] may find it hard to keep up with her schoolmates in this skill area...

[Petitioner's mother] responses on the Conners' Parent Rating Scale-Revised and the Attention/Deficit/Hyperactivity Disorder Test indicated that [Petitioner] had a high probability of ADHD. During the evaluation, [Petitioner] was fidgety, in and out of her seat, answering questions before they were fully read, and flipped the pages of the book. She was easily distracted and needed redirection to stay focused. [Petitioner's mother] reports of [Petitioner's] behavioral problems in school, the current evaluation results, and [Petitioner's] presentation during the evaluation suggest a diagnosis of Attention-Deficit/Hyperactivity Disorder, Combined Type...

[Petitioner] should be considered as a student classified under the category of Other Health Impairment and be afforded the necessary services to assist her in appropriately managing her school day.

#### Recommendations

Based on the current results, [Petitioner] is considered to have ADHD, Combined Type...

A Functional Behavioral Assessment is recommended in order to develop a Behavior Intervention Plan to address her behavioral difficulties.

Due to deficits with visual-motor coordination and perceptual organization, an Occupational Therapy Evaluation should be administered.

[Petitioner] would benefit from a behavioral program that includes a reward system where she earns things that are important to her...

[Petitioner] should receive on-on-one assistance, be placed in a classroom with a low student-teacher ratio, and have minimalized distractions in order to aid [Petitioner] in focusing and staying on task...<sup>5</sup>

3. DCPS convened a Multidisciplinary Team ("MDT") meeting on June 5, 2008 to determine Petitioner's eligibility for special education services. The MDT determined that Petitioner was eligible for services and developed an initial IEP: it classified Petitioner as Emotionally Disturbed ("ED") and prescribed 12.5 hours per week of specialized instruction and one hour per week of psychological services.<sup>6</sup> The MDT

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<sup>5</sup> P.Exh. No. 3 at 10-11.

<sup>6</sup> P.Exh. No. 7 at 1.

determined that "Student requires small structured environment to accommodate disabilities," "Extended time, Multiple test sessions or test sessions spread over several days, Reduced/minimalized distractions, Read directions/test to student, Repeated review/drill."<sup>7</sup>

4. At the June 5, 2008 MDT meeting, the occupational therapist reported that all of her subtests of Petitioner were "within average range" and that Petitioner did not require occupational therapy services. Similarly, the speech therapist and her regular education teacher reported that they saw no need for speech services. After a discussion of Ms. Jones' evaluation, the school psychologist recommended that

All of her academic skills are average and she should be able to stay within the General Education Classroom because she has the ability. Her social skills are low and she is at risk. Her behaviors according to the report are attention seeking according to the BASC-II parent rating... Her BASC-II self assessment says she also rates herself low. Anxiety, Depression. She states she has a poor relationship with her mother. This leads toward ED... Sentence Completion - Immature behaves younger than expected. The findings lead toward ED. I recommend that she qualifies for Emotional Disturbance according to IDEA.<sup>8</sup>

The MDT accepted the school psychologist's recommendations, classified Petitioner ED, and placed Petitioner at [redacted]. The parent and her advocate completed an Eligibility Determination Form indicating that they agreed with the determinations made at the MDT meeting.<sup>10</sup>

5. DCPS convened an MDT meeting on November 14, 2008 to "review Petitioner's progress to determine if there are adjustments needed to implement Special Education programming." Her special education teacher, [redacted] reported that when she meets with Petitioner, there are nine students in the class. [redacted] reported further as follows:

She scored superior in the word identification assessments. She scored 31 of 36 sounds in spelling. Reading Assessment 2<sup>nd</sup> grade read with fluency (superior) 3<sup>rd</sup> grade reading fluency (96%) accuracy.

Very few errors are made by [Petitioner] in her classroom activities. Her multiplications facts of 1, 2, 4s. She went from 62% to 85%.

She is the top [redacted] grader in my Sped. Ed. Environment. When she has to compete with another student and the student performed better than her in a specific area then she would become sad and frustrated.

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<sup>7</sup> *Id.*, ¶¶ IX and X.

<sup>8</sup> P.Exh. No. 6 at 2-5.

<sup>9</sup> *Id.* at 6; Initial Placement Form.

<sup>10</sup> P.Exh. No. 6, Eligibility Determination Form.

Petitioner's general education teacher, \_\_\_\_\_ reported as follows:

She is easily distracted and is often affected by the situations and disturbances of others. [Petitioner] often feels as though she doesn't have to do the work in General Education. She gets very upset when others are in conflict and often she is not involved in the conflict by becomes emotional. There are 22 children...

I noticed she seeks a lot of attention. She went on a trip with the class and it was a smaller setting and she did well. She does do assignments in my class when they are exciting. When it's more informational text she tends to be reluctant to complete assignments.<sup>11</sup>

\_\_\_\_\_ reported that she would begin providing Petitioner an additional 1.5 hours per week of specialized instruction.<sup>12</sup>

6. DCPS reconvened an MDT meeting on April 7, 2009 to develop her annual IEP. The MDT prescribed fifteen hours per week of specialized instruction outside of general education and two hours per week of behavioral support services.<sup>13</sup>

7. At the MDT meeting on April 7, 2009, \_\_\_\_\_ reported that Petitioner is often restless and uncooperative after lunch.

She enjoys showing off to get the attention of the other students. When she does her work she does it well most of the time. If things are challenging she sometimes has no interest...<sup>14</sup> She doesn't want to do work in my setting. She has science and social studies in the afternoons.<sup>15</sup>

Although \_\_\_\_\_ reported that Petitioner has had "inconsistent behaviors" in her class, \_\_\_\_\_ the social worker said that "She has no issues when in my setting."<sup>16</sup> Petitioner is in \_\_\_\_\_ resource room every morning from 9:00 to 12:00.<sup>17</sup> \_\_\_\_\_ reported as follows:

She doesn't have conflicts in my setting. Even when she has conflicts in other settings I can redirect her after resolving her concern... There is something new happening because she is saying things are hard. Once I explain the task she is willing to complete whatever task is required... I'm not having the refusal to complete work in my settings... She does not

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<sup>11</sup> P.Exh. No. 8.

<sup>12</sup> *Id.*, last page.

<sup>13</sup> P.Exh. No. 10 at 4.

<sup>14</sup> P.Exh. No. 9 at 2.

<sup>15</sup> *Id.* at 6. \_\_\_\_\_ issued Student Incident Reports on March 12, 2009 for disruptive behavior. P.Exh. No. 14. There were additional unsigned "Anecdotal Records" describing oppositional behavior on February 2 and 25, 2009, March 12 and 13, 2009, and April 1 and 2, 2009.

<sup>16</sup> *Id.* at 2-3.

<sup>17</sup> *Id.* at 2.

have a hyper problem. She does get excited sometimes though but not hyper... She reads on 3<sup>rd</sup> grade level but not as fluently as I would like but on 3<sup>rd</sup> grade level... She just needs a nurturing setting, not a smaller setting. She has moved in reading two grades and does not have math issues. She has the most time of all my students...<sup>18</sup>

Petitioner's educational advocate, \_\_\_\_\_ requested that Petitioner receive full-time special education services.<sup>19</sup> \_\_\_\_\_ refuted the need for full-time services:

What is the justification for the request? She will not benefit socially all day. She is receiving the Social Emotional support with \_\_\_\_\_ My additional time will not address the Social Emotional concerns.<sup>20</sup>

The MDT increased Petitioner's specialized instruction to 15 hours per week, increased her behavioral support from \_\_\_\_\_ to two hours per week, and agreed to reconvene in a month to develop a new IBP. Petitioner's advocate requested a psychiatric evaluation "to monitor medication therapy," but Petitioner's mother stated that "I don't want to put [Petitioner] on medication. Let me make this clear, I am not asking for medication. I just want to know where she's at." The MDT did not agree that a psychiatric evaluation was warranted.<sup>21</sup>

## Conclusions of Law

### *Failure to Evaluate in All Areas of Suspected Disability*

The LEA must evaluate a child suspected of a disability in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.<sup>22</sup> No single procedure should be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.<sup>23</sup>

The *Complaint* alleges that Petitioner "has long experienced behavior problems which interfere with her ability to access the curriculum" and that Ms. Jones' March 3, 2008 evaluation recommended that Petitioner receive an FBA. It is precisely because of Petitioner's behavior problems that she was identified as a child with a disability and classified with an emotional disturbance. While Ms. Jones recommended that Petitioner receive an FBA, an FBA would do nothing to clarify Petitioner's suspected disability. While an FBA might facilitate the development of an IBP, and while an IBP might be a

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<sup>18</sup> *Id.* at 3-10.

<sup>19</sup> *Id.* at 12.

<sup>20</sup> *Id.* at 13.

<sup>21</sup> *Id.* at 12-14.

<sup>22</sup> 34 C.F.R. §300.304(c)(4).

<sup>23</sup> 34 C.F.R. §300.304(b)(2).

necessary component of an appropriate IEP, the failure to conduct an FBA does not constitute a violation of the regulation requiring evaluations in all areas of suspected disability.

### ***Failure to Develop an Appropriate IEP***

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“*Rowley*”),<sup>24</sup> the Supreme Court set forth the requirements for IEPs:

The “free appropriate public education” required by the Act is tailored to the unique needs of the handicapped child by means of an “individualized educational program” (IEP). § 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document containing

“(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.” § 1401(19).

Local or regional educational agencies must review, and where appropriate revise, each child's IEP at least annually. § 1414(a)(5). See also § 1413(a)(11).<sup>25</sup>

The *Complaint* asserts that the June 5, 2008 IEP is inappropriate because it did not provide an appropriate classification, did not prescribe sufficient specialized instruction, and failed to include an intervention behavior plan (“IBP”). First, the parent and her advocate completed an Eligibility Determination Form indicating that they agreed with the determinations made at the MDT meeting on June 5, 2008, particularly the disability classification. While Ms. Jones’ evaluation recommended that Petitioner be classified other health impaired, the school psychologist at the MDT meeting offered rational arguments for an ED classification that the parent and her advocate accepted. Second, at least three of the short-term objectives on the June 5<sup>th</sup> IEP address Petitioner’s ADHD symptoms: pausing before acting, staying on task and completing assignments, and demonstrating self-regulation and self-control.

Third, Petitioner offered no evidence that the 12.5 hours prescribed in the June 15<sup>th</sup> IEP, or the 14 hours agreed to at the November 14<sup>th</sup> MDT meeting were insufficient

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<sup>24</sup> 458 U.S. 176 (1982).

<sup>25</sup> *Id.* at 181-82.

to meet Petitioner's needs. While Ms. Jones recommended a small-class environment, she did not recommend a full-time specialized education program. Petitioner offered no evidence that, at the time the *Complaint* was filed, Petitioner required a full-time program. At the November 14<sup>th</sup> MDT meeting, \_\_\_\_\_ increased Petitioner's specialized instruction to 14 hours per week despite documented improvement in math, spelling, and reading, and despite the fact that Petitioner was the top performer of \_\_\_\_\_ nine special education students. The best evidence of Petitioner's progress was the MDT notes of the April 7, 2009 MDT meeting, which occurred after the *Complaint* was filed. In that meeting, Petitioner's special education teacher reported that Petitioner was making significant progress and argued strenuously that a full-time special education program would be counterproductive.

Fourth, no persuasive evidence was offered that at the time the *Complaint* was filed, Petitioner required an IBP. Neither Petitioner's parent nor her advocate raised this issue at the June 5<sup>th</sup> meeting or the November 14<sup>th</sup> meeting. Petitioner has never been suspended, and an Incident Report was submitted for but one day, March 12, 2009.

The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that the June 5, 2008 IEP is inappropriate.

#### ***Failure to Implement the IEP***

The *Complaint* asserts that prior to November 11, 2008, Petitioner received only 10 hours per week of specialized instruction of the 12.5 hours prescribed on her IEP, and DCPS failed to provide weekly evaluations of Petitioner's social-emotional progress. The only evidence that Petitioner received less than the prescribed amount of specialized instruction appears in \_\_\_\_\_ notes of the November 14<sup>th</sup> MDT meeting.

\_\_\_\_\_ did not testify at the hearing. Moreover, \_\_\_\_\_ agreed to increase Petitioner's level of specialized instruction by 1.5 hours to 14 hours per week despite the progress Petitioner was making. As for the weekly reports of social-emotional progress, the Hearing Officer found no such requirement in the June 5<sup>th</sup> IEP. The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS has failed to implement her IEP.

#### ***Failure to Provide an Appropriate Placement***

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),<sup>26</sup> the Supreme Court held that the local education agency ("LEA") must provide an environment in which the student can derive educational benefit.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon the States which receive funding under the

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<sup>26</sup> 458 U.S. 176 (1982).

Act...The statutory definition of “free appropriate public education,” in addition to requiring that States provide each child with “specifically designed instruction,” expressly requires the provision of “such... supportive services... as may be required to assist a handicapped child to benefit from special education”...We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.<sup>27</sup>

Therefore, it was incumbent upon Petitioner to prove, by a preponderance of the evidence, that DCPS has failed to provide an educational environment in which she can derive educational benefit. Petitioner spends 15 hours per week in a small, structured resource room. This setting is consistent with the recommendation in Ms. Jones’ evaluation. At the November 14<sup>th</sup> MDT meeting, the last meeting held before the *Complaint* was filed, Petitioner had made documented progress in math, spelling, and reading, and was the top performing special education student in \_\_\_\_\_ class of nine students. While Petitioner was having occasional behavioral problems in \_\_\_\_\_ class, Petitioner offered no credible evidence to refute \_\_\_\_\_ reports of Petitioner’s academic progress. The Hearing Officer concludes that Petitioner failed to meet her burden of proving that DCPS failed to provide an appropriate placement.

### **ORDER**

Upon consideration of Petitioner’s request for a due process hearing, the parties’ Five-Day Disclosure Notices, the testimony presented during the hearing, and the representations of the parties’ counsel at the hearing, this 23<sup>rd</sup> day of May 2009, it is hereby

**ORDERED**, that the *Complaint* is **DISMISSED WITH PREJUDICE**.

**IT IS FURTHER ORDERED**, that this Order is effective immediately.

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<sup>27</sup> Rowley, *supra*, at 200-01.

**Notice of Right to Appeal Hearing Officer's Decision and Order**

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) days of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

\_\_\_\_\_/s/\_\_\_\_\_  
Terry Michael Banks  
Hearing Officer

Date: May 23, 2009