

**District of Columbia
Office of the State Superintendent of Education**

**Office of Review and Compliance
Student Hearing Office
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STUDENT HEARING OFFICE
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Confidential

STUDENT, through the legal guardian¹)
Complaint Filed: May 7, 2009
)
Petitioner,)
Prehearing Order: June 26, 2009
)
v.)
Hearing Date: July 8-9, 2009
)
THE DISTRICT OF COLUMBIA)
Docket No.)
PUBLIC SCHOOLS)
)
Respondent.)
)
Student Attending:)
)
)

HEARING OFFICER'S DECISION

Counsel for Petitioner: Christopher L. West, Esquire
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Counsel for DCPS: Kendra Berner, Esquire
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¹ Personal identification information is provided in Appendix A.

Jurisdiction

This proceeding was conducted in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("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.

Background

Petitioner is an _____ year-old student attending _____ School. On May 7, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) implement Petitioner's Individualized Education Program ("IEP"), and (2) provide an appropriate placement. In a Prehearing Order issued on June 26, 2009, the Hearing Officer determined the issues to be adjudicated at the hearing as follows:

- DCPS' alleged failure to implement Petitioner's IEP

Petitioner alleges that DCPS has failed to provide the full-time, out-of-general education services prescribed in Petitioner's IEP. DCPS concedes that Petitioner has not always received the 25 weekly hours of specialized instruction prescribed in his IEP.

- DCPS' failure to provide an appropriate placement

Petitioner alleges that DCPS' failure to provide the full amount of services prescribed in the IEP renders the placement inappropriate. DCPS asserts that it has invited Petitioner to a Multidisciplinary Team ("MDT") meeting on June 25th at which time it will propose a new placement,

The due process hearing was convened on June 8, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated May 7, 2009

DCPS Resolution Session Waiver dated May 11, 2009

Order dated May 28, 2009

District of Columbia Public School's Notice of Insufficiency and Response to Petitioner's Due Process Complaint dated May 29, 2009

Interim Order dated June 1, 2009

Prehearing Order dated June 26, 2009

Interim Order dated June 26, 2009
DCPS' Five-Day Disclosure dated June 30, 2009 (Exhibit Nos. 1-8)
Petitioner's Five-Day Disclosure dated June 30, 2009 (Exhibit Nos. 1-22)
Attendance Sheet for hearing conducted on July 8, 2009

Witnesses for Petitioner

Carolyn Miskel, Educational Advocate, James E. Brown & Associates
Petitioner's Mother
Assistant Director,

Witnesses for DCPS

Special Education Coordinator,
Kenyetta Singleton, Special Education Specialist, DCPS

Findings of Fact

1. Petitioner is an _____ year old student attending

2. On May 1, 2008, Dr. Kellie M. McCants-Price completed a Neuropsychological Evaluation of Petitioner. Dr. McCants-Price diagnosed Petitioner with Attention Deficit Hyperactivity Disorder ("ADHD") and Learning Disorder, NOS.³ Dr. McCants-Price's findings and recommendations, *inter alia*, include the following:

The results of the current evaluation indicate that [Petitioner] demonstrates impaired attention/executive functioning, language processing, sensorimotor and visuospatial skills, and memory.

[Petitioner's] NEPSY profile was suggestive of deficits beyond those expected of a child with Attention-Deficit/Hyperactivity Disorder which may be explained, at least in part, by his seizure disorder. This result and his history of language-related challenges and gross and fine motor skills deficits suggest that his academic and attentional difficulties may be secondary to neurological impairment. He will continue to benefit from special education programming and related services to address his academic weaknesses and to assist in maximizing his academic performance...

² Complaint at 1.

³ Petitioner's Exhibit ("P.Exh.") No. 16 at 7.

RECOMMENDATIONS

The results of the current evaluation should be considered in tandem with all other relevant evaluations in determining [Petitioner's] eligibility for additional special education services. It is notable that the DSM-IV diagnostic criteria require an IQ score of 70 or lower and deficits (scores less than 70) in two or more areas of adaptive behavior functioning. As [Petitioner] does not have deficits in multiple areas and demonstrated gross and fine motor deficits that may have affected his performance on the WISC-IV, reconsideration of the *mental retardation* classification may be warranted...

Given the results of the neuropsychological evaluation, it appears that [Petitioner] will continue to benefit from receiving specialized instruction services to address language-related challenges.

[Petitioner] will likely benefit from receiving speech/language services to address his language challenges. Speech/language services should be coordinated with his special education services to insure that he is learning to do grade-appropriate work in a way that he is able to understand...⁴

3. On May 8, 2008, DCPS School Psychologist, completed at
Psycho-Educational Re-Evaluation Report.⁵ findings and recommendations,
inter alia, include the following:

[Petitioner], a year old male, earned a WISC-IV IQ of 50, which classifies his intellectual functioning as Extremely Low. The disparity between the two scales was not statistically significant. [Petitioner's] verbal reasoning skills and nonverbal reasoning abilities are in the Extremely Low range (VCI=57, PRI=51). His pattern of subtest scores was suggestive of relatively even functioning in the two skilled areas. On a language-free measure of abstract/figural problem solving, [Petitioner] earned a TONI-3 Quotient of 73 (Poor). Language skills did not appear age appropriate and commensurate with his level of cognitive functioning. [Petitioner's] performance in the rendition of VMI designs revealed below average ability in the development of visual-motor integration skills. Current academic testing, reportedly, revealed that [Petitioner's] performance is low in math calculation skills and very low in broad reading, mathematics, written language and written expression. Projective device revealed emotional indicators related to immaturity, insecurity, uninhibited impulse control, and feelings of inadequacy. Based on a review of reports, student interview and test results, [Petitioner's] performance was thought to be reflective of deficits in intellectual ability that has negatively affected academic functioning...

⁴ *Id.* at 7-8.

⁵ P.Exh. No. 28 at 9-10.

RECOMMENDATIONS:

Time allowances will need to be extended for all copied and written assignments...

Assist [Petitioner] on a one-to-one basis when presenting new material to be learned...⁶

4. On April 10, 2008, DCPS convened a Multidisciplinary Team ("MDT") meeting. The MDT classified Petitioner with multiple disabilities ("MD"): other health impaired ("OHI") and mental retardation ("MR"). The team prescribed twenty hours per week of specialized instruction, one hour per week of occupational therapy ("OT"), and thirty minutes per week each of physical therapy ("PT") and psychological services. Petitioner's mother, who was assisted at the meeting by an educational advocate, agreed with the contents of the IEP.⁷

5. On March 19, 2009, DCPS convened an MDT meeting. Petitioner's mother participated in the meeting by telephone and "requested that [Petitioner] be placed in a Full Time Out of Gen. Ed. Setting."⁸ The MDT determined that Petitioner "requires a full-time placement in an educational environment specifically designed to address the needs of students with disabilities within a special educational school."⁹ The MDT prescribed 25.5 hours per week of specialized instruction, and the same related services prescribed in the previous IEP.¹⁰ The MDT agreed to reconvene to determine a placement.¹¹

6. DCPS reconvened an MDT on June 25, 2009 to determine a placement. DCPS proposed placing Petitioner at _____ Petitioner's mother had been informed of the proposed placement earlier in the month and had tried, unsuccessfully, to arrange a visit of the facilities at _____. Petitioner's mother rejected the placement at _____ primarily because _____ does not have a full-time nurse on its staff who would be available to address Petitioner's seizures. Petitioner's mother requested that Petitioner be placed at Ivymount.¹²

7. If Petitioner were to attend _____ he would be in a self-contained class of 6-7 students. The teacher, _____ is certified as "highly qualified." There is a teacher's aide in _____ class. _____ has the related service providers to provide the services prescribed in Petitioner's IEP: a full-time social worker and part-time OT and PT therapists. The nurse at Wilson is part-time.¹³

⁶ DCPS Exh. No. 2 at 6-7.

⁷ P.Exh. No. 14 at 1; P.Exh. No. 15 at 4.

⁸ P.Exh. No. 8.

⁹ P.Exh. No. 7, Placement Review Summary Document.

¹⁰ P.Exh. No. 7 at 5.

¹¹ P.Exh. No. 8.

¹² Testimony of Petitioner's mother; P.Exh. No. 6.

¹³ Testimony of Ms. Singleton.

Conclusions of Law

Failure to Implement the IEP

Petitioner offered no documentary or testimonial evidence that DCPS has failed to implement Petitioner's IEP. Therefore, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS failed to implement Petitioner's IEP.

Failure to Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),¹⁴ 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 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.¹⁵

Thus, Petitioner's burden is to show that DCPS has failed to provide an environment in which Petitioner can derive educational benefit.

Petitioner's case was based on DCPS' alleged failure to deny the parent an opportunity to participate in the placement determination and on Wilson's lack of a full-time nurse. The placement determination must be made "by a group of persons, *including the parents*, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and ... is based on the child's IEP."¹⁶ Thus, a placement determination made by a DCPS official or a DCPS entity that does not include the parents, that is reached without consideration of the capability of the proposed placement to meet the needs identified in the IEP, and that is made by a group that otherwise fails to meet the requirements of an appropriate IEP team, is invalid.

¹⁴ 458 U.S. 176 (1982).

¹⁵ *Rowley, supra*, at 200-01.

¹⁶ 34 C.F.R. §300.116(a)(1), emphasis added. Each public agency must ensure that a parent of a child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. 34 C.F.R. §300.501(c)(1).

In *W.G. v. Board of Trustees of Target Range School District No. 23*,¹⁷ the school system gave no serious consideration to any proposal but the one it proposed. The Ninth Circuit agreed with the district court that the school district had independently developed a proposed IEP that would place the student in a predetermined program.¹⁸ The court held that in order to fulfill the goal of parental participation in the IEP process, the school district was required to conduct, not just an IEP meeting, but a “meaningful” IEP meeting.¹⁹

In *Deal v. Hamilton County Board of Education*,²⁰ the Sixth Circuit reversed a district court decision in which the lower court denied reimbursement for a unilateral private placement by the parents. The parents had alleged that they had been denied a meaningful opportunity to participate in a placement determination in that the school system refused to consider funding a program for their autistic child that seemed to be effective.

The facts in this case do not support the contention that the parent did not have a meaningful opportunity to participate in the placement determination. At the March 19, 2009 MDT meeting, the MDT acceded to the parent’s request to prescribe a full-time special education setting. DCPS notified the parent in early June that it would propose a placement at _____ at the upcoming MDT meeting. Armed with this knowledge, Petitioner’s mother came to the meeting on June 25th and rejected the proposed placement on the grounds that _____ did not have a full-time nurse. She also proposed that Petitioner be placed at _____ which, as the testimony from Ms. de Sibour revealed, would offer superior support for Petitioner’s seizures.

However, Petitioner’s representatives’ emphasis on Petitioner’s seizures was excessive and misplaced. None of his evaluations provides an Axis-I diagnosis of a seizure disorder. None of his evaluations makes a recommendation regarding the handling of Petitioner’s seizures; there is no documented recommendation that Petitioner have access to a full-time nurse. Petitioner’s mother agreed with the April 10, 2008 IEP that made no mention of the need for a full-time nurse. The evidence at the hearing did not suggest that Petitioner’s seizure condition has deteriorated since April 2008. Nor was there an explanation why he needs a full-time nurse now, but did not need one in April 2008.

Moreover, Petitioner offered no proof that _____ cannot meet Petitioner’s educational needs. In its defense, DCPS offered testimony that if Petitioner were to attend _____ he would be in a self-contained class of 6-7 students. His teacher would be certified as “highly qualified” and would be assisted by an aide. The Hearing Officer was persuaded that Ivymount is better equipped to handle Petitioner’s seizures and offers an intensive academic program. However, as discussed by the Court in *Rowley* above, DCPS is not obliged to maximize the academic potential of disabled students. Rather, it must

¹⁷ 960 F.2d 1479 (9th Cir. 1992).

¹⁸ *Id.* at 1484.

¹⁹ *Id.* at 1485.

²⁰ 392 F.3d 840 (6th Cir. 2004).

provide a "floor of opportunity," educational benefit. The Hearing Officer concludes that Petitioner has failed to meet his burden of proving that Wilson does not provide an environment in which he can derive educational benefit.

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 19th day of July 2009, it is hereby

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

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

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: July 19, 2009