



## **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 a                    year-old student attending

On July 18, 2008, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) develop an appropriate Individualized Education Program ("IEP"), (2) provide special education services, and (3) provide extended year services. The due process hearing was convened on November 3, 2008. On November 12, 2009, this Hearing Officer issued a Hearing Officer's Decision ("HOD") that incorporated the terms of a settlement agreement. The HOD required that DCPS convene a Multidisciplinary Team ("MDT") on November 13, 2008 to review all current evaluations and assessments, develop an updated IEP, and discuss placement alternatives.

On February 18, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) develop an appropriate Individualized Education Program ("IEP"), and (2) provide an appropriate placement. The due process hearing was convened on April 1, 2009 and completed on April 24, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

## **Record**

*Due Process Complaint Notice* dated February 18, 2009  
*DCPS' Response to Parent's Administrative Due Process Complaint Notice* dated April March 4, 2009  
Prehearing Order March 8, 2009  
DCPS' Five-Day Disclosure dated March 9, 2009 (Exhibit Nos. 1-9)  
Petitioner's Five-Day Disclosure dated March 9, 2009 (Exhibit Nos. 1-19)  
Interim Order dated March 16, 2009  
Interim Order dated April 1, 2009  
Attendance Sheet for hearings on April 1, 2009 and April 24, 2009  
CD-Rom of hearings conducted on April 1, 2009 and April 24, 2009

## Witnesses for Petitioner

Juan Fernandez, Educational Advocate, James E. Brown & Associates  
Petitioner's Mother  
Petitioner  
Senior Director,  
Dr. Gayle Norbury, Clinical Psychologist

## Witnesses for DCPS

Special Education Coordinator,

## Findings of Fact

1. Petitioner is a                      year-old student attending
2. DCPS convened an MDT meeting on May 19, 2008 to determine Petitioner's eligibility for special education services. Her teacher reported that Petitioner "has major attendance issues, however when she did attend class she is very capable of completing her assignments. She functioned academically average to her peers if not above average to her peers. Of the 45 days [Petitioner] has missed approximately 30 days. [Petitioner] was never aggressive towards her peers or to                      Between August 24, 2007 and May 19, 2008, Petitioner had 405 unexcused class absences.<sup>4</sup> The MDT determined that Petitioner was eligible for special education services. The MDT prescribed seven hours of specialized instruction per week and thirty minutes per week of psychological counseling.<sup>5</sup>
3. On July 3, 2009, an HOD was issued in which Hearing Officer Tonya Butler Truesdale concluded that DCPS denied Petitioner a free appropriate public education ("FAPE") by failing to determine Petitioner's eligibility within a reasonable time after the completion of a psychological assessment in July 2007. The HOD ordered DCPS to fund an independent clinical psychological evaluation, develop a functional behavior assessment ("FBA"), and to convene an MDT meeting by October 31, 2008.<sup>6</sup>
4. On August 21, 2008, Dr. Cleopatra Lightfoot, completed a Psychological Evaluation of Petitioner. Dr. Lightfoot diagnosed Petitioner with Depressive Disorder, NOS, Attention Deficit Hyperactivity Disorder ("ADHD"), Learning Disorder, NOS, Academic Problem Oppositional Defiant Disorder, Bipolar Disorder, and Intermittent

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<sup>2</sup> *Complaint* at 1.

<sup>3</sup> Petitioner's Exhibit ("P.Exh.") No. 4 at 3. The MDT also discussed the fact that Petitioner was currently serving a ten-day suspension for bringing a knife to school after hours. It was her only suspension for the 2007-2008 school year. *Id.* at 5.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> DCPS Exh. No.

Explosive Disorder.<sup>7</sup> Dr. Lightfoot's findings and recommendations, *inter alia*, include the following:

[Petitioner's] score on the Brown ADD scale indicates that the diagnosis of ADHD is highly probable. [Petitioner] reported that she has excessive difficulty getting started on tasks, procrastinates excessively and she often forgets to do things that she intends to complete. [Petitioner's] overall score on the BDI indicated that she may be experiencing moderate to severe depression. Some of the symptoms expressed by [Petitioner] included feeling discouraged about her future, feeling guilty over many things, feeling restless or agitated, having much difficulty in making decisions, not having a lot of energy, feeling like crying but she can't, and it's hard to keep her mind on anything for very long. The CAB-PX indicated that [Petitioner] is at a clinical risk for anger, aggression, bullying and conduct problems. The vague and simplistic manner in which [Petitioner] processes information may also reflect basic cognitive impairments and can be the source of adjustment difficulty. This warrants a careful evaluation of her cognitive functioning with measures specifically designed for this purpose as her cognitive processing difficulties may be independent of the cognitive impairments due to depression. Also [Petitioner's] emotional overload is likely to be interfering with her ability to think before she acts. [Petitioner] is consequently susceptible to losing self-control and behaving in an impulsive manner.

Many of these symptoms are supportive of a diagnosis of Depression... [Petitioner] may now be behind academically not only from a Learning Disability but also undiagnosed ADHD and due to depression symptoms interfering with the interest in academics. [Petitioner] may therefore benefit from a trial of medication for both ADHD and Depression and with her depression symptoms addressed in a therapeutic setting her performance may become more stabilized within her true potential.

Due to the various difficulties that [Petitioner] is experiencing because of her inability to focus and control her emotions, [Petitioner] will benefit from individual therapy and a structured environment. Her academic performance has decreased over the past year, which also coincides with the death of her cousin, her parents' divorce, aggressive outbursts and depressive symptoms. In order for [Petitioner] to be successful she requires emotional and social support, one to one tutoring, individualized instructions, and constant contact with adolescents her age...

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<sup>7</sup> P.Exh. No. 5 at 8.

## RECOMMENDATIONS:

Due to findings of current testing [Petitioner] must have full time special education services in a therapeutic setting due to emotional struggles (depression) and indicators of ADHD.

[Petitioner] will benefit from individualized instructions, a structured environment and tutoring and especially one that focuses on step-by-step procedures, behavior modifications, an after-school program and tutor to assist her in the completion of her daily assignments...

[Petitioner] requires immediate individual therapy to help her understand her strengths and limitations while learning ways to seek help rather than create anxiety, frustration and shameful feelings when she feels she is overwhelmed academically and emotionally.<sup>8</sup>

5. DCPS convened an MDT on November 3, 2008 to develop an IEP. The MDT classified Petitioner with a Specific Learning Disability and prescribed 1.5 hours of specialized instruction per week, thirty minutes per week of behavioral support services, and 65 hours of independent compensatory education services.<sup>9</sup> Petitioner's educational advocate "strongly disagree[d] with DCPS and believe [Petitioner] qualifies for special Ed services as an Emotionally Disturbed student who should receive a full-time IEP or close to full time services in a therapeutic setting where her unique needs can be met."<sup>10</sup>

6. has an open space environment.<sup>11</sup> The resource room class sizes range from 12-15 students, the general education classes range from 25-30 students.<sup>12</sup>

7. Petitioner admitted that she seldom attends classes. She skips classes when she is bored (when she already knows the material), or because she uncomfortable with material she does not understand. Petitioner also has difficulty concentrating in open space environment.<sup>13</sup>

8. Petitioner has been accepted at in Maryland. is a private school offering full-time special education services to students whose primary disability is emotional disturbance ("ED"). All of teachers are certified in special education. The maximum class size is ten students. Each teacher is assisted by at least one teacher's assistant.<sup>14</sup>

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<sup>8</sup> *Id.* at 7-9. Dr. Lightfoot's evaluation was reviewed and approved by Dr. Gayle Norbury, who testified at the hearing. Dr. Norbury's testimony was consistent with the findings and recommendations in the evaluation.

<sup>9</sup> P.Exh. No. 3 at 2 and 7.

<sup>10</sup> *Id.* at 2 and Advocate's Meeting Notes. Petitioner and Petitioner's mother participated in the meeting by telephone.

<sup>11</sup> Testimony of Mr. Fernandez and

<sup>12</sup> Testimony of

<sup>13</sup> Testimony of Petitioner.

<sup>14</sup> Testimony of

## Conclusions of Law

### *Inappropriate IEP*

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“*Rowley*”),<sup>15</sup> the Supreme Court established that an appropriate IEP is one that is reasonably calculated to enable the child to receive educational benefits.<sup>16</sup> The Court also enumerated specific IEP requirements include the following:

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>17</sup>

According to the definitions contained in the Act, a “free appropriate public education” consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child “to benefit” from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the

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<sup>15</sup> 458 U.S. 176 (1982).

<sup>16</sup> *Id.* at 207.

<sup>17</sup> *Id.* at 181-82.

definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.<sup>18</sup>

Dr. Lightfoot diagnosed Petitioner with a learning disability, ADHD, and significant mood disorders that are likely to impair Petitioner's ability to function successfully in a general education environment. Dr. Lightfoot prescribed a full-time, structured, therapeutic environment. The MDT on November 3<sup>rd</sup> ignored Dr. Lightfoot's recommendations both as to the appropriate disability classification and educational setting. Not only did the MDT fail to prescribe a full-time, therapeutic setting, it placed Petitioner in an open space environment in which a student with inattentiveness is not likely to thrive. According to the MDT rejected Dr. Lightfoot's recommendations because it felt that Petitioner's truancy was the principle reason for her academic difficulties. However, the fact that the MDT found Petitioner eligible for services means that it recognizes that a disability is having an adverse impact on her academic performance. There is just as much evidence in the record, if not more, to substantiate a classification of emotional disturbance ("ED") or other health impaired ("OHI" of Petitioner's ADHD), as there is for the specific learning disability that the MDT determined. offered no explanation as to how the MDT differentiated between the three classification possibilities. The Hearing Officer also notes that the transition services plan in the IEP provides no discernible plan for Petitioner to pursue her career goals. The Hearing Officer concludes that Petitioner has met her burden of proving that DCPS failed to develop an appropriate IEP.

### ***Inappropriate Placement***

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),<sup>19</sup> the Supreme Court held that the 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.<sup>20</sup>

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<sup>18</sup> *Id.* at 188-89.

<sup>19</sup> 458 U.S. 176 (1982).

<sup>20</sup> *Rowley, supra*, at 200-01.

As discussed above, Dr. Lightfoot concluded that for Petitioner to succeed, she must be in a full-time, structured, therapeutic environment. This is not the environment at [redacted]. The Hearing Officer concludes that Petitioner has met her burden of proving that DCPS has failed to provide an appropriate placement.

[redacted] would be an appropriate placement for Petitioner. It offers full-time special education services in a small-class environment. [redacted] teachers are certified in special education. With teachers' assistants in each class, and a maximum class size of ten, Petitioner would receive the individualized attention Dr. Lightfoot recommended. [redacted] also employs the necessary related service providers to provide the psychological counseling Petitioner requires.

When a public school system has defaulted on its obligations under the Act, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits."<sup>21</sup> "[O]nce a court holds that the public placement violated IDEA, it is authorized to 'grant such relief as the court determines is appropriate.' '...[E]quitable considerations are relevant in fashioning relief'... and the court enjoys 'broad discretion' in so doing."<sup>22</sup> In light of Petitioner's truancy, the Hearing Officer is apprehensive about making a placement to a full-time private school at considerable expense to the District taxpayers. Petitioner's indifference towards her responsibility to attend her assigned classes is disturbing. However, from Dr. Lightfoot's evaluation and Dr. Norbury's testimony, it is apparent that Petitioner cannot achieve success in an atmosphere such as the one that exists at [redacted]. Thus, the Hearing Officer has the option of placing Petitioner at [redacted] or referring this matter back to an MDT to determine an appropriate placement. The Hearing Officer concludes that it would be in Petitioner's best interest to give her an opportunity to honor her commitment she made at the hearing: if she were placed at [redacted] she would attend regularly. The Hearing Officer will order DCPS to place Petitioner at [redacted] but with a probationary condition. If Petitioner fails to attend at least 90 ninety percent of her classes before the next MDT meeting, the Hearing Officer will authorize DCPS to rescind the Prior Notice placing Petitioner at [redacted].

### 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 4<sup>th</sup> day of May 2009, it is hereby

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<sup>21</sup> *Florence County School District Four v. Carter*, 510 U.S. 7, 11 (1993).

<sup>22</sup> *Id.*, 510 U.S. at 15-16.

**ORDERED**, that DCPS shall immediately issue a Prior Notice placing and funding Petitioner at \_\_\_\_\_, including transportation and all other appropriate related services.

**ORDERED**, that Petitioner is authorized to obtain an independent vocational assessment (Level 2) *and is not constrained by 5 D.C.M.R. Section 3027.5*. Petitioner's counsel shall provide copies of the completed assessment to the Special Education Coordinator at \_\_\_\_\_ the appropriate DCPS Placement Specialist, and the DCPS Office of Special Education ("OSE") Legal Unit by facsimile transmission and first-class mail along with a written request to schedule the MDT meeting described below.

**IT IS FURTHER ORDERED**, that at least thirty days after Petitioner's enrollment at \_\_\_\_\_ but no later than September 15, 2009, DCPS shall convene an MDT meeting at \_\_\_\_\_ to review Petitioner's progress at \_\_\_\_\_ review all current evaluations, revisit Petitioner's disability classification, and update Petitioner's IEP. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel, Miguel A Hull, Esquire. The MDT shall also develop a transition services plan that meets the requirements of 34 C.F.R. Section 300.320(b). In the event Petitioner fails to attend at least 90 percent of her classes at \_\_\_\_\_ prior to the MDT meeting, DCPS is authorized to rescind the Prior Notice placing Petitioner at \_\_\_\_\_ and the MDT shall consider placement alternatives.

**IT IS FURTHER ORDERED**, that DCPS shall afford Petitioner's parent an opportunity to participate in any meeting in which Petitioner's placement is discussed or determined. The DCPS placement representative shall advise Petitioner's parent of the advantages and disadvantages for Petitioner with respect to each school that is discussed, including any schools proposed by the parent. DCPS shall provide Petitioner's parent an explanation for the placement DCPS proposes, and the reasons for the proposal shall be provided in the Meeting Notes. DCPS shall issue a Prior Notice within seven days if Petitioner is placed in a public facility or within 30 days if Petitioner is placed in a private facility.

**IT IS FURTHER ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

**IT IS FURTHER ORDERED**, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's counsel will contact the Special Education Coordinator at \_\_\_\_\_ the appropriate DCPS Placement Specialist, and the DCPS OSE

Legal Unit to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.<sup>23</sup>

**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: May 4, 2009

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<sup>23</sup> If DCPS fails to contact Petitioner's counsel to coordinate scheduling the MDT meeting by a date that would make compliance with this Order feasible, Petitioner's counsel shall initiate telephone calls and electronic correspondence to attempt to effect compliance within the timelines set out herein.