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
2010 FEB 26 PM 3:50

Confidential

STUDENT, through the legal guardian[1]	)	Complaint Filed: December 14, 2009
	)	
Petitioner,	)	Prehearing Conference: January 28, 2010
	)	
v.	)	Hearing Date: February 17, 2010
	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Docket No.
	)	
	)	
Respondent.	)	
	)	
Student Attending:	)	
	)	

HEARING OFFICER'S DECISION

Counsel for Petitioner:	Pamela Halpern, 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:	Kendra Berner, Esquire Office of the General Counsel, DCPS 825 North Capitol Street, N.E.; 9th Floor Washington, D.C. 20002-4232 (202) 442-5000; Fax: (202) 442-5098

[1] Personal identification information is provided in Appendix A.

Jurisdiction

This proceeding was invoked 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 December 14, 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"), (2) develop an appropriate transition services plan, and (3) comply with appropriate disciplinary procedures and (4) provide an appropriate placement. In a Prehearing Order on October 28, 2010, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure to develop an appropriate IEP

  Petitioner alleges that the IEP developed on July 1, 2009 is inappropriate, because it fails to prescribe a full-time therapeutic special education setting out-of-general education. Petitioner also alleges that Petitioner requires more counseling than is prescribed in his IEP. DCPS asserts that the IEP is designed to confer educational benefit and that Petitioner's academic problems are caused by his poor attendance and lack of participation in class.

- DCPS' alleged failure to develop an appropriate transition services plan

  Petitioner alleges that Petitioner's transition services plan was not based upon a vocational assessment, has no meaningful post-secondary goals, and offers no vocational training. DCPS asserts that it authorized an independent vocational assessment on January 11, 2010. DCPS did not respond to the allegations as to the appropriateness of the transition services plan.

- DCPS' alleged failure to comply with disciplinary procedures

  Petitioner alleges that DCPS failed to conduct manifestation determinations during 2008-2009 when Petitioner was suspended on numerous occasions. DCPS admits that it conducted no manifestation determinations during the 2008-2009 school year, but asserts that Petitioner's parent was satisfied with the alternative placement DCPS provided, DCPS asserts that it has conducted a

manifestation determination during the 2009-2010 school year. DCPS further asserts that it has conducted a functional behavior assessment ("FBA") of Petitioner. Petitioner argues that the FBA is appropriate for Choice but not for

- DCPS' alleged failure to provide an appropriate placement

Petitioner alleges that cannot provide the full-time therapeutic program that Petitioner requires. Petitioner also alleges that does not offer the vocational program that Petitioner requires. DCPS asserts that can meet Petitioner's needs as set forth in the IEP and offers the least restrictive environment.

Neither party requested a modification of the Prehearing Order. The due process hearing was convened on February 17, 2010. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.[2]

Witnesses for Petitioner

Petitioner's Mother
Petitioner
Dr. Ida Jean Holman, Educational Advocate, James E. Brown & Associates
James Olden Edwards, Jr., Educational Advocate, Affordable Behavior Consultants
, Principal,
Chief Operating Officer,

Witnesses for DCPS

Acting Special Education Coordinator,

Findings of Fact

1. Petitioner is a year-old student attending

2. On September 26, 2008, Petitioner was suspended for three days for the "repeated failure to comply with the orders or directions of a principal, teacher, or other authorized D.C. Public School employee – refusal to go to class."[4]

[2] Upon DCPS' objection, the Hearing Officer deferred ruling on the admissibility of Petitioner's proposed Exhibit No. 20 until specifically offered into evidence. Petitioner's counsel did not later offer the document into evidence.
[3] Petitioner's Exhibit ("P.Exh.") No. 29.
[4] P.Exh. No. 8 at 1.

3. On October 10, 2008, Petitioner was suspended for fifty-six (56) days for insubordination, continued class disruption, inappropriate/profane language, inciting others to violence/disruption, and class disruption.[5] Petitioner was assigned to during the suspension.[6]

4. On November 7, 2008, Ms. Monica Moment, DCPS School Psychologist, completed a Comprehensive Psychological Evaluation of Petitioner. Ms. Moment's findings and recommendations, *inter alia*, include the following:

> [Petitioner's] overall cognitive performance is classified in the Borderline range, on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). He demonstrated a Verbal Comprehension Index (VCI) of 77 – Borderline range, a Perceptual Reasoning Index (PRI) of 79 – Borderline range, a Working Memory Index (WMI) of 107 – Average range, a Processing Speed Index (PSI) of 75 - Borderline range, and a Full Scale IQ (FSIQ) of 79 – Borderline range.
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> [Petitioner's] overall ability is equal to or higher than that or 8% of the children his age (8th percentile).
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> (Academically, Gayle Huthcinson, Educational Assessor, attempted to assess [Petitioner] in this area on three different attempts.)
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> [Petitioner's] visual-motor integration was assessed using the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) which measures the extent to which the examinee can integrate their visual and motor abilities, subsequently, a precursor for success in reading, handwriting, general intelligence. The VMI further identify significant difficulties in visual-motor integration that could lead to a vision screening and/or test. [Petitioner] yielded standard score of 78; he demonstrated Low performance on the VMI.
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> Behaviorly, [Petitioner's] Algebra teacher, Mr. Peor, CAB-T information suggested his emotional disturbance (T score=58; normal range), but his social maladjustment (T score = 70; significant clinical risk). The social maladjustment T-scores suggest that [Petitioner] is presenting elevated negative behaviors in the areas of anger, conduct problems, attention-deficit/hyperactivity, and learning disability. These areas should be assessed and/or monitored more closely for heightened behaviors.

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[5] P.Exh. Nos. 37-38.

[6] P.Exh. No, 37 at 3. Petitioner was cited for inappropriate behavior at later in October and in November 2008. The testimony did not resolve the conflict between the suspension to be served at and the disciplinary referrals at during the period of suspension. P.Exh. Nos. 32-36. Petitioner also received a ten day suspension on August 28, 2008 and a three-day suspension on September 17, 2008, both for a "failure to comply." P.Exh. No. 25.

RECOMMENDATIONS

A consideration, regarding [Petitioner's] assessment, yields inconclusive data to render an eligibility disability classification at this time...[7]

5. On March 6, 2009, Ms. Gayle Hutchinson conducted an Educational Evaluation for DCPS. Her findings and recommendations, *inter alia*, include the following:

When compared to others of his age, [Petitioner's] academic achievement is in the average range in Broad Written Language...

Written Expression measures [Petitioner's] fluency of production and quality of expression in writing. [Petitioner's] written expression standard score is within the low average to average range ... His overall ability to express himself in writing is limited to average; writing fluency tasks above the age 16-9 will be quite difficult for him.

Broad Reading includes reading, decoding, reading speed, and the ability to comprehend connected discourse while reading. [Petitioner's] reading standard score is within the low average range (percentile rank range of 16 to 21; standard score range of 85 to 88) for his age. His overall reading ability is limited; reading tasks above the age 14-0 level will be quite difficult for him...

[Petitioner's] mathematics calculation skills standard score is within the low range (percentile rank range of 2 to 6; standard score range of 70 to 76) for his age. His mathematics calculation skills are limited; math calculation tasks above the age 12-9 level will be quite difficult for him.

Broad Math includes mathematics reasoning and problem solving, number facility, and automaticity. [Petitioner's] mathematics standard score is within the low range (percentile rank range of 3 to 5; standard score range of 71 to 76) for his age. His overall mathematics ability is limited; math tasks above the age 12-2 level will be quite difficult for him.

Academic Processing

[Petitioner's] academic skills are limited to average. Specifically, his spelling is average. [Petitioner's] math calculation skill is limited.

Academic Fluency. [Petitioner's] writing fluency is limited to average. His fluency with mathematics problems is limited. His fluency with reading tasks is very limited. [Petitioner's] ability to apply his academic skills is limited. For example, his writing ability is limited to average. His passage

[7] P.Exh. 19 at 7-8.

comprehension ability is limited. [Petitioner's] quantitative reasoning is very limited.

Summary

[Petitioner's] academic skills are within the average range of others at his age level. His fluency with academic tasks is low average. His ability to apply academic skills is low.

When compared to others at his age level, [Petitioner's] performance is average in written language; low average in broad reading and written expression; and low in mathematics and math calculation skills.[8]

6. On December 15, 2008, Petitioner was suspended from December 17, 2008 thorough May 21, 2009. During the suspension, Petitioner was assigned to

7. On May 4, 2009, Ms. Thelma Hebron, a DCPS Social Worker, conducted a Functional Behavior Assessment ("FBA") of Petitioner while Petitioner was assigned to Ms. Hebron's findings and conclusions, *inter alia*, include the following:

The student was sent to Academy for failure to comply with school rules and regulations and violation of Chapter 25, D.C. Code. While at the student had multiple level one suspensions, resulting in level two suspensions; with behaviors of profane language, non-compliant behavior and failure to comply with the rules and regulations set forth by the Principal and teacher.

Frequency: Based on observations of the student and information obtained from the classroom teacher, the student is compliant with the rules and regulations at The student can be redirected and not progressive disciplinary actions are warranted at this time.

Intensity: The student does not present as a disciplinary problem at

Duration: The behaviors previously identified at School are non-existence at

8. DCPS convened a Multidisciplinary Team ("MDT") meeting on May 4, 2009 to determine Petitioner's eligibility for special education services. At the time, Petitioner was assigned to 'Presently he is doing well at He will stay at until the end of the year per his mother's request."[11] The MDT determined that Petitioner

[8] P.Exh. No. 18.
[9] P.Exh. No. 31.
[10] P.Exh. No. 16 at 1.
[11] P.Exh. No. 11 at 3.

was eligible for special education services as a learning disabled ("LD") student. The MDT prescribed fifteen hours of specialized instruction per week and thirty minutes per week of counseling services.[12]

9. Despite the indication from the MDT on May 4th that Petitioner would remain at for the remainder of the school year, he was suspended at on May 22, 2009 for ten days for failure to comply.[13]

10. During the 2008-2009 school year at Petitioner repeated the grade for the second time. He failed four courses, received a B in Music, and withdrew from Survey of World Art.[14] At Petitioner received B's in English and Music, a D in "Comp. Appl.", and failed Algebra.[15]

11. DCPS convened an MDT meeting on July 1, 2009 to develop an IEP. The MDT developed an IEP that prescribed fifteen hours per week of specialized education services and thirty minutes per week of behavioral support services.[16] The IEP also included goals and objectives in mathematics, reading, and emotional/social/behavioral development.[17] The Post-Secondary Transition Plan included no goals, no proposed courses of study, and no vocational plan.[18]

12. On September 21, 2009, Petitioner received a three-day on-site suspension for failing to report to his classroom.[19]

13. DCPS reconvened an MDT meeting on September 22, 2009 to review Petitioner's progress.[20]

14. On September 23, 2008, Petitioner's counsel requested that DCPS conduct the following evaluations: psychoeducational, vocational, social history, functional behavior, and clinical psychological.[21]

15. On January 11, 2010, DCPS authorized Petitioner to obtain an independent vocational assessment.[22]

16. has an LD Cluster program for LD students. It can provide full-time, out-of-general education services with class sizes from 10-15 students. Each class includes a teacher's assistant.[23]

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[12] *Id.* at 4.
[13] P.Exh. No. 26.
[14] P.Exh. No. 23.
[15] P.Exh. No. 45.
[16] P.Exh. No. 9 at 5.
[17] *Id.* at 2-4.
[18] *Id.* at 9-10.
[19] P.Exh. No. 30.
[20] P.Exh. No. 8.
[21] P.Exh. No. 55.
[22] DCPS Exh. No. 2.

17. During the 2009-2010 school year, through February 8, 2010, Petitioner was present 33.5 out of 101 days. He had 333 absences from classes, of which 278 were unexcused, and was late 76 times.[24]

18. Petitioner does not attend classes because he feels he receives insufficient one-on-one assistance from teachers at He attends class, because there are only 10 students in that class. He also goes to his Spanish class, because he can do the work and there are usually no more than nine students in that class. However, he does not attend reading class, because the work is "too easy." There are 15 students in

19. Petitioner failed to apply for or attend a tutoring session offered each Tuesday, a tutoring program staffed by Howard University students, and the an in-house vocational program that offers training in air conditioning, electrical, plumbing, and bricklaying. Participants in the are eligible for summer jobs in these vocational areas paying

Conclusions of Law

Failure to Develop an Appropriate IEP

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[27] 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
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> "(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

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[23] Testimony of Ms. . *Id.* at 2-4
[24] DCPS Exh. No. 3.
[25] Testimony of Petitioner.
[26] Testimony of Ms. .
[27] 458 U.S. 176 (1982).

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).[28]

DCPS does not dispute the fact of Petitioner's learning disability. DCPS' position is that Petitioner's academic problems are due to his persistent refusal to attend class on a regular basis. Because Petitioner offered no evidence that his truancy is a function of his disability, the Hearing Officer is sympathetic to DCPS' argument. However, Petitioner repeated the grade twice, and has been promoted to the grade despite failing all of his core subjects last year. According to Ms. Hutchinson's educational evaluation, Petitioner performs at levels one to four years below his peers in core subject matter areas. Nevertheless, Petitioner's IEP prescribes less than full-time services and does not require the enhanced assistance that one at Petitioner's advanced age would require to close the gap between him and his peers before exiting DCPS. In other words, even if Petitioner's attendance were perfect, it is not apparent that Petitioner's needs can be met with fifteen hours of specialized instruction per week in a general education environment.

While Petitioner may elect not avail himself of the services, DCPS has an obligation to offer a program that meets Petitioner's unique educational needs. Petitioner's evaluations reveal a student who requires a full-time out-of-general education environment as well as tutoring assistance. Further, as discussed below, the Transition Plan in the IEP provides no plan at all. Therefore, the Hearing Officer concludes that Petitioner has met his burden of proving that Petitioner has met his burden of proving that DCPS has failed to develop an appropriate IEP.

Failure to Develop an Appropriate Transition Services Plan

The IDEIA regulations require that when a student "turns 16," his or her current IEP must include

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.[29]

The Transition Services Plan in Petitioner's July 1, 2009 IEP did not include potential career paths or specific transition goals, objectives, activities or strategies, and no proposed courses of study. Moreover, DCPS concedes that it has conducted no vocational assessment that would guide the development of "appropriate measurable

[28] *Id.* at 181-82.
[29] 34 C.F.R. §300.320(b).

postsecondary goals." The Hearing Officer concludes that Petitioner met his burden of proving that DCPS failed to develop an appropriate Transition Services Plan.

Failure to Comply with Disciplinary Procedures

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local education agency ("LEA"), the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or (2) if the conduct in question was the direct result of the LEA's failure to implement the IEP.[30]

If the MDT determines that the conduct was a manifestation of the child's disability, the MDT must either (1) conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (2) review the existing behavioral intervention plan, and modify it, as necessary, to address the behavior. The LEA must also return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.[31]

DCPS offered no evidence that it conducted a manifestation determination during the 2008-2009 school year. Thus, it was obligated to conduct an FBA and return Petitioner to the placement from which he was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan. DCPS conducted an FBA at that concluded that Petitioner had no behavioral issues in that placement. Petitioner and his mother also testified that they were satisfied with the placement at In fact, at the MDT meeting on May 4, 2009, Petitioner's mother requested that Petitioner remain at for the remainder of the school year. Therefore, although DCPS failed to conduct a manifestation determination, the Hearing Officer concludes that Petitioner is not entitled to any further relief for that violation.

The only evidence of a suspension during the 2009-2010 school year is a three-day, on-site suspension on September 21, 2009 for failing to report to his classroom.[32] Since there was no change in placement, DCPS was not required to conduct a manifestation determination.

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[30] 34 C.F.R. §300.530(e)(1).
[31] 34 C.F.R. §300.530(f).
[32] P.Exh. No. 30.

Failure Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[33] 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.[34]

Thus, Petitioner's burden is to show that DCPS has not, and is incapable of providing an environment in which Petitioner can derive educational benefit.

District regulations sets forth the following criteria for determining an appropriate placement; the decision must be

> (a) 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;
> (b) Made in conformity with the Least Restrictive Environment (LRE) provision of the Act and § 3011 of this Chapter;
> (c) Made within timelines consistent with applicable local and Federal law;
> (d) Determined at least annually after his or her initial placement;
> (e) Based on the child's IEP; and
> (f) Is as close as possible to the child's home.[35]

Petitioner's counsel argues that DCPS has failed to implement strategies at to address Petitioner's truancy. However, counsel has also failed to offer any legal authority that compels DCPS to address Petitioner's truancy. Petitioner's evaluations make no connection between his disability, LD, and his proclivity to avoid attending class. At the hearing, Petitioner testified that he skips class, because he receives insufficient one-on-one assistance in his classes at He testified that he attends

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[33] 458 U.S. 176 (1982).
[34] *Rowley, supra,* at 200-01.
[35] 5 D.C.M.R. §3013.1. *See also* 34 C.F.R. §300.116.

two classes that are relatively small, and Spanish. However, he admitted that he does not attend his reading class simply because the curriculum is "too easy" for him. Thus, Petitioner skips classes that are both too hard and too easy, regardless of class size. Additional testimony revealed that Petitioner has failed to avail himself of one-on-one tutoring opportunities that were offered to him, and failed to apply for a vocational program despite persistent encouragement to do so from a staff member.

Truancy is an endemic problem within DCPS. However, this Hearing Officer is unaware of any authority that imposes a greater obligation on DCPS to cure truancy among the population of disabled students than its non-disabled population. Absent evidence that Petitioner's unwillingness to attend class is caused or exacerbated by his disability, IDEIA imposes no obligation on DCPS to implement strategies to address it.

Petitioner and his mother testified that he performs better in a small class environment. There is scant evidence that this is true. Both testified that Petitioner attended classes at because the classes were smaller. While there was no credible documentation of the class sizes at the Hearing Officer will assume the accuracy of this testimony. Moreover, the FBA conducted at reveals that Petitioner did not engage in the disruptive behavior that he exhibited at and there was no indication that truancy was a problem at Nevertheless, Petitioner's academic performance was only marginally better at than it was at

At any rate, Ms. Rankin testified that can provide a full-time, out-of-general education environment for Petitioner. In light of Petitioner's history of failure to attend class, his poor academic performance cannot be attributed to the services offered at The Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS has failed to provide an environment conducive to providing educational benefit. In light of capability to provide a full-time, out-of-general education setting, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS in incapable of providing an environment in which Petitioner 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 26th day of February 2010, it is hereby

ORDERED, that on or before March 19, 2010, DCPS shall convene an MDT meeting to review all current evaluations, including the independent vocational assessment, and revise Petitioner's IEP consistent with this decision. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel, Pamela Halpern,

Esquire. The MDT shall also develop and include within the IEP a transition services plan that meets the requirements of 34 C.F.R. Section 300.320(b).

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 and the DCPS Office of Special Education Resolution Team to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.[36]

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: February 26, 2010

[36] 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.