District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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Confidential

STUDENT, through the legal guardian[1]	)	Complaint Filed: December 10, 2009
	)	
Petitioner,	)	Prehearing Order: January 19, 2010
	)	
v.	)	Hearing Date: March 4-5, 2010
	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Docket No.
	)	
Respondent.	)	
	)	
Student Attending:	)	
	)	

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STUDENT HEARING OFFICE
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HEARING OFFICER'S DECISION

Counsel for Petitioner: Kathy Zeisel, Esquire
The Children's Law Center
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Counsel for DCPS: Daniel McCall, Esquire
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[1] Personal identification information is provided in Attachment 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 10, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) complete childfind procedures in a timely manner, (2) develop an appropriate Individualized Education Program ("IEP"), and (3) provide an appropriate placement. In a Prehearing Order on January 19, 2010, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure timely to complete childfind procedures

  Petitioner alleges that during the 2007-2008 school year, Petitioner's mother expressed concerns to DCPS about Petitioner's academic progress, but DCPS failed to refer Petitioner for evaluations to determine her eligibility for special education services. During the 2008-2009 school year, Petitioner "struggled" academically and exhibited behavioral problems, but DCPS failed to refer Petitioner for evaluations to determine her eligibility for special education services. Petitioner's mother obtained an independent psychoeducational evaluation of Petitioner in June 2009 and provided it to DCPS at the beginning of the 2009-2010 school year. DCPS found Petitioner eligible for services in October 2009.

  DCPS asserts that it first became aware that Petitioner might be a child with a disability when the parent submitted the psychoeducational evaluations in September 2009. DCPS further asserts that it "conducted its referral on September 21, 2009" and, thus, has until February 21, 2010 to complete childfind procedures.

- DCPS' alleged failure to provide an appropriate IEP

  Petitioner alleges that the IEP is inappropriate because (1) "other health impaired" ("OHI") was not included as one of Petitioner's disabilities, (2) the IEP does not include Attention Deficit Hyperactivity Disorder ("ADHD") goals and objectives, (3) the IEP fails to provide the full-time specialized instruction that Petitioner requires, (4) the IEP provides

insufficient counseling, no occupational therapy ("OT"), and no speech and language ("S/L") therapy, (5) the academic and social/emotional goals and objectives do not address attentional or behavioral problems, and the IEP does not (6) provide a reading specialist, require the posting of daily schedules, require written graphics and organizers, and require frequent breaks and modification of in-class and homework assignments.

DCPS asserts that the IEP is reasonably calculated to provide educational benefit.

- DCPS' alleged failure to provide an appropriate placement

  Petitioner alleges that is an inappropriate placement because (1) it cannot provide the full-time services that Petitioner needs, and (2) the student/teacher ratio is too high.

The due process hearing was convened on March 4, 2010 and completed on March 5, 2010. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.[2]

Witnesses for Petitioner

Petitioner's Mother
Psychology Associate,
Emily Pelzman, Investigator, Children's Law Center
Kathia Studivant, Therapist, Capital Region Children's Center
Michael Wilson, Former Investigator, Children's Law Center
Associate Head of School,

[2] Petitioner's counsel objected to the admission of DCPS' proposed Exhibit Nos. 1-3, 11, 16, and 19. The Hearing Officer overruled the objections to Nos. 1-3, concluding that the documents were Petitioner's educational records. The Hearing Officer sustained the objection to DCPS Exh. No. 11, an unsigned IEP; Petitioner offered Petitioner's Exhibit ("P.Exh.") No. 4, a signed copy of the same document. The Hearing Officer deferred ruling on DCPS Exh. No. 16, Multidisciplinary Team ("MDT") meeting notes. The exhibit was admitted at the conclusion of the testimony. The Hearing Officer overruled the objection to Exh. No. 19, signed authorizations for medical records. DCPS objected to P.Exh. Nos. 25, 36, and 37. The Hearing Officer deferred ruling on P.Exh. No. 25, two photographs of Petitioner. These photographs were subsequently admitted into evidence during the testimony of Petitioner's mother. The Hearing Officer sustained the objection to P.Exh. No. 36, an affidavit of but authorized testimony of despite his not being listed as a witness in Petitioner's Disclosure. The Hearing Officer sustained the objection to P.Exh. No. 37 as not relevant. The Hearing Officer also admitted a sealed exhibit offered by DCPS pursuant to 34 C.F.R. §300.517 (c)(2). Under that provision, attorneys' fees may be limited if a petitioner rejects an offer made by an LEA more than 10 days before the hearing, and "the administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement." 34 C.F.R. §300.517 (c)(2)(i)(C).

Witnesses for DCPS

Dr. Eva Ramsey, School Psychologist, DCPS
Sabrina Pinnock, Speech and Language Pathologist, DCPS
Special Education Teacher,
Regular Education Teacher,
Social Worker,
Special Education Coordinator,

Findings of Fact

1. Petitioner is a year-old student who has attended since the beginning of the 2008-2009 school year.[3]

2. During the 2007-2008 school year, Petitioner attended the grade at E.S. For the first two advisory periods, Petitioner was "Below Basic" in Reading/English and Mathematics. At the end of the third advisory period, her teacher did not believe Petitioner was ready for the grade in Reading and Math. At the end of the school year, Petitioner was Below Basic in Math, Basic in Reading/English, Science, and Social Studies, and Proficient in Music/Art and Health & Physical Education. Petitioner's teacher stated that Petitioner "has shown a great deal of academic and social growth," but "is still working below grade level. I strongly recommend that she attend summer school." Petitioner was promoted to the grade.[4]

3. During the 2008-2009 school year, Petitioner was Below Basic throughout the school year in Reading/English, Math, and Social Studies. Her Work Habits and Personal & Social Skills were poor throughout the year. During the second advisory period, her teacher stated that Petitioner was unenthusiastic about school work and playful during classes. In the third advisory, the teacher stated that Petitioner "is capable of doing more work that she cares to. Her low scores and class cutting are not working in her favor," and was not ready for the grade. At the end of the year, her teacher retained her in grade: "[Petitioner] has missed significant numbers of instructional days. It would be very unfair to expect her to do grade level when she has missed a lot of grade instruction." Petitioner was absent 29 days during the 2008-2009 school year.[5]

4. Dr. Kara Covington of the Children's National Medical Center ("CNMC") completed a Comprehensive Psychoeducational Evaluation of Petitioner in April 2009. Petitioner's grade equivalency scores were 1:7 in Academic Skills, 1:5 in Academic Fluency, 1:6 in Academic Applications, 2:1 in Broad Reading, 1:3 in Broad Written Language, and 1:5 in Broad Math.[6] Dr. Covington's findings and recommendations, *inter alia*, include the following:

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[3] Testimony of Petitioner's mother.
[4] P.Exh. No. 18.
[5] P.Exh. Nos. 19-20.
[6] P.Exh. No. 8 at 15-16.

[Petitioner] demonstrated inattentive and overactive behaviors during the testing. Results of the cognitive assessment revealed overall Borderline intellectual ability (seventh percentile) with Average processing speed (thirty-fourth percentile), Low Average working memory (eighteenth percentile), and verbal comprehension (thirteenth percentile) and Borderline perceptual reasoning (third percentile)...

The educational evaluation indicated Low Average sight word identification skills and lower end of Average word attack skills. [Petitioner's] sight word reading efficiency and phonemic decoding efficiency fell in the Below Average range. Her reading fluency and literal comprehension skills were in the Low range. In the area of math, [Petitioner's] calculation skills and fluency measured in the Very Low range while her applied problem-solving skills were Low Average. She demonstrated Very Low spelling, writing fluency, and written expression skills. Based on the test scores, [Petitioner] meets criteria for coding as a student with Specific Learning Disability, i.e., Reading Disorder (DSM-IV 315.00), Mathematics Disorder (DSM-IV 315.01), and Disorder of Written Language (DSM-IV 315.2).

The results of norm-based rating scales completed by [Petitioner's mother] yielded Markedly Elevated scores on the Cognitive Problems/Inattention and Hyperactivity subscales with a Moderately Elevated score on the Oppositional subscale and Mildly Elevated scores on the Anxious-Shy and Perfectionism subscales. Teacher rating scales produced Markedly Elevated scores on measures of Hyperactivity, Oppositional, Social Problems, Inattention, and Cognitive Problems/Inattention. Based on parent and teacher ratings and observations during testing, [Petitioner] meets criteria for Attention-Deficit/Hyperactivity Disorder (ADHD) – Combined Type (DSM-IV 314.01)...

Recommendations

...[Petitioner] should receive a comprehensive occupational therapy evaluation to more clearly delineate her visual-spatial skills and fine-motor coordination weaknesses.

[Petitioner] will benefit from a small, supportive, and structured classroom with a small student-teacher ratio that is designed to meet the needs of students with Specific Learning Disability. She requires a high degree of structure, support, and positive feedback in order to be successful. School placement should also provide the related services (e.g., counseling, occupational therapy) that may be necessary for [Petitioner] to derive educational benefit.

> [Petitioner] would also benefit from individual instruction three times weekly in reading and written language using a structured, carefully sequenced multi-sensory approach like the Orton-Gillingham Method. This should be provided by a professional who is specifically trained to work with children with learning disabilities…
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> Individual instruction to improve her reading fluency and reading comprehension is recommended. [Petitioner] should be coached in methods to improve in speed and efficiency in reading as described in the books *Reading Drills for Speed and Comprehension and Skimming and Scanning.*[7]

5. Petitioner was accepted at on September 15, 2009.[8] is a private school offering full-time special education services to students whose primary disability is language based learning disabilities. It offers small classes that are taught by certified special education teachers who are assisted by teachers' assistants. employs and contracts with service providers who can provide a range of related services including occupational therapy ("OT"), speech and language ("S/L") and psychological counseling. If Petitioner were to attend she would be the eighth student in a class that now has three boys and four girls. has received a Certification of Authority from OSSE.[9]

6. On the DC-CAS Assessment at the end of the 2008-2009 school year, Petitioner scored 337 in Reading and 314 in Mathematics, both Below Basic.[10] On similar tests in the fall and January 2010, Petitioner scored 222 and 335, respectively, in Reading, and 227 and 339, respectively, in Mathematics.[11]

7. On October 1, 2009, DCPS convened an MDT meeting and reviewed Dr. Covington's evaluation.[12] The MDT developed a Student Evaluation Plan ("SEP") in which it referred Petitioner for OT, S/L, and social history evaluations.[13] Petitioner's teacher reported that Petitioner had difficulty keeping up with the class work, had difficulty during class transitions, paying attention, staying on task, completing her work, and was aggressive on the playground during recess. The DCPS team described as utilizing the School-wide Application Model ("SAM") in which a special education teacher is assigned to every general education class for five hours per week to provide individualized attention for all students. DCPS proposed to provide Petitioner an additional five hours per week of services, in the general education environment, from this same special education teacher. Petitioner's mother objected on the grounds that Petitioner was failing and could not keep up in a general education environment.[14]

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[7] P.Exh. No. 8 at 9-11.
[8] P.Exh. No. 38.
[9] Testimony of
[10] P.Exh. No. 14.
[11] P.Exh. No. 16.
[12] Testimony of DCPS Exh. No. 3.
[13] P.Exh. No. 1. at 3.
[14] Testimony of

8. On October 9, 2009, DCPS convened an MDT to determine Petitioner's eligibility for special education services.[15] The team found Petitioner eligible as a child with a Specific Learning Disability ("SLD"). The MDT drafted an IEP that prescribed ten hours per week of specialized instruction in general education and thirty minutes per week of behavioral support services.[16] The IEP included goals and objectives in math, reading, and emotional, social, and behavioral development.[17] Petitioner's mother "consents to start services but is not in agreement with eligibility or the IEP."[18] Petitioner's representatives proposed no specific goals and objectives at the meeting. The draft of the IEP was not completed at the meeting. Petitioner's representatives received a copy later in October.[19]

9. Dr. Ramsey completed a Psychological Evaluation of Petitioner on November 16, 2009. Dr. Ramsey's findings and recommendations, *inter alia*, include the following:

> Current functioning in school is below average. Previous evaluations indicated Borderline intellectual functioning, Low to Very Low academic performance, & difficulties with Visual Motor processing and integration. On tests of emotional functioning, [Petitioner] presented as a child whose social and emotional development has been significantly influenced by self regulatory difficulties as well as family and situational stressors. The evaluator attributed much of [Petitioner's] problematic and disruptive behavior to familial complications and environmental stressors.
>
> According to this assessment, [Petitioner] does appear to have difficulties that impact her learning. The responses given by her mother were much higher than the responses given by her current teacher. Though the responses were elevated they were inconsistent across assessment tools. Often it was indicated that [Petitioner] fell into the normal range of functioning, specifically in terms of ADHD. [Petitioner] will and does present as a child who is distractible and has difficulties maintaining focus. However, it is likely that these difficulties are more a result of deficits with perceptual reasoning, memory and processing information, rather than Attention Deficit Hyperactivity Disorder.
>
> Based on previous results, [Petitioner] does meet the criteria for a student with learning disabilities as defined by District of Columbia public schools. [Petitioner's] intellectual abilities fall within the Borderline range. The MDT team has provided support and interventions in an effort to improve [Petitioner's] academic functioning. Based on the results of the current evaluation, [Petitioner] does not meet the criteria for a student who is Other

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[15] Testimony of
[16] P.Exh. No. 2 at 5.
[17] *Id.* at 2-4.
[18] *Id.* at 1.
[19] Testimony of

Health Impaired, as she does not meet the criteria for ADHD, as defined by District of Columbia public schools.[20]

10. developed a behavior plan for Petitioner on or about November 25, 2009.[21] The plan required that Petitioner "will be given prompts regarding her behavior, as well as praise for transitioning appropriately with her class. A daily transition log will be kept by her Teachers and Social Worker, which will allow for documentation of behavior during transitions... [Petitioner's] behavior chart will be sent home on a weekly basis; this can be a reward or a consequence, depending upon behavior. [Petitioner] can also lose privileges such as recess or field trips if adverse behaviors are noted."[22]

11. On a Diagnostic Report dated December 2, 2009, Petitioner had a grade equivalency of 0:6 in Mathematics. "Her test performance is therefore comparable to that of an average kindergartener after the sixth month of the school year... This student's math skills are below average for her grade. [Petitioner] would benefit from additional math instruction each day..."[23]

12. The MDT reconvened on December 2, 2009 to review recently completed evaluations and to revise the IEP.[24] Petitioner's specialized instruction was unchanged – ten hours per week in general education. Her thirty minutes per week of behavioral support services was changed to out-of-general education, and the MDT also prescribed sixty minutes per week of speech-language services and 45 minutes per week of OT services, both out-of-general education.[25] The revised IEP included goals and objectives in math; reading; written expression; communication/speech and language; emotional, social and behavioral development; and motor skills/physical development.[26] There were three social/emotional goals: (1) "[Petitioner] will interact with her peers in an age-appropriate manner with 80% accuracy; (2) [Petitioner] will ask for adult assistance with her classwork when necessary with 80% accuracy; (3) [Petitioner] will stay on task during transitions with 80% accuracy."[27] Petitioner's mother agreed to allow services to be provided, but did not agree that the IEP was appropriate.[28] Petitioner's representatives offered no revised or additional goals for the IEP.[29]

13. The MDT reconvened at a Resolution Session meeting on January 8, 2010. The MDT redrafted the IEP, but it made no substantive changes to the December 2, 2009 IEP.[30]

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[20] P.Exh.. No. 12 at 13-14.
[21] Testimony of
[22] P.Exh. No. 3.
[23] P.Exh. No. 15.
[24] Testimony of
[25] P.Exh. No. 4 at 8.
[26] *Id.* at 3-7.
[27] *Id.* at 6.
[28] *Id.* at 2.
[29] Testimony of
[30] P.Exh. No. 5.

14. The MDT reconvened on January 27, 2010 and revised the IEP. It prescribed 30 additional minutes per week of behavioral support services in general education, fifteen minutes per week of OT consultation services, and fifteen minutes per week of S/L consultation services.[31] The MDT added the following classroom accommodations: "[Petitioner] will receive appropriate accommodations and modifications to assist her with academic performance at grade level such as: graphic organizers, frequent breaks, posted daily schedules, preferential seating, positive reinforcement, differential instruction, checklists, strategies provided for organizational skills, homework revisions, communication with teachers, providers, and mother.[32] The Emotional, Social and Behavioral Development section was added by supplementing the Present Level of Educational Performance, Needs, and Impacts on the Student. Three additional goals were also added to this section: "(4) [Petitioner] will make positive statements about herself with minimal (two or fewer prompts) in 4 out of 5 trials; (5) [Petitioner] will learn to utilize a daily agenda book in order to increase organizational skills (example: bringing home/turning it in) with 80% improvement; and (6) [Petitioner] will increase her time on task during group instruction with 80% accuracy."[33] Petitioner was provided DCPS bus transportation to replace transportation services provided by a contractor.[34]

15. At the January 27th meeting, stated that she could not provide pull-out services for Petitioner, only inclusion services. reported that Petitioner was improving, but had not mastered her social/emotional goals. Ms. Pinnock, the S/L pathologist noticed that Petitioner was stuttering more, but said that Petitioner did not require more than one hour per week of therapy. Petitioner's counsel requested a reading specialist for Petitioner, but the DCPS representatives stated that Petitioner scored too high on a reading placement test to justify being placed in a special reading group. Petitioner's mother requested placement at The DCPS team denied the request due, in part, to Mr. statement that Petitioner would be placed in a class with autistic and emotionally disturbed ("ED") children at

16. Petitioner's aggressive behavior subsided considerably from the beginning of the school year to the time of the January 27th meeting. She is no longer disruptive in the hallways, is a "much calmer child," and follows directions much better than she did early in the school year. Petitioner interacts well with her non-disabled peers, is not as aggressive as she was at the beginning of the school year, and is learning how to make positive bonds with her peers.[36]

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[31] P.Exh. No. 7 at 10.
[32] *Id.*
[33] *Id.* at 7.
[34] Testimony of P.Exh. No. 7 at 12. Petitioner was expelled from the contractor-provided bus in November after an incident on the bus and not allowed to return for three days. Testimony of Petitioner's mother.
[35] Testimony of also testified that Petitioner's January test results did not qualify her for the "Burst" reading program.
[36] Testimony of Dr. Ramsey. Dr. Ramsey also testified that she did not believe would be an appropriate placement in light of the possibility of Petitioner being in a class with ED students. She testified that she might have a different opinion if there were no ED students in the class. Ms. Pinnock also

17. Petitioner's general education class has approximately twenty-three students. The teacher is assisted by two unlicensed volunteers. Petitioner receives one-on-one assistance from a special education teacher, and receives individual behavioral support from a social worker, Over the course of the current school year, Petitioner's handwriting has improved from illegible to legible; Petitioner's work is now good enough to be exhibited on the bulletin board, meaning it is "proficient or advanced." In math, she has progressed from being reluctant to participate to being excited, and volunteers to go to the board to do problems. In reading, she is more excited and takes a leadership role in her small group.[38]

18. has seen improvement in Petitioner's performance since the beginning of the school year. In math, Petitioner now works faster with more accuracy. She has progressed from one-digit to three-digit operations, but has more difficulty with subtraction.[39]

19. Petitioner has exhibited stuttering. Her stuttering is inconsistent; she stutters more when she's excited.[40] In her speech therapy sessions, Petitioner has improved in processing, utilization and verbalization, and in applying a strategy to reduce her stuttering.[41]

20. Petitioner's social worker, believes she has made "excellent" progress towards her social emotional goals. He sees her in counseling sessions as well as in the cafeteria, at recess, and assemblies. Evidence of progress includes (1) no suspensions this year versus three last year, (2) she interacts very well with her non-disabled peers, and (3) although there have been altercations, she's been able to process and take responsibility for her actions.[42]

Conclusions of Law

Failure to Complete Childfind Procedures Timely

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.[43] No single procedure should be used as the sole criterion for determining

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testified that Petitioner interacts appropriately with non-disabled peers and would benefit from continued interaction with non-disabled peers.

[37] Testimony of Ms. Pelzman and testified that she has 22 students, but Ms. Pelzman testified that there were 23 students in the class when she visited on November 17, 2009.

[38] Testimony of

[39] Testimony of characterized Petitioner's work samples in DCPS Exh. No. 23 as third grade work.

[40] Testimony of and

[41] Testimony of

[42] Testimony of

[43] 34 C.F.R. §300.304(c)(4).

whether a child is a child with a disability and for determining an appropriate educational program for the child.[44] The results of the evaluations must be given considerable weight in determining the child's eligibility for services and in the development of the child's IEP.[45] Under local law, "DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment."[46]

The first inquiry is whether DCPS was on notice that Petitioner might be a child with a disability and delayed initiating evaluations to determine his eligibility. DCPS asserts that it was first put on notice in the fall of 2009 when it convened an MDT meeting and referred Petitioner for evaluations to determine his eligibility for services. Petitioner asserts that DCPS was on notice as early as the 2006-2007 school year when Petitioner was in grade at and performed poorly. The 2006-2007 school year is beyond the statute of limitations for IDEIA claims.[47] However, during the first two advisory periods of the 2007-2008 school year, Petitioner was "Below Basic" in Reading/English and Mathematics. At the end of the third advisory period, her teacher did not believe Petitioner was ready for the grade in Reading and Math. At the end of the school year, Petitioner was Below Basic in Math, Basic in Reading/English, Science, and Social Studies. Petitioner's teacher stated that Petitioner "has shown a great deal of academic and social growth," but "is still working below grade level. I strongly recommend that she attend summer school." Nevertheless, Petitioner was promoted to the grade. During the 2008-2009 school year, Petitioner was Below Basic throughout the school year in Reading/English, Math, and Social Studies. Her Work Habits and Personal & Social Skills were poor throughout the year, and she was retained at the end of the school year.

The Hearing Officer concludes that Petitioner has met her burden of proving that DCPS failed to initiate and complete childfind procedures when it was first put on notice that Petitioner might be a child with a disability. DCPS was aware of Petitioner's academic problems as early as the 2006-2007 school year.[48] Her lack of progress continued into the 2007-2008 school year, when Petitioner was performing Below Basic through the first two advisory periods. At the end of the third advisory period, when her teacher indicated that Petitioner was not ready for reading and math at the next grade level, DCPS had enough of a history to suspect that Petitioner's problems might be the result of a disability. Had DCPS initiated testing in the last quarter of the 2007-2008 school year, services could have been implemented by the beginning of the 2008-2009 school year.

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[44] 34 C.F.R. §300.304(b)(2).

[45] 34 C.F.R. §300.305(a).

[46] D.C. Code §38-2561.02(a). 5 D.C.M.R. §3004 (a) and (b)(1) provides that a referral for evaluations may be initiated in writing by the parent.

[47] 20 U.S.C. §1415(f)(3)(C). During the prehearing conference at in her opening statement at the hearing, Petitioner's counsel argued for the application of the exception to the two year limitation, where the LEA has engaged in a continuing violation or where the LEA withheld crucial information from the parent that impaired her ability to exercise her rights. 20 U.S.C. §1415(f)(D). Counsel withdrew her claim to the exception after Dr. Covington's testimony.

[48] P.Exh. No. 17; testimony of Dr. Covington.

Failure to Develop an Appropriate IEP

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[49] 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 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).[50]

Petitioner's most significant arguments as to the inadequacy of the IEP are (1) it fails to list other health impairment ("OHI") as a disability classification, (2) it fails to prescribe full-time specialized instruction, and (3) it fails to require that Petitioner be placed in a small-class setting with a low student-to-teacher ratio. During the hearing, Dr. Covington testified that Petitioner should have been assigned a reading specialist by the third quarter of the 2006-2007 school year, and that Petitioner requires year-around schooling to avoid regression during the summer months.

Incomplete Classification

Petitioner's counsel offered no authority for the proposition that an incomplete classification, by itself, renders an IEP inadequate. Moreover, the parties presented conflicting evidence in this case as to the appropriateness of Petitioner's diagnosis. Dr. Covington testified that she diagnosed Petitioner with ADHD based on rating scales completed by Petitioner's mother and teacher. However, Dr. Ramsey disputed this diagnosis. She criticized Dr. Covington's use of but one screen (Connors). Dr. Ramsey testified that she observed Petitioner on three occasions, and used three screens when she examined Petitioner. Dr. Ramsey found that Petitioner's symptoms were not consistent in

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[49] 458 U.S. 176 (1982).
[50] *Id.* at 181-82.

all environments: "It appears that [Petitioner's] mother sees more of these problematic behaviors at home, which are not seen as much in the classroom." Dr. Ramsey concluded that Petitioner did not meet the criteria for a diagnosis of ADHD.

At any rate, the December 2, 2009 included social/emotional goals and a behavior plan in addition to goals addressing Petitioner' learning disability. At least one of the goals was specifically directed to Petitioner's hyperactivity and inattentiveness: "[Petitioner] will stay on task during transitions with 80% accuracy." The January 27, 2010 IEP included two additional goals to address Petitioner's ADHD symptoms: "[Petitioner] will learn to utilize a daily agenda book in order to increase organizational skills (example: bringing home/turning it in) with 80% improvement;" and "[Petitioner] will increase her time on task during group instruction with 80% accuracy." Petitioner offered no evidence that her representative proposed goals and objectives to address Petitioner's ADHD symptoms that were rejected by the MDT. DCPS' witnesses testified that Petitioner's representatives never offered proposed goals at any of the MDT meetings. The Hearing Officer concludes that DCPS' failure to add OHI as a disability classification on the cover page of the IEP did not render the IEP inappropriate.

Educational Setting

Dr. Covington evaluated Petitioner during the third and fourth quarters of the 2008-2009 school year. Petitioner had been receiving subpar grades and teacher reports for two years, and Dr. Convington found that Petitioner was performing well below grade level. Dr. Covington recommended that Petitioner receive services in "a small, supportive, and structured classroom with a small student-teacher ratio that is designed to meet the needs of students with Specific Learning Disability." Dr. Covington also recommended that Petitioner receive services from a trained reading specialist three times per week. During the hearing, Dr. Covington testified that Petitioner required full-time specialized instruction and that Petitioner could not prosper in a large class that included non-disabled peers.

The Hearing Officer notes, however, that Dr. Covington never observed Petitioner in her general education environment, did not talk to any of Petitioner's teachers, and did not participate with Petitioner's teachers in any of the MDT meetings described above. Since Petitioner began receiving services during the second advisory period, she seems to be making academic progress. testified that Petitioner's handwriting has improved from illegible to legible. In math, she has progressed from being reluctant to participate to being excited, and she now volunteers to go to the board to do problems. In reading, she is more excited and takes a leadership role in her small group.
testified that Petitioner works faster and with more accuracy in math.
and Dr. Ramsey all testified that Petitioner has shown steady improvement in her ability to interact appropriately with her non-disabled peers, including a reduction in aggressive behavior and evincing leadership in small study groups.

The testimony of DCPS' witnesses is persuasive that the least restrictive environment for Petitioner is not a full-time private school. She appears to be able to

make academic progress in an environment in which she has contact with her non-disabled peers. The Hearing Officer also recognizes that Petitioner has received special education services for a relatively brief period of time in which dramatic progress is not likely to be evident. However, DCPS offered no tangible evidence that Petitioner is making progress in her current environment. Her latest test scores, reflected in Petitioner's Exhibits 15 and 16, and the work samples in DCPS Exh. 23 reveal that Petitioner continues to perform well below grade level. Therefore, the Hearing Officer concludes that Petitioner requires more of the supports recommended by Dr. Covington including full-time specialized instruction and intensive reading assistance. The specialized instruction may be provided in a combination of general education and resource room settings. If DCPS is not capable of providing such services at it must reconvene an MDT to determine a location where such services can be provided. Finally, in light of the evidence that Petitioner's math and reading scores dropped significantly from the spring of 2009 to the fall of 2009, Petitioner should receive services during the summer of 2010. In lieu of extended year services ("ESY") from DCPS, the Hearing Officer will authorize Petitioner to receive services from the Center during the summer of 2010.

Failure Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[51] 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.[52]

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.

The Hearing Officer has concluded that Petitioner's IEP fails to meet Petitioner's educational needs. The testimony suggests that those needs cannot be met at testified that does not offer full-time specialized instruction and little or

[51] 458 U.S. 176 (1982).
[52] *Rowley, supra,* at 200-01.

no pull-out services. Petitioner's proposed placement is a full-time, private special education school. 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."[53] "[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."[54] In this case, however, the Hearing Officer has concluded that a full-time out-of-general education setting is not the least restrictive environment. Therefore, the Hearing Officer will order the parties to convene an MDT meeting to revise the IEP consistent with this decision and to determine an appropriate placement for the implementation of the IEP.

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 15th day of March 2010, it is hereby

ORDERED, that Petitioner is authorized to obtain an evaluation of Petitioner from the ,[55] at DCPS expense, to determine if Petitioner would benefit from supplemental academic services in math and reading, and *Petitioner is not limited by 5 D.C.M.R. Section 3027.5.* Petitioner is authorized to obtain the services recommended in the evaluation, up to a maximum of 200 hours of services to be completed during the summer of 2010, at DCPS expense, and *Petitioner is not limited by 5 D.C.M.R. Section 3027.5.* DCPS shall provide transportation for Petitioner to attend the summer courses at

IT IS FURTHER ORDERED, that on or before April 9, 2010, DCPS shall convene an MDT meeting to review all current evaluations, revise Petitioner's IEP consistent with this decision, and discuss placement alternatives. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel, Kathy Zeisel, Esquire.

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

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[53] *Florence County School District Four v. Carter,* 510 U.S. 7, 11 (1993).
[54] *Id.*, 510 U.S. at 15-16.
[55]

seven days of the MDT meeting 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 in the event of DCPS' failure to comply with the terms of this Order, Petitioner's counsel will contact counsel for DCPS 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.

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 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: March 15, 2010