

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

Office of Review and Compliance

Student Hearing Office

Terry Michael Banks, Due Process Hearing Officer

1150 - 5th Street, S.E.; Room 3

Washington, D.C. 20003

(202) 698-3819

Facsimile: (202) 698-3825

Tmbanks1303@earthlink.net

OSSE
STUDENT HEARING OFFICE
2009 APR 15 PM 4: 24

Confidential

STUDENT, through the legal guardian¹) Complaint Filed: March 2, 2009
)
Petitioner,) Prehearing Order: March 20, 2009
)
v.) Hearing Date: April 6, 2009
)
THE DISTRICT OF COLUMBIA) Docket No.
PUBLIC SCHOOLS)
)
Respondent.)
)
Student Attending:)
)

HEARING OFFICER'S DECISION

Counsel for Petitioner: Fatmata Barrie, Esquire
10 R Street, N.E.
Washington, D.C. 20002
(202) 626-0040; Fax: (202) 626-0048

Counsel for DCPS: Kendra Berner, Esquire
Office of the General Counsel, DCPS
825 North Capitol Street, N.E.; 9th Floor
Washington, D.C. 20002

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.

Introduction

Petitioner is a year-old student attending

On March 2, 2009, Petitioner filed a Due Process Compliant Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") failed to (1) identify Petitioner as a child with a disability, (2) develop IEPs for Petitioner for the last two school years, (3) evaluate Petitioner in all areas of suspected disability, and (4) provide an appropriate placement. The due process hearing was convened on April 6, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated March 2, 2009
District of Columbia Public School's Notice of Insufficiency and Response to Petitioner's Due Process Complaint dated March 9, 2009
Prehearing Order dated March 23, 2009
Petitioner's Five-Day Disclosure dated March 31, 2009 (Exhibit Nos. 1-10)
DCPS' Five-Day Disclosure dated March 30, 2009 (Exhibit Nos. 1-5)
Attendance Sheet for hearing on April 6, 2009
CD-Rom of Hearing conducted on April 6, 2009

Witnesses for Petitioner

Samar Malik, Educational Advocate, Law Offices of Christopher N. Anwah
Petitioner's Mother
Dr. James Moses Ballard II, Clinical Psychologist

Witnesses for DCPS

LaTanya Randolph, School Psychologist, DCPS

Findings of Fact

1. Petitioner is a year-old student attending

2. On July 28, 2008, Dr. James Moses Ballard of Interdynamics, Inc. completed a Comprehensive Psychoeducational Evaluation of Petitioner. Dr. Ballard's findings and conclusions, *inter alia*, include the following:

The mother... admits to using alcohol and drugs during her pregnancy, with her drug of choice being heroin. [Petitioner] was born addicted to cocaine.

[Petitioner] completed the WISC-IV and the WIAT-II. His overall cognitive ability, as evaluated by the WISC-IV, cannot easily be summarized because his nonverbal reasoning abilities are much better developed than his verbal reasoning abilities. [Petitioner's] reasoning abilities on verbal tasks are generally in the Low Average range (VCI=85), while his nonverbal reasoning abilities are significantly higher and in the Average range (PRI=108).

[Petitioner] demonstrated relatively weak skills in Listening Comprehension, Math Reasoning, Numerical Operations, Reading Comprehension, Word Reading, and Written Expression on the WIAT-II.

[Petitioner] has a history of being withdrawn and of keeping to himself. He is also given to hyperactivity. He has a mercurial emotional capacity...

RECOMMENDATIONS

... [Petitioner] would benefit from one on one tutorial in pull out sessions. It is important to establish rapport with [Petitioner] in order to effectively teach him. Subjects in which he would need help include Math and Math Reasoning...³

Dr. Ballard administered the BASC-2 test that measures behavior and the Devereaux Scales of Mental Disorder. With respect to the BASC, many of Petitioner's scores were Clinically Significant (high level of maladjustment) or At-Risk (significant problem that may not be severe enough to require formal treatment or may identify the potential of developing a problem that needs careful monitoring). From the Devereaux, Dr. Ballard drew the following conclusions:

[Petitioner] is experiencing mixed depressive reaction and anxiety is present. His inability to handle these emotions gives rise to maladaptive

² *Complaint* at 1.

³ P.Exh. No. 3 at 10-11.

behaviors (conduct). The following descriptors were identified by his mother as occurring Very Frequently:

- Withdraws and avoids social contact
- Cuts or skips classes
- Remains alone or isolated
- Fails to control his anger
- Becomes easily upset or frustrated
- Runs away from home⁴

3. On August 14, 2008, Dr. Spencer Johnson of Interdynamics completed a Psychiatric Evaluation of Petitioner. Dr. Johnson diagnosed Petitioner with Attention Deficit Hyperactivity Disorder (“ADHD”), Inattentive Type, Oppositional Defiant Disorder (“ODD”), and Dysthymic Disorder (“DD”).⁵ Dr. Johnson’s findings and recommendations, *inter alia*, include the following:

[Petitioner] is a fifteen year old African American male with a history of school failure and behavior concerns since middle school, where he was also retained. He has been asked to leave two public high schools and recommended for alternative programming. In spite of the multiple years of school failure, suspensions and retention, [Petitioner] reportedly has not received any special services in school. He will need some assistance beyond a typical regular special education and supports in school. [Petitioner] could benefit from both supportive psychotherapeutic measures and targeted psychopharmacologic medications.

It can be expected that [Petitioner] will resist involvement in therapy, as he is not inclined to believe that the therapist will act in his best interests. This is directly related to the involvement with social services agencies and his view of them as threats to his family. Treatment efforts for this introverted and anxious young man are best directed toward countering his withdrawal tendencies. Minimally introspective and exhibiting diminished affect and energy, [Petitioner] must be prevented through counseling from becoming totally isolated. He currently spends less time in school. His mother reports his school is often calling and reporting his absence from school. However, [Petitioner] denies truancy.

4. During the 2006-2007 school year at School
Petitioner failed five courses, received Ds in D.C. History and World Geography, and Cs in English I and Physical Education. During the 2007-2008 school year (10th grade), Petitioner failed the only four courses shown on his transcript. During the fall semester of the 2008-2009 school year, and placed back the grade, Petitioner

⁴ *Id.* at 8-10.

⁵ P.Exh. No. 6 at 2.

failed or failed to attend all of his courses. Petitioner's absences exceeded 55 days in all of his courses except Seminar in the Visual Arts, which he missed 33 times.⁶

5. DCPS convened a Multidisciplinary Team ("MDT") meeting at _____ on February 24, 2009. Petitioner's parent joined the meeting by phone more than an hour after the meeting had begun, but Petitioner was represented throughout the meeting by Ms. Malik.⁷ Much of the discussion at the meeting concerned Petitioner's truancy:

As of today he has missed a total of 86 days of full and half at this school. He has absences and cuts classes. He has missed 605 individual classes. The school records indicate various letters sent home that were certified regarding attendance. The parent indicated receiving those letters. A recent records review indicates the following: Letters sent by _____ on 11/17/08 which indicates over 20 days of unexcused absences (at that time) from _____. Also on 1/22/09 an Attendance Intervention Conference was held. The parent indicates her participation in this meeting. This meeting indicated that the student was/is not present to implement attendance interventions. At this meeting with the parent's assistance, time, and recommendations, additional intervention strategies were developed that included suggestions... The parent and advocate did not indicate any follow up with these outside interventions composed at the 1/22/09 Attendance Intervention Conference.⁸

Petitioner's mother stated that she was unaware of Petitioner's whereabouts when he leaves home.⁹ She said that sometimes "he does come home after school and sometimes he does not. She stated 'he is a teenager' and she is in a program herself and can't keep up with him. Social Worker indicated ... that student was residing with his older girlfriend."¹⁰ The MDT determined that due to Petitioner's absences, it could not rule out his lack of receiving appropriate instruction (citing 34 C.F.R. Section 300.306) as the cause of his academic problems, and declined to find him eligible for special education services.¹¹

⁶ P.Exh. No. 9.

⁷ P.Exh. No. 2 at 1.

⁸ P. Exh. No. 2 at 2.

⁹ During the hearing, Petitioner's mother testified that Petitioner resided with his girl friend for a period of time.

¹⁰ P.Exh. No. 2 at 4-5.

¹¹ *Id.* at 6.

Conclusions of Law

Failure to Identify Petitioner as a Child with a Disability

The MDT on February 24th declined to identify Petitioner as a child with a disability because it could not rule out his lack of presence to receive instruction, rather than his emotional disorders, as the primary reason for his academic failures. Counsel submitted copies of *Letter to Borucki*,¹² and *Department of Education v. Cari Rae*¹³ for the proposition that a local education agency (“LEA”) must provide a free appropriate education even to students who refuse to attend classes. However, counsel filed no memorandum of points and authorities demonstrating the precedential value of these authorities in this case.

In *Letter to Borucki*, the U.S. Department of Education’s Office of Special Education Programs stated that the Education of the Handicapped Act, the first law enacted to ensure access to public education for disabled students, required school districts to provide services even when students do not cooperate with school officials:

[w]hile EHA-B does not require that school officials be held accountable for a student’s progress, the failure of a student to cooperate with school staff does not relieve the school officials of the responsibility to provide a FAPE to that child...

Your letter indicates that in this situation, the placement team believes that the child’s current placement is appropriate. However, the student’s failure to cooperate with school staff may be an indication of the need for a reevaluation, a revision in the child’s IEP, or a change in the child’s educational placement.

In this case, there was no evidence that Moore abandoned its obligation to provide services to Petitioner. As noted in the Findings of Fact, Moore attempted intervention strategies to address Petitioner’s absenteeism that simply did not work. Petitioner’s mother was routinely unaware of his whereabouts during the day and, despite his status as a minor, permitted him to reside with his older girl friend for an extended period of time. Petitioner failed to make himself available for educational services, resulting in failing grades. Therefore, in this Hearing Officer’s opinion, *Letter to Borucki* is inapplicable to the circumstances in this case. The Hearing Officer is unsure why Petitioner’s counsel cited *Cari Rae* other than the fact that the student in that case was absent 79 days. However, the case offers no support for the proposition that the school system must provide special education services for a student who refuses to attend classes.

There was no persuasive showing that Petitioner’s absenteeism was caused by a disability. Dr. Ballard testified that Petitioner should be found eligible for services with

¹² 16 IDELR 884 (OSEP 1990).

¹³ 158 F. Supp. 2d 1190 (D.Haw. 2001)

classifications of other health impaired (“OHI”) due to his ADHD and emotional disturbance (“ED”). However, Dr. Ballard made no such recommendation in his extensive Comprehensive Psychological Evaluation in July 2008. Although he administered the BASC and the Devereaux, he drew no conclusions and made no recommendations relating to social and emotional impacts on Petitioner’s academic performance.¹⁴ Dr. Ballard also testified that Petitioner’s emotional problems affect his ability to attend school. However, in response to a question from the Hearing Officer, Dr. Ballard admitted that he never asked Petitioner why he fails to attend classes.

The regulations define emotional disturbance (“ED”) as follows:

A condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

An inability to learn that cannot be explained by intellectual, sensory, or health factors.

An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

Inappropriate types of behavior or feelings under normal circumstances.

A general pervasive mood of unhappiness or depression.

A tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance. Diagnosed through psychological evaluations.¹⁵

The regulations define an other health impairment as follows:

Having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –

Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder,

¹⁴ In his discussion of the results of the Devereaux evaluation, Dr. Ballard cited Petitioner’s mother’s report that Petitioner often “cuts or skips classes.” But Dr. Ballard reached no conclusion that Petitioner’s absences were a consequence of his disorders.

¹⁵ 34 C.F.R. §300.8(c)(4).

diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

Adversely affects a child's educational performance.¹⁶

Ms. Randolph, the School Psychologist that participated in the eligibility determination, did not dispute Petitioner's diagnoses of ADHD, ODD, and DD. She testified that despite these diagnoses, the MDT could not rule out Petitioner's failure to receive instruction due to his absences as the primary reason for his poor academic record.¹⁷

The Hearing Officer also does not question the validity of Dr. Johnson's diagnoses. The issue is not whether Petitioner has emotional issues, but whether these emotional issues are the reason for his poor performance in the classroom. Dr. Ballard testified that Petitioner's emotional problem causes him to avoid going to class. If the Hearing Officer accepted this opinion as valid, it would follow that Petitioner's disorders cause his absences and, therefore, that he is ED within the meaning of IDEIA. However, the Hearing Officer is not persuaded that Dr. Ballard's opinion is valid. First, inexplicably, Dr. Ballard never asked Petitioner why he did not attend classes. Second, Petitioner did not appear for the hearing and explain why he does not attend classes. Thus, Petitioner's reasons for not attending classes are largely speculative, other than the period of time he lived with his older girl friend.

Third, Petitioner was diagnosed with ADHD, ODD, and DD. Dr. Ballard did not explain, and nothing in the record offers an explanation, why a student with these diagnoses would be expected to avoid coming to school. Disruptive or inattentive behavior would be expected, but the Hearing Officer is unconvinced that non-attendance is an ordinary consequence of any of these diagnoses. For these reasons, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS acted unreasonably when it declined to identify Petitioner as a child with a disability.¹⁸

Failure to Evaluate in All Areas of Suspected Disability

The LEA must evaluate a child suspected of a disability in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and

¹⁶ 34 C.F.R. §300.8(c)(9).

¹⁷ Ms. Randolph cited 34 C.F.R. §300.306, which provides that a student may not be found eligible if lack of instruction is the cause of poor performance:

“(b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part—(1) If the determinant factor for that determination is—(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA); (ii) Lack of appropriate instruction in math.”

¹⁸ The *Complaint* also alleged DCPS' failure to (1) provide an appropriate placement, and (2) develop an IEP for the last two school years. Since Petitioner was not identified as a child with a disability, DCPS was not obligated to provide these services to Petitioner. 34 C.F.R. §300.101(a)(1); 34 C.F.R. §300.107(a) and (b).

motor abilities.¹⁹ No single procedure should be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.²⁰

At the prehearing conference, Petitioner's counsel argued that DCPS has failed to conduct a functional behavior assessment ("FBA") of Petitioner despite his ODD diagnosis. DCPS argued that an FBA is not an evaluation it is required to conduct to determine a student's disability. At the hearing, Petitioner offered no testimony as to the need for an FBA, and Petitioner's counsel did not address the issue in either her opening or closing statement. The Hearing Officer's understanding of the purpose of an FBA is to develop strategies to address behavioral issues exhibited in the classroom. In this case, there is no dispute as to Petitioner's diagnoses: ADHD, ODD, and DD. There was no testimony that his disorders caused behaviors that led to inappropriate behaviors in the classroom. Petitioner's problem is his refusal to come into the classroom, not misbehavior when he is present. The Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS failed to evaluate him in all areas of suspected disability.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented at the hearing, and the representations of the parties' counsel at the hearing, this 15th day of April 2009, it is hereby

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

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

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

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

/s/
Terry Michael Banks
Hearing Officer

Date: April 15, 2009

¹⁹ 34 C.F.R. §300.304(c)(4).

²⁰ 34 C.F.R. §300.304(b)(2).