

**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

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Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: June 8, 2009
)	
Petitioner,)	Prehearing Order: July 6, 2009
)	
v.)	Hearing Date: July 13, 2009
)	July 16, 2009
THE DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS)	Docket No.
)	
Respondent.)	
)	
Student Attending:)	
)	

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HEARING OFFICER'S DECISION

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¹ Personal identification information is provided in Appendix A.

Jurisdiction

This proceeding was conducted in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Background

Petitioner is an _____ year-old student attending _____

On June 8, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) provide an appropriate disability classification, (2) develop appropriate Individualized Education Programs ("IEPs"), and (3) provide an appropriate placement. In a Prehearing Order issued on July 6, 2009, the Hearing Officer determined the issues to be adjudicated at the hearing to be as follows:

- DCPS' alleged failure to provide an appropriate disability classification

Petitioner alleges that despite his having been diagnosed with two mood disorders, DCPS classified him with only a learning disability ("LD") instead of multiple disabilities: LD/emotional disturbance ("ED"). DCPS asserts that Petitioner was appropriately evaluated and classified.

- DCPS' alleged failure to develop appropriate IEPs for school years 2007-08, 2008-09, and 2009-10.

Petitioner alleges that his 2007-08 and 2008-09 IEPs lacked appropriate present level of performance, since they were based on 2005 test data; the 2008-09 IEP provided an insufficient amount of services when it reduced Petitioner's specialized instruction from 25 to 15 hours and halved his behavioral support counseling; the goals and objectives remained the same from year to year; and the 2009-2010 IEP further reduced Petitioner's specialized instruction, and the goals and objectives do not address his academic and emotional needs.

DCPS asserts that Petitioner's 2007-2008 IEP was adopted from Petitioner's previous school, Petitioner's goals and objectives on his 2008-09 IEP remained the same due to 82 days of absences during the 2007-08 school year; the current IEP, developed on November 4, 2008, has updated performance levels, eliminated occupational therapy services, and has service levels that meet Petitioner's needs. Petitioner's mother opted out of an IEP meeting

in March 2009 that eliminated the "Read Aloud" accommodation for the DC CAS that had been included in Petitioner's November 2008 IEP; Petitioner's next IEP will be developed on or before November 4, 2009.

- DCPS' alleged failure to provide an appropriate placement

Petitioner contends that Tubman is an inappropriate placement because Petitioner is in a general education setting, his service levels have been severely reduced, and a Multidisciplinary Team ("MDT") in March 2008 determined that a new placement might be necessary to control Petitioner's increasingly dangerous behavior. DCPS asserts that Petitioner's academic problems are primarily the result of his absences during the 2007-2008 school year. He has received inclusion support as well as his prescribed related services, and had an improved attendance record and showed academic progress in the 2008-09 school year.

The due process hearing was convened on July 13, 2009 and completed on July 16, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated June 8, 2009
DCPS Resolution Session Waiver dated June 11, 2009
District of Columbia Public School's Response to Petitioner's Due Process Complaint dated June 23, 2009
Parent's Motion for Notices to Appear dated July 1, 2009
Prehearing Order dated July 6, 2009
DCPS' Five-Day Disclosure dated July 6, 2009 (Exhibit Nos. 1-15)
Petitioner's Five-Day Disclosure dated July 6, 2009 (Exhibit Nos. 1-32)
Attendance Sheet for hearings on July 13, 2009 and July 16, 2009
Joint Statement of Facts Not in Dispute dated July 16, 2009

Witnesses for Petitioner

Petitioner's Grandmother
Dr. Seth King, Psychologist
Principal,
Director of Special Education,
Principal,

Witnesses for DCPS

Special Education Coordinator,

Findings of Fact

1. Petitioner is an _____ year-old student attending _____
2. Petitioner was enrolled in the _____ Grade at _____ School during the 2007-2008 School Year.³
3. Petitioner repeated the _____ Grade at _____ School during the 2008-2009 School Year due to truancy.⁴
4. Petitioner was first identified as eligible for special education as a Learning Disabled (“LD”) student in 2006 through a series of evaluations completed at _____ His disability classification has not changed since 2006.⁵
5. _____ developed the first IEP for Petitioner on March 7, 2006. The IEP classified Petitioner as LD, and called for thirteen hours of special education, including ten hours a week of Specialized Instruction, one hour a week of Speech and Language (“S/L”) Services, one hour a week of Psychological Services, and one hour a week of Occupational Therapy (“OT”).⁶
6. _____ developed an IEP for Petitioner on June 5, 2007. The IEP classified Petitioner as LD, and increased Petitioner's special education services by fifteen hours. The IEP prescribed twenty five hours a week of Specialized Instruction, one hour a week of S/L Services, one hour a week of Psychological services, and one hour a week of OT services.⁷
7. _____ developed an IEP for Petitioner on March 3, 2008. The IEP classified Petitioner as LD, and scheduled him to receive twenty-eight hours a week of special education services, including twenty five hours a week of Specialized Instruction, one hour a week of S/L Services, one hour a week of Psychological services, and one hour a week of OT services.⁸

² *Complaint* at 1.

³ Joint Statement of Facts Not in Dispute.

⁴ *Id.*

⁵ *Id.*

⁶ Joint Statement of Facts Not in Dispute.

⁷ *Id.*

⁸ *Id.*

8. The Present Levels of Performance for the March 3, 2008 IEP are based on testing completed in June 2005 (Academic Areas, Communication, Social Emotional Behavioral (no scores reported), and February 2006 (Motor/Health).⁹

9. The goals and objectives listed in Visual Perceptual Motor, Math, Communication and Behavioral on the March 3, 2008 IEP are identical to those from the IEP developed by _____ on June 5, 2007.¹⁰

10. The short-term objectives listed for "Reading" on the March 3, 2008 IEP are identical to the short-term objectives listed for Language Arts on the June 5, 2007 IEP.¹¹

11. _____ Petitioner's Special Education Teacher at _____ completed an Educational Assessment of Petitioner on April 15, 2008.¹² Petitioner's grade equivalent scores ranged from 1:6 to 3:4: Total Achievement was 2:0, Broad Reading 1:6, Broad Math 3:1, and Broad Written Language 1:7.¹³

12. Dr. Denise Daniels, DCPS Psychologist, completed a Psychological Re-Evaluation of Petitioner on June 30, 2008. Dr. Daniels indicates she reviewed Ms. Lappin's classroom notes on Petitioner's behavior, and Dr. Wilder's 2005 Psycho-Educational Evaluation for her evaluation.¹⁴ On the Wechsler Abbreviated Scale of Intelligence, Petitioner's Full Scale IQ was 85, Average. On the Woodcock Johnson III Tests of Achievement, "Results denote deficits in reading and writing and average range in math."¹⁵ Dr. Daniels' additional findings and conclusions, *inter alia*, include the following:

To help determine if any ability/achievement discrepancies exist, comparisons were made between Petitioner's cognitive can achievement scores. Significant discrepancies were found between Petitioner's overall intellectual ability and his academic skills. Given Petitioner's severe attendance problem where he missed 105 of 160 days of school that he attended _____ it is clear that this current school year Petitioner missed most of the instruction that was provided and therefore we cannot assume that his academic deficits are due to a learning disability but would be directly a result of lack of instruction. However, since Petitioner was determined to be learning disabled prior to this year where he experienced extreme absenteeism, I will defer to his previous evaluation that determined that he was learning disabled. Educationally, Petitioner's

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Joint Statement of Facts Not in Dispute.

¹³ Petitioner's Exhibit ("P.Exh.") No. 18-3.

¹⁴ Joint Statement of Facts Not in Dispute.

¹⁵ P.Exh. No. 21-4.

present disability is listed as Learning Disabled. Petitioner continues to meet the disability criteria as a Learning Disabled student.¹⁶

13. updated Petitioner's IEP on November 24, 2008. The IEP again classified Petitioner as LD. The MDT reduced Petitioner's special education services by eight and one-half hours: fifteen hours a week of Specialized Instruction (down from twenty-five), one hour a week of Speech and Language Services, and half an hour a week of Behavioral Support services (down from an hour).¹⁷ Petitioner's special education teacher reported that he "has improved this year. He seems happier under care of his grandmother. Petitioner seems to be eager to learn and he attempts all assignments she gives him." His general education teacher reported that Petitioner "is a hard worker when he is engaged... She feels that he is more alert now that medication has been adjusted. There are now 24 students in the classroom – all males. [Petitioner] enjoys working in small groups."¹⁸

14. Petitioner's grandmother did not check the box on the November 24, 2008 IEP to indicate that she agreed with the contents of the IEP.¹⁹

15. On January 5, 2009, Dr. Seth King of the D.C. Department of Mental Health, completed a Psychoeducational Evaluation of Petitioner. Dr. King diagnosed Petitioner with a Learning Disorder, NOS, Attention Deficit Hyperactivity Disorder, Combined Type, Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, Neglect of Child, and Enuresis.²⁰ Dr. King's findings and recommendations regarding Petitioner's present levels of performance, *inter alia*, include the following:

In regard to achievement (academic) testing, Petitioner earned a Low score on the Broad Math Cluster and Very Low (similar to the Extremely Low classification) scores on the Broad Reading, Broad Written Language, and Oral Language Clusters... His Broad Math score fell approximately two years below his same-age norm group, his Broad Reading and Written Language scores fell more than three years below his norm group, and his Oral Language score fell about four years below his norm group. His cluster scores spanned from the 1st (Oral Language and Broad Reading) and 2nd (Broad Written Language) to the 3rd grade (Broad Math) equivalent levels. When a selected set of his achievement areas were compared, the youth demonstrated a significant weakness in broad reading.

Overall, Petitioner's Full Scale IQ score actually falls within the range that is typically associated with Mild Mental Retardation. This diagnosis does not appear to be warranted, however, as some of his index scores reached the upper end of the Borderline and the Low Average ranges. Also, it is

¹⁶ P.Exh. No. 21-5.

¹⁷ Joint Statement of Facts Not in Dispute.

¹⁸ P.Exh. No. 14-1-2.

¹⁹ Joint Statement of Facts Not in Dispute

²⁰ P.Exh. No. 22-11.

likely that the respondent's reported exposure to educational neglect and distracting emotional stressors have negatively impacted his development of cognitive and academic skills... It is possible that Petitioner presents with Reading Disorder and/or Disorder of Written Expression as those are the subjects with which he struggles most. However, a diagnosis of Learning Disorder Not Otherwise Specified (NOS) seems to be most appropriate at this time as his scores reflected deficits of at least two years across all achievement areas that were tested. It is possible that the respondent's scores in at least some cognitive and achievement exercises could rise if his school attendance and programming is stabilized over the next few years...

Recommendations:

[H]e requires individualized instruction and he would benefit from tutoring as well as practice with his caregiver outside of school to supplement learning principles (i.e., reading, writing, etc.)... A behavioral modification program that targets a few specific behaviors might be beneficial...

Petitioner should continue to be provided with individual psychotherapy on a weekly basis to address and monitor symptoms of emotional distress and behavioral problems... Additionally, individual and/or group therapy should assist the youth in enhancing his coping, anger and impulse control, social, and interpersonal skills...²¹

16. Petitioner has been accepted at _____ Schools.²² _____ is a private school offering full-time special education services to students whose primary disability is emotional disturbance ("ED"). Pathways has a Certificate of Approval from the Office of the State Superintendent of Education for the District of Columbia ("OSSE"). All of its students receive individual therapy once a week and group therapy twice a week. All students participate in a behavior modification program in which students earn points for appropriate behaviors which result in tangible rewards. The maximum class size is nine students. Each class is led by a certified teacher who is assisted by an aide. S/L and OT services are provided through outside contractors. _____ employs one full-time licensed social worker who provides psychological counseling.²³

Conclusions of Law

Failure to Identify Petitioner as a Child with an Emotional Disturbance

The regulations define emotional disturbance ("ED") as follows:

²¹ P.Exh. No. 22-12-14.

²² P.Exh. No. 24-1.

²³ Testimony of Mr. Okine.

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.²⁴

Petitioner's claim that he has been misclassified is based primarily on testimony from his grandmother as to a long history of misbehavior, and Dr. King's evaluation that diagnosed Petitioner with "Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, Neglect of Child." Dr. King also testified that he believes Petitioner should be classified ED and with mental retardation, and that Petitioner's Adjustment Disorder affects his ability to develop relationships, causes him to lash out, curse in class, to lack coping skill, and causes him to be prone to act-out and cause disruptions. However, when Petitioner's latest IEP was developed in November 2008, there was no current evaluation that suggested that Petitioner had an emotional disturbance.²⁵ Moreover, both of his teachers reported that Petitioner was performing much better during the 2008-2009 school year; neither teacher reported any behavioral issues. In the absence of persuasive evidence that Petitioner's emotional problems were having an adverse impact on Petitioner's academic performance during the 2008-2009 school year, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that he has been misclassified.

²⁴ 34 C.F.R. §300.8(c)(4).

²⁵ In 2005, Dr. Belton Wilder conducted a Clinical Evaluation and diagnosed Petitioner with Disruptive Disorder, NOS, but "Overall, test results did not suggest that this young man is experiencing mild depression... It seems that [Petitioner] is learning that negative behavior is better than no behavior. His social and emotional difficulties are likely to make him mentally unavailable for class instruction." P.Exh. No. 17-3-4.

Failure to Develop an Appropriate IEP

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“*Rowley*”),²⁶ 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

“(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).²⁷

Petitioner alleges that his 2007-08 and 2008-09 IEPs lacked appropriate present level of performance, since they were based on 2005 test data; the 2008-09 IEP provided an insufficient amount of services when it reduced Petitioner's specialized instruction from 25 to 15 hours and halved his behavioral support counseling; the goals and objectives remained the same from year to year; and the 2009-2010 IEP further reduced Petitioner's specialized instruction, and the goals and objectives do not address his academic and emotional needs. That Petitioner's goals and objectives did not change from year to year does not necessarily undermine the appropriateness of his IEP. A local exchange agency (“LEA”) does not guarantee academic success to a student when it develops a goals and objectives on an IEP. If the student fails to achieve the stated objectives, those objectives must either be reduced or repeated the following year. However, under those circumstances, it does not follow that the student's level of services should be reduced. Despite lack of progress on his 2007-2008 goals and objectives, the November 2008 MDT reduced Petitioner's specialized instruction by ten hours per week. No adequate explanation was offered in the IEP meeting notes or

²⁶ 458 U.S. 176 (1982).

²⁷ *Id.* at 181-82.

through testimony at the hearing. Therefore, the Hearing Officer concludes that Petitioner has met his burden of proving that DCPS failed to develop an appropriate IEP.²⁸

Failure to Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“*Rowley*”),²⁹ 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.³⁰

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

In April 2008, Petitioner’s grade equivalent scores on Ms. Lappin’s evaluation ranged from 1:6 to 3:4: Total Achievement was 2:0, Broad Reading 1:6, Broad Math 3:1, and Broad Written Language 1:7.³¹ Eight months later, Dr. King’s evaluation revealed that Petitioner had made no significant improvement. “His Broad Math score fell approximately two years below his same-age norm group, his Broad Reading and Written Language scores fell more than three years below his norm group, and his Oral Language score fell about four years below his norm group. His cluster scores spanned from the 1st (Oral Language and Broad Reading) and 2nd (Broad Written Language) to the 3rd grade (Broad Math) equivalent levels.”³² DCPS offered no documentation or testimony to refute this evidence. DCPS’ primary defense on the placement issue was that Petitioner was chronically absent. However, the only documentation of Petitioner’s absences was an

²⁸ The MDT also reduced Petitioner’s psychological counseling by thirty minutes per week. However, in light of the very positive reports on Petitioner’s classroom attentiveness and participation at the meeting from his general education and special education teachers, there was a basis for the MDT to conclude that Petitioner’s psychological counseling could be reduced.

²⁹ 458 U.S. 176 (1982).

³⁰ *Rowley, supra*, at 200-01.

³¹ P.Exh. No. 18-3.

³² P.Exh. No. 22-12.

attendance report that contained no data since March 2008.³³ The only DCPS testimony regarding Petitioner's absences was offered by Ms. Morse, who testified that Petitioner's truancy problems ended in March 2008. Thus, the Petitioner's lack of academic progress between the Lappin and King evaluations cannot fairly be attributed to Petitioner's failure to be available for instruction. Therefore, the Hearing Officer concludes that Petitioner has met his burden of proving that DCPS has failed to provide an appropriate placement.

School

would be an appropriate placement for Petitioner. It has a Certificate of Approval from OSSE. It offers a small-class environment with a low student-to-teacher ratio. Pathways employs or contracts with service providers who can deliver the related services prescribed in Petitioner's IEP. Although serves students whose primary disability is ED, Petitioner's primary disability is LD. Nevertheless, the Hearing Officer believes that Petitioner can derive educational benefit at . Dr. King offered persuasive testimony that Petitioner should be classified as ED. While the Hearing Officer found that DCPS did not err by failing to provide Petitioner an ED classification, this finding was based on reasonableness of the decision made by the MDT in November 2008. While the MDT was justified in maintaining Petitioner's LD classification at that time, Dr. King's subsequent evaluation and testimony provide support for placement at a facility serving ED students.

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."³⁴ "[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."³⁵

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented at the hearing, the *Joint Statement of Facts Not in Dispute*, and the representations of the parties' counsel at the hearing, this 26th day of July 2009, it is hereby

ORDERED, that DCPS shall immediately issue a Prior Notice placing Petitioner at Pathways for the 2009-2010 school year, including transportation and all other appropriate related services.

³³ DCPS Exh. No. 10.

³⁴ *Florence County School District Four v. Carter*, 510 U.S. 7, 11 (1993).

³⁵ *Id.*, 510 U.S. at 15-16.

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

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

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

_____/s/_____
Terry Michael Banks
Hearing Officer

Date: July 26, 2009