

**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
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STUDENT, through the legal guardian¹) **Complaint Filed: May 14, 2009**
)
 Petitioner,) **Prehearing Order: June 23, 2009**
)
 v.) **Hearing Date: June 24, 2009**
)
 THE DISTRICT OF COLUMBIA) **Docket No.**
 PUBLIC SCHOOLS)
)
 Respondent.)
)
 Student Attending:)
)

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.

Introduction

Petitioner is an _____ year-old student attending _____

On November 19, 2008, Petitioner filed a Due Process Compliant Notice alleging that the District of Columbia Public Schools ("DCPS") failed timely to complete procedures to identify Petitioner as a child with a disability. The due process hearing was convened on December 18, 2008. On December 26, 2008, this Hearing Officer issued a Hearing Officer's Decision ("HOD") concluding that Petitioner had met her burden of proof. The HOD required DCPS to convene a Multidisciplinary Team ("MDT") meeting within fifteen school days of its receipt of four independent evaluations from Petitioner. The MDT was ordered to review all current evaluations and determine Petitioner's eligibility for special education services. If the MDT determined that Petitioner were eligible for services, it would develop an Individualized Education Program ("IEP") and discuss placement alternatives.

On May 14, 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) provide an appropriate placement, (3) develop an appropriate Individualized Education Program ("IEP"), and (4) evaluate Petitioner in all areas of suspected disability. In a Prehearing Order issued on June 23, 2009, the Hearing Officer determined the issues to be adjudicated at the hearing to be as follows:

- DCPS' alleged failure timely to complete childfind procedures

Petitioner alleges that despite recommendations in comprehensive psychological, speech and language, psychiatric, and functional behavior evaluations, DCPS found Petitioner to be ineligible for special education services at a Multidisciplinary Team ("MDT") meeting on April 14, 2009. DCPS asserts that the determination of ineligibility was reasonable and appropriate; Petitioner's 29 absences impacted her performance and her teachers report that she can perform adequately when she is present in class.

- DCPS' alleged failure to evaluate Petitioner in all areas of suspected disability

Petitioner alleges that a January 20, 2009 evaluation diagnosed Petitioner with Attention Deficit Hyperactivity Disorder ("ADHD"), and a December 18, 2008 psychoeducational evaluation recommended that Petitioner receive an occupational therapy ("OT") evaluation, but DCPS has failed to conduct the necessary evaluations. DCPS asserts that it granted Petitioner authority to obtain an independent evaluation to evaluate Petitioner for ADHD, but the MDT determined appropriately that Petitioner did not require an OT evaluation.

- The *Complaint* also alleges DCPS' failure to (1) provide an appropriate placement, and (2) develop an IEP. Since Petitioner has not yet been identified as a child with a disability, DCPS is not obligated to provide these services to Petitioner.² Therefore, these issues will not be adjudicated.

The due process hearing was convened on June 24, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated May 14, 2009
DCPS Resolution Session Waiver dated May 14, 2009
District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice dated May 21, 2009
Interim Order dated June 8, 2009
DCPS' Five-Day Disclosure dated June 17, 2009 (Exhibit Nos. 1-13)
Petitioner's Five-Day Disclosure dated June 17, 2009 (Exhibit Nos. 1-18)
Prehearing Order dated June 23, 2009
Attendance Sheet for hearing on June 24, 2009
Petitioner's Findings of Fact and Conclusions of Law dated July 1, 2009

Witnesses for Petitioner

Dr. James Ballard, Psychologist
Petitioner's Mother
Samar Malik, Educational Advocate, James E. Brown & Associates

² 34 C.F.R. §300.101(a)(1); 34 C.F.R. §300.107(a) and (b).

Witnesses for DCPS

Teacher,
, Teacher,
Special Education Coordinator,

Findings of Fact

1. Petitioner is an _____ year-old student attending _____
2. In a Report or Student Progress on November 17, 2008, Ms. Young referred Petitioner for tutoring in reading. Ms. Young did not indicate that Petitioner had "Attendance Problems," but that Petitioner was "Lacking Basic Skills (Learn math facts)," "Lack of effort/poor," "Insufficient class participation," "Assignments late/incomplete," "Missing projects/reports," and "Scores poorly on tests/quizzes."⁴
3. On December 18, 2008, Manal Abukishk of Interdynamics, Inc. completed a Comprehensive Psychoeducational Evaluation of Petitioner. Mr. Abukishk's findings and recommendations, *inter alia*, include the following:

On the Weschler Intelligence Scale for Children – 4th Edition, [Petitioner] obtained a Full Scale IQ of 77 (FSIQ=77) which places her overall intellectual functioning within the Borderline range and at 10th percentile when compared to same aged peers. No significant discrepancy was found between her Verbal Comprehension Composite Index score (VCI=81, Low Average) to her Perceptual Reasoning Performance (PRI=79, Average), indicating that her Full Scale IQ is the best representative estimate of her global intellectual functioning.

[Petitioner's] WISC-IV performance indicates that there is no real difference between her ability to reason with and without the use of words. Given that her Full Scale IQ is in the Borderline (FSIQ=77), [Petitioner] may have trouble in keeping up with her peers in a wide range of situations that require age appropriate thinking and reasoning abilities.

[Petitioner's] performance on the Achievement Assessment as was measured by the WJ-III shows that [Petitioner] performs below her grade level in most academic areas. [Petitioner's] academic skills are limited to Average. Although Jennifer's overall reading standard score is within the Low Average range when compared to others her age, her performance varied on two different types of reading tasks. [Petitioner's] performance is Average on tasks requiring reading decoding and the ability to identify words. However, her performance is very limited on tasks requiring the

³ Complaint at 1.

⁴ Petitioner's Exhibit ("P.Exh.") No. 8.

ability to use syntactic and semantic cues in comprehending written discourse as it is being read. [Petitioner's] WJ-III performance indicated pronounced difficulties in the area of Reading Comprehension as she performed in the Borderline range of functioning and at the 7th percentile when compared to same aged peers...

Jennifer's Mathematics Calculation skills standard score is within the Low to the Low Average range... math calculation tasks above the age 9-11 level will be quite difficult for her.

[Petitioner's] VMI score was 77... placing her Visual-Motor skills in the Borderline range of functioning and at the 6th percentile when compared to peers her age. [Petitioner's] VMI performance suggests that [Petitioner] has problems performing tasks that required visual-motor integration skills such as writing...

The BASC-2 and her Human Figures Drawings coupled with her own testing behavior suggest that [Petitioner] experiences feelings of inadequacy and inferiority resulting from her academic difficulties and her overall poor academic performance. As a way to deal with these feelings, she reportedly develops somatic complaints in order to avoid attending school...

RECOMMENDATIONS

...[T]he results of the Psychoeducational Assessment identified [Petitioner] as having a Learning Disability (NOS), and hence qualifies her for Special Education services.

In terms of her academic instructions, [Petitioner] would benefit from being placed in a small classroom setting where her specific academic needs can be accommodated. Specifically, [Petitioner] will benefit from receiving one-on-one classroom assistance in identified areas of weakness...

Due to fine motor and visual-motor integration difficulties that were evidenced in her testing performance, and as was reported by his mother, it is crucial to refer [Petitioner] for a more specific Occupational Therapy Evaluation.

Given the results of her emotional functioning and her mother's report that [Petitioner] suffers from somatic complaints with no real medical reason, she should be referred for a Clinical Assessment.⁵

⁵ P.Exh. No. 12 at 11-14.

4. On December 18, 2008, Dr. Spencer Johnson of Interdynamics, Inc. completed a Psychiatric Evaluation of Petitioner. Dr. Johnson diagnosed Petitioner with Attention Deficit Hyperactivity Disorder ("ADHD"), Adjustment Disorder, with Anxiety, and Learning Disorder, NOS.⁶ Dr. Johnson's findings and recommendations, *inter alia*, include the following:

Previous assessments combined with her current social emotional screening support the notion that she has difficulty working independently in order to complete age appropriate assignments. Her low frustration tolerance and poor coping skills can ultimately have a negative impact on her relationship with peers and adults if not addressed. Furthermore, poor school attendance has contributed to her low self-esteem leading to sustained periods of ineffectiveness and uncertainty concerning her abilities. It should be noted that [Petitioner's] attendance issues have often been associated with her mother's physical and mental health issues, which impact upon her ability to supervise [Petitioner's] attendance. [Petitioner] is often preoccupied with her mother's condition and will become distracted at school as a result. Currently, Jennifer is in need of a small structured setting, with a low teacher to student ratio, where she can receive a combination of psychological, pharmacological, remedial and academic support in order to achieve any educational goals she may have.

Recommendations:

Education

Full time placement in a small time structured setting with a low teacher to student ratio to facilitate specialized instruction.
Ongoing consultation with mom to monitor attendance.

Treatment

Individual counseling twice a week to address coping skills and self esteem issues.
Group counseling once a week to improve interpersonal skills and peer relations...

Medication

Trial of psychostimulant to address symptoms associated with the diagnosis of ADHD.⁷

⁶ P.Exh. No. 11 at 3.

⁷ *Id.* at 3-4.

5. On December 21, 2008, Ms. Tamara Corbin of Interdynamics completed a Speech and Language Evaluation of Petitioner. Ms. Corbin's findings and recommendations, *inter alia*, include the following:

[Petitioner], a .year, 8-month-old female presents with communication abilities ranging from moderately below average to average. [Petitioner's] receptive and expressive language skills are within the Average range as measured by the CELF IV. She received a Core Language Score of 87, a Receptive Language Score of 85, and Expressive Language Score of 87, a Language Content Score of 72, and a Language Memory Score of 90. [Petitioner's] weaknesses include her ability to identify relationships between words and her ability to answer wh-questions after information has been verbally presented to her. Fluency, pragmatics, and receptive and expressive vocabulary are strengths for [Petitioner] when measured in isolation... In the classroom, [Petitioner] may exhibit difficulty with classifying words for shared and non-shared meaning features, classifying words by semantic classes to form concepts categories and semantic networks, and using antonyms and synonyms and answering questions after information has been presented to her verbally.

Recommendations

[Petitioner's] results indicate abilities ranging from average to moderate. These weaknesses may impact her ability to access the general education curriculum. It is recommended that [Petitioner] continue to receive speech and language therapy for 30 minutes a week. Therapy should be completed in individual sessions and/or groups as well as service implementation in the classroom. The speech and language pathologist should collaborate with the classroom teacher to maximize success.⁸

6. On March 3, 2009, Ms. Maria Versis of Interdynamics completed a Functional Behavior Assessment of Petitioner. Ms. Versis' observations, *inter alia*, included the following:

[Petitioner] has a history of being inattentive; getting distracted easily and being talkative during classes. At the recent school [Petitioner] was not reported as a problem, and none of those behaviors reported in the previous schools were observed. During the observations [Petitioner] seemed to be attentive to the teacher's instructions, but she quickly focused back on her activity, she kept relatively quiet according to the activity she was performing... During the observation, [Petitioner] did not show any behavior that suggested hyperactivity. [Petitioner] reportedly is having attendance problems during this school year, and this could be corroborated with his [sic] attendance records and the fact that [Petitioner] has a history of poor participation during the class activities. During the observation, [Petitioner] participated when she was selected by the teacher, and in some

⁸ P.Exh. No. 13 at 5.

occasions she attempted to participate on her own, especially during P.E. in which she was observed enjoining [sic] and actively participating in the class.⁹

7. DCPS convened an MDT meeting on April 7, 2009 to determine Petitioner's eligibility for special education services. The meeting was completed on April 14, 2009. The occupational therapist recommended that Petitioner not receive an occupational therapy ("OT") evaluation, because Petitioner's "Visual-Motor Integration performance is consistent with her Full Scale IQ of 77."¹⁰ The MDT discussed the effect of Petitioner's 28-29 absences on her academic performance. The speech therapist reported that although Petitioner had some weaknesses, they did not warrant speech services.¹¹ The school psychologist reported that Petitioner's "academic scores were in the range of expectancy for cognitive skills,"¹² and her teachers reported that when she is in school, she is capable of doing the work. Her "difficulty stems as a result of her inconsistent attendance."¹³ The MDT determined, by "a majority opinion," that Petitioner "does not meet the eligibility criteria as a student with a disability in any category for special education."¹⁴

Conclusions of Law

Failure to Identify Petitioner as a Child with a 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 motor abilities.¹⁵ 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.¹⁶ 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.¹⁷

During the hearing Dr. Ballard reaffirmed Mr. Abukishk's conclusion that Petitioner has a learning disorder. In response to the Hearing Officer's question, Dr.

⁹ P.Exh. No. 14 at 9-10.

¹⁰ P.Exh. No. 17 at 7.

¹¹ Testimony of Mr. White. The DCPS therapist conducted a Speech/Language Evaluation Review that found Petitioner to be within normal limits or average in all categories. DCPS Exh. No. 12.

¹² In DCPS Exh. No. 10, the school psychologist disagreed with Mr. Abukishk's conclusion that Petitioner has a learning disability: "This examiner does not agree with the second recommendation that [Petitioner] qualifies for special education services based upon a learning disability. Assessment results did not indicate a discrepancy among cognitive and educational performance nor were deficits reflected in school performance, on assessments or class assignments. There is no evident educational impact." *Id.* at 4.

¹³ P.Exh. No. 17 at 7.

¹⁴ P.Exh. No. 17 at 8.

¹⁵ 34 C.F.R. §300.304(c)(4).

¹⁶ 34 C.F.R. §300.304(b)(2).

¹⁷ 34 C.F.R. §300.305(a).

Ballard stated that Petitioner's specific disorder is in reading comprehension. Petitioner's Passage Comprehension score on the Woodcock-Johnson, 78, exceeded her Full Scale IQ, 77, by one. Thus, there was no disparity between these scores. In fact, all of Petitioner's achievement scores exceeded her Full Scale IQ.¹⁸ Dr. Ballard also testified that Petitioner suffers from an emotional disturbance, as indicated by her somaticization: she routinely complains of illness due to her anxiety about going to school. However, Mr. Abukishk's evaluation, supervised by Dr. Ballard, did not diagnose Petitioner with a mood disorder, and it did not conclude that Petitioner suffered from an emotional disturbance. Dr. Johnson diagnosed Petitioner with "Adjustment Disorder, with Anxiety," but he did not testify at the hearing, and his evaluation gave no explanation for his finding. Dr. Johnson also recommended "Full time placement in a small time structured setting with a low teacher to student ratio to facilitate specialized instruction," but this recommendation was also not adequately explained. In his summary, Dr. Johnson noted that "she has difficulty working independently in order to complete age appropriate assignments." This observation, by itself, offers insufficient support for a recommendation for a highly restrictive educational setting.

Although Petitioner is performing below grade level in most subject matter areas, it is not apparent to the Hearing Officer that her poor performance is due to a learning disability. All of her achievement scores exceeded her Full Scale IQ, and the only other justification offered for a learning disability was her performance below grade level. The record includes other possible reasons: absences, inattentiveness, and failure to complete assignments. A child may not be determined to be eligible if the child's poor performance is due primarily to a lack of instruction in reading or math or limited English proficiency.¹⁹ Thus, a significant number of absences militate against a finding of a learning disability.

There was no credible testimony that Petitioner presents a behavior problem in class. Both of Petitioner's teachers who testified, Ms. Young and Ms. Johnson, agreed with the MDT that Petitioner is not disabled. Both testified that she does not present a behavioral problem and that she is capable of doing grade level work. Thus, even if Petitioner had a mood disorder, it has not been shown to have an adverse impact on her academic performance, a requirement for a determination of an emotional disturbance.²⁰ Petitioner's independent functional behavior assessment reported that inattentiveness has not been a recent problem, and the observer, Ms. Versis, reported that Petitioner actively participating in the classroom.

For all of the reasons discussed above, the Hearing Officer concludes that Petitioner has failed to meet her burden of proving that the MDT erred when it determined that Petitioner was not eligible for special education services.²¹

¹⁸ P.Exh. No. 12 at 17.

¹⁹ 34 C.F.R. §300.306(b).

²⁰ 34 C.F.R. §300.8(c)(4)(i).

²¹ In light of the Hearing Officer's conclusion that Petitioner has not established an entitlement to special education services, she is also not entitled to an occupational therapy evaluation that would lead, at best, to the provision of related services.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, and the representations of the parties' counsel at the hearing, this 4th day of July 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: July 4, 2009