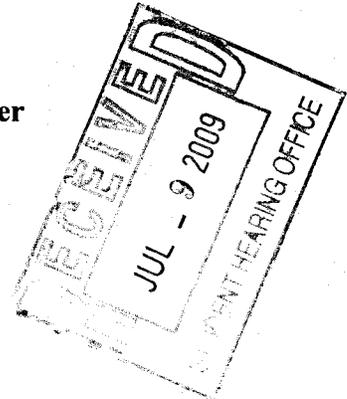


**District of Columbia
Office of the State Superintendent of Education**

**Office of Review and Compliance
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Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: April 13, 2009
)	
Petitioner,)	Prehearing Order: May 19, 2009
)	
v.)	Interim Order: June 16, 2009
)	
THE DISTRICT OF COLUMBIA)	Hearing Dates: June 16, 2009
PUBLIC SCHOOLS)	June 29, 2009
)	
Respondent.)	Docket No.
)	
Student Attending:)	
)	

HEARING OFFICER'S DECISION

Counsel for Petitioner: John Straus, Esquire
James E. Brown & Associates
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Washington, D.C. 20005
(202) 742-2000; Fax: (202) 742-2098

Counsel for DCPS: Harsharen Bhuller, 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 Appendix A.

Jurisdiction

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

Background

Petitioner is an _____ year-old student attending _____

On April 13, 2009, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) had failed to (1) comply with the terms of a Hearing Officer’s Decision (“HOD”), (2) review an independent evaluation, (3) develop an appropriate Individualized Education Program (“IEP”), and (4) provide an appropriate placement. In a Prehearing Order issued on May 19, 2009, the Hearing Officer determined the issues to be adjudicated at the hearing as follows:

- DCPS’ alleged failure to comply with the terms of an HOD

Petitioner alleges that an HOD issued on November 16, 2008 compelled DCPS to convene a Multidisciplinary Team (“MDT”) meeting within fifteen school days. An MDT meeting was confirmed for January 6, 2009, but DCPS did not convene the meeting that day. DCPS conducted an MDT meeting on January 21, 2009 in the parent’s absence.

DCPS asserts that the MDT meeting was confirmed for January 21st, not January 6th, and the parent failed to appear. The parent was represented at the January 21st meeting by an educational advocate who declined to participate in the meeting in the absence of an occupational therapist.

- DCPS’ alleged failure to develop an appropriate IEP

Petitioner alleges that Petitioner’s IEP is inappropriate because it fails to reflect recommendations in a July 15, 2008 independent psychological evaluation that was sent to DCPS on August 13, 2008 and November 21, 2008. DCPS asserts that the psychological evaluation was reviewed at the January 21st MDT meeting.

- DCPS’ alleged failure to provide an appropriate placement

Petitioner alleges that _____ does not provide an educational program that emphasizes functional communication, independent living, and _____

social problem solving, as recommended in the July 15, 2008 psychological evaluation, and has not received a "palm top" as recommended in a December 13, 2007 Assistive Technology Team Evaluation. DCPS asserts that the evaluation was considered by the MDT at the January 21, 2009 MDT meeting.

The due process hearing was convened on June 16, 2009 and completed on June 29, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated April 13, 2009
DCPS Resolution Session Waiver dated April 15, 2009
District of Columbia Public School's Response and Motion to Dismiss Parent's Administrative Due Process Complaint dated May 4, 2009
Answer to DCPS' Motion to Dismiss dated May 11, 2009
Amended Prehearing Order dated May 19, 2009
DCPS' Five-Day Disclosure dated June 9, 2009 (Exhibit Nos. 1-13)
Petitioner's Five-Day Disclosure dated June 9, 2009 (Exhibit Nos. 1-35)
Attendance Sheets for hearing conducted on June 16, 2009

Witnesses for Petitioner

William Daywalt, Educational Advocate
Senior Clinical Manager,
Dr. Ida Holman, Educational Advocate, James E. Brown & Associates
Petitioner's Mother

Witnesses for DCPS

Aaron Karty, DCPS Compliance Specialist
Special Education Coordinator,
Kathiresen Rajendran, Speech & Language Pathologist, DCPS

Findings of Fact

1. Petitioner is an _____ year old student attending

² *Complaint* at 1.

2. On July 15, 2009, Dr. Syretta James completed a Clinical, Cognitive, Educational & Adaptive Psychological evaluation of Petitioner.³ Dr. James' findings and recommendations, *inter alia*, include the following:

In evaluating her cognitive performance over time, [Petitioner] has consistently demonstrated declines in both verbal and nonverbal reasoning. As in previous assessments, the current assessment reveals that her overall cognitive performance is best described by her nonverbal ability score that fell in the *Mildly Delayed* range. Measures of adaptive functioning reveal significant adaptive weaknesses in areas of social, practical and conceptual functioning. Significant social skill deficits are also demonstrated in her ability to initiate social interactions, demonstrate leadership qualities, and to effectively problem solve. Academically, [Petitioner] is demonstrating significant reading, math, and written language weaknesses. She is currently instructional at the first grade level and demonstrates frustration at the second grade level in all her academic subjects. When compared to others her age, [Petitioner's] overall academic performance falls in the **Extremely Low** range and is commensurate with her current cognitive and adaptive functioning. Based on these findings, [Petitioner] currently demonstrates characteristics consistent with an individual with intellectual limitations and meets the criteria of an individual with Mild Mental Retardation (FCI:01). Accordingly, [Petitioner] will benefit from an educational program that emphasizes functional communication, independent living, and social problem solving. She will also benefit from supports provided in a classroom environment that has a low student teacher ratio and a modified instructional curriculum.

It is important to note that her medical diagnosis of Myotonic Muscular Dystrophy also contributes to her current school based functioning. Myotonic Muscular Dystrophy is a genetic disorder... Primary disabilities related to this disorder can include functional impairments to cognition, gastrointestinal systems, vision, heart, respiration, speech, and motor skills. Although the progression of this disease is slow, deficits in functioning are degenerative in nature and occur throughout the lifespan...

In considering the appropriate educational disability for [Petitioner], the IEP team should consider a disability classification of **Multiple Disabled** (FCI:10) to include Mental Retardation and Other Health Impaired in order to account for the compounding effect of her medical condition and cognitive deficits.

RECOMMENDATIONS

...The team may also seek to refer [Petitioner] for an assistive technology evaluation to determine whether her needs are best met through the use of

³ Petitioner's Exhibit ("P.Exh.") No. 26.

electronic, computer, and software tools geared toward aiding students with their individual learning needs. [Petitioner] will likely benefit from the use of technology such as computers, electronic spell checkers, alpha-smarts, and calculators in order to improve her performance in reading, math, and written language. She may also benefit from the use of graphic organizers and visual models to improve her ability to express her thoughts in writing...

Given [Petitioner's] overall cognitive and adaptive functioning, [Petitioner] will benefit from a specialized education program that emphasizes functional life, academic, and communication skills. She may also benefit from an environment that includes multiple adults so that she can have access to immediate and consistent adult assistance in class. Based on this, the team should review the appropriateness of a more restrictive academic environment...⁴

3. On November 16, 2008, an HOD was issued in which Hearing Officer Virginia Dietrich found that (1) DCPS failed to comply with a June 18, 2008 HOD by failing to convene a Multidisciplinary Team ("MDT") meeting within twenty days of receipt of an independent evaluation, and (2) failing to review the independent evaluation. The HOD ordered DCPS to convene an MDT meeting within 15 school days to review Dr. James' evaluation, develop an IEP, discuss and determine an appropriate placement, and discuss and determine compensatory education.⁵

4. On December 4, 2008, _____ of _____ sent a Letter of Initiation to Petitioner's counsel proposing three MDT meeting dates: December 10, 11, and 22, 2009.⁶ Not having received a response by December 11, 2008, _____ set a meeting date of December 19, 2009.⁷ Mr. Daywalt responded on Petitioner's behalf on December 11th, requesting that the meeting be scheduled in January.⁸

5. _____ issued a Letter of Invitation on December 12, 2008 proposing MDT meeting dates of January 6, 7, and 13, 2009.⁹ Having received no response by December 29th, _____ sent a follow-up inquiry to Mr. Daywalt.¹⁰

6. Eventually, the parties agreed to convene the MDT meeting on January 21, 2009. The parent was unavailable due to a hospitalization.¹¹ Mr. Daywalt appeared for the meeting on Petitioner's behalf, but he declined to participate in the meeting because no DCPS occupational therapist was present.¹²

⁴ *Id.* at 10-11.

⁵ P.Exh. No. 28 at 9-10.

⁶ DCPS Exh. No. 1

⁷ DCPS Exh. No. 2.

⁸ DCPS Exh. No. 3.

⁹ DCPS Exh. No. 4.

¹⁰ DCPS Exh. No. 5.

¹¹ Testimony of Petitioner's mother.

¹² Testimony of _____

7. proceeded with the MDT meeting despite the absence of a representative of Petitioner "to address the HOD issues."¹³ The MDT reviewed independent evaluations submitted by Petitioner's counsel including Dr. James' evaluation,¹⁴ an Adapted Physical Education evaluation, a Speech and Language Reevaluation, and an Assistive Technology Team Evaluation.¹⁵ The MDT agreed to prescribe 21 hours per week of specialized instruction, one hour per week of psychological services, 30 minutes per week of occupational therapy, one hour per week of speech services, 30 minutes per week of adaptive physical education, a "Palm device" as assistive technology, and a dedicated aide.¹⁶ Petitioner's social worker urged the team not to place Petitioner in a class of mentally retarded students:

[Petitioner] works well in a small group for counseling. Her group members tend to compensate for speech difficulties. They focus on making her feel a part of the group and do not normally tease her.

[Petitioner] is motivated and attempts to complete any task given in the group. She is very competitive. When [Petitioner] is with students whose disability is not as severe as her[']s she is motivated to keep up or be as similar in skills as they are.

I feel isolating [Petitioner] by sending her to a setting of low functioning students would have a negative impact...¹⁷

8. The Palm Device referred to in the previous paragraph was recommended in the Assistive Technology Team Evaluation:

Due to vendor loan programs, it is recommended that [Petitioner] complete a trial with a small, handheld picture based system such as a PalmTop3 (Dynavox). The PalmTop3 would give [Petitioner] the potential to use picture communication symbols/written words and voice output; however, it is important to note that [Petitioner] expressed that she would be opposed to using such a system to augment her speech.¹⁸

The PalmTop arrived in February 2009.¹⁹ Petitioner's special education teacher and speech therapist were trained to use the device and used it with Petitioner for the rest of the 2008-2009 school year. Because the device was expensive, over it was kept locked in office overnight.²⁰

¹³ DCPS Exh. No. 11 at 1.

¹⁴ *Id.* at 11-6.

¹⁵ *Id.* at 11-2.

¹⁶ *Id.*

¹⁷ *Id.* at 11-3.

¹⁸ P.Exh. No. 22 at 4.

¹⁹ Testimony of

²⁰ *Id.*; testimony of

9. On February 4, 2009, [redacted] notified [redacted] that “you have been faxing letters pertaining to [Petitioner] to the wrong school. On January 29, 2009, I received a fax forwarding from [redacted] forwarded a copy of the January 21st MDT meeting notes and proposed an MDT meeting on February 18, 2009.²¹ Neither Mr. Daywalt nor Petitioner’s counsel responded to [redacted] offer of another MDT meeting.²²

10. No occupational therapist was available at [redacted] from January 2009 through the end of the 2008-2009 school year.²³

11. DCPS developed an IEP dated February 24, 2009. In addition to the services prescribed in paragraph No. 7 above, the IEP included a Compensatory Educational Plan that provided ninety minutes per week of independent occupational therapy services for two months.²⁴ The IEP included goals and objectives in mathematics; reading; communication/speech and language; emotional, social, and behavioral development; health/physical; and motor skills/physical development.²⁵

Conclusions of Law

Failure to Comply with HOD

Petitioner alleged that DCPS failed to comply with the November 16, 2008 HOD. The HOD ordered DCPS to convene an MDT meeting within 15 school days to review Dr. James’ evaluation, develop an IEP, discuss and determine an appropriate placement, and discuss and determine compensatory education. The record shows that beginning on December 4, 2008, DCPS made persistent efforts throughout that month to schedule an MDT meeting. The parties eventually agreed to meet on January 21, 2009. Petitioner’s mother was hospitalized and could not attend, but [redacted] appeared to represent Petitioner at the meeting. Because no occupational therapist was available, [redacted] refused to participate in the meeting.

The IEP team must include the parents of the child, at least one regular education teacher of the child, at least one special education teacher of the child, a representative of the public agency who is qualified to provide or supervise special education services, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the public agency, and an individual who can interpret the instructional implications of evaluation results.²⁶ The regulations do not specifically require that each service provider for a student be present for an IEP meeting. In this case, in light of the mandate of the HOD, and in light of the difficulty the parties had in arriving at a mutually

²¹ DCPS Exh. No. 6.

²² Testimony of Mr. Daywalt.

²³ Testimony of Ms. [redacted].

²⁴ DCPS Exh. No. 13, last page.

²⁵ DCPS Exh. No. 13.

²⁶ 34 C.F.R. §300.321(a).

convenient date for the meeting, refusal to participate in the MDT meeting on January 21st was not in Petitioner's best interests. All required IEP team members were present, and the individuals present were competent to interpret the findings and recommendations of the current OT evaluation. As for developing OT goals and objectives, could have offered to proceed with the meeting with the understanding that a follow-up meeting would be held with the occupational therapist. willingness to comply with such a request is indicated in her February 4th letter offering another MDT meeting. forwarded the letter to Petitioner's counsel, but Petitioner's counsel did not respond to offer.

At the MDT meeting on January 21st, the MDT reviewed Petitioner's current evaluations, modified her educational program, and developed a compensatory education program, as ordered in the November 16th HOD. The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS failed to comply with the HOD.

Failure to Develop an Appropriate IEP

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),²⁷ the Supreme Court set forth the requirements for IEPs:

The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). § 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document containing

"(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).²⁸

Petitioner's counsel argued that Petitioner's IEP is inappropriate because it fails to reflect recommendations in Dr. James' evaluation, specifically "a specialized education

²⁷ 458 U.S. 176 (1982).

²⁸ *Id.* at 181-82.

program that emphasizes functional life, academic, and communication skills.” The MDT is not bound to follow every recommendation in every evaluation. It must, however, consider every evaluation and develop a program based upon the evaluations and the experience of the student’s service providers. This is exactly what transpired in this case. The team reviewed all of the evaluations, including Dr. James’. Petitioner’s social worker specifically addressed the issue of a “functional” program and argued against placing Petitioner in a class of lower performing students just because of Dr. James’ mental retardation diagnosis.

The educational program developed on January 21st, and the IEP developed on February 24th included 21 hours of specialized instruction, speech services, occupational therapy services, counseling services, adaptive physical education services, and goals and objectives in mathematics; reading; communication/speech and language; emotional, social, and behavioral development; health/physical; and motor skills/physical development. Petitioner’s counsel offered no showing that the prescribed services are not designed or likely to confer educational benefit. Therefore, the Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS failed to develop an appropriate IEP.

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 _____ has failed to provide an environment in which Petitioner can derive educational benefit.

Petitioner’s case was based on _____ failure to provide an educational program that emphasizes functional communication, independent living, and social problem

²⁹ 458 U.S. 176 (1982).

³⁰ *Rowley, supra*, at 200-01.

solving, as recommended in the July 15, 2008 psychological evaluation, and its failure to provide Petitioner a PalmTop device as recommended in the December 13, 2007 Assistive Technology Team Evaluation.³¹ As discussed above, the MDT's decision not to provide Petitioner a "functional" program does not, by itself, render Petitioner's program inadequate. As for the PalmTop, the testimony revealed that Petitioner's PalmTop arrived no later than February of this year, her special education teacher and speech therapist were trained in the use of the device, and both teachers used the device throughout the remainder of the 2008-2009 school year. Petitioner's counsel offered no direct or persuasive testimony or documentation that Petitioner is not deriving educational benefit at Therefore, the Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS failed to provide an appropriate placement.

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 9th 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 9, 2009

³¹ Amended Prehearing Order at 3-4.