

District of Columbia
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Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE
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Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: July 9, 2009
)	
Petitioner,)	Prehearing Conference: July 31, 2009
)	
v.)	Hearing Date: August 25, 2009
)	
THE DISTRICT OF COLUMBIA)	Interim Orders: August 10, 2009
PUBLIC SCHOOLS)	September 7, 2009
)	
Respondent.)	Docket No.
)	
Student Attending:)	
)	

HEARING OFFICER'S DECISION

Counsel for the Petitioner: Donovan Anderson, Esquire
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Counsel for DCPS: Kendra Berner, Esquire
Office of the General Counsel, DCPS
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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 a _____ year-old student attending _____

On July 9, 2009, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) had failed timely to provide an appropriate placement. In a Prehearing Order issued on August 8, 2009, the Hearing Officer determined the issues to be adjudicated to be as follows:

- DCPS’ alleged failure to provide an appropriate placement

Petitioner alleges that DCPS placed Petitioner at _____ at a Multidisciplinary Team (“MDT”) meeting on April 6, 2009. Petitioner further alleges that _____ is inappropriate because it cannot provide the out-of-general education, “small structured therapeutic setting” that is prescribed in Petitioner’s Individualized Education Program (“IEP”).

DCPS asserts that _____ is an appropriate program, but that an MDT will be reconvened on August 10, 2009 to discuss placement.

The due process hearing was convened and completed on August 25, 2009. The parties’ Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated July 9, 2009

DCPS Resolution Session Waiver dated July 15, 2009

District of Columbia Public School’s Response to Petitioner’s Due Process Complaint dated July 20, 2009

Prehearing Order dated August 8, 2009

Interim Order dated August 10, 2009

Petitioner’s Five-Day Disclosure dated August 17, 2009 (Exhibit Nos. 1-7)

DCPS’ Five-Day Disclosure dated August 18, 2009 (Exhibit Nos. 1-2)

Attendance Sheet for hearing conducted on August 25, 2009

Interim Order dated September 7, 2009

Witnesses for Petitioner

Secondary Communications Disorder Teacher, PLC
Petitioner's Mother
Associate Head of School,

Witnesses for DCPS

Special Education Coordinator,

Findings of Fact

1. Petitioner is a year-old student attending
2. On April 18, 2008, Kathleen Shaw, DCPS School Psychologist, completed a Report of Comprehensive Psychological Evaluation. Her findings and recommendations, *inter alia*, include the following:

The present results from the intellectual tests indicate that [Petitioner's] Full Scale IQ functioning is in the Extremely Low range, composite score, 66 at the 1% percentile. Her Verbal Comprehension IQ is 69 at the Extremely Low range at the 2% percentile and her Nonverbal IQ is the Borderline range, composite score, 77. For all intentional purposes, her intellectual abilities are considered equally developed because of the small difference between her verbal and nonverbal performance...

Academically, her Broad Reading skills are in the Borderline range, standard score, 76 with age equivalent at 8-7, three years below her chronological age. On Broad Language, her standard score is 80 at the 9% percentile with age equivalent, 9-0, three years below her chronological age. In Math, her standard score is 109 for Calculation, age equivalent, 14-4, two years above her chronological age. She is also average for the subtest, Applied Problems and is performing on grade level...

Emotionally, [Petitioner] is displaying Clinically Significant behaviors in areas as rule-breaking, involving cheating and deception, strange and odd behaviors, disconnection from her surroundings, feeling alone, making decisions, seeking and finding information on her own. The results also state that she has difficulty communicating with others, finishing tasks, lacks interest in school, easily distracted, defiant, vindictive and does not complete school assignments or follow through with instructions. In the areas of Inattention and ADHD, she is displaying major concerns in focusing and does not follow through with that which is required of her in

² Testimony of

school work and home chores. According to [Petitioner], she has problems with unusual thoughts and perceptions, negative self-image and low self-esteem.

In comparing her current emotional assessment as reported by her mother, teacher and herself with the previous clinical evaluation, [Petitioner] continues to display many of the issues identified before, but is experiencing others, such as ADHD, Inattention, Developmental Social Disorder and Functional Communication. These problems are considered significant enough to warrant immediate attention because of the impact they are having on her academically. In addition, her emotional problems are escalating and can be devastating if they are allowed to go without intervention... Based on all the information gathered, [Petitioner's] profile has not reached the level where she can be considered eligible for the Emotionally Disabled classification at this time, but the information should be taken seriously as needing immediate action.

Recommendations:

[Petitioner] will need close observation and monitoring of the depression so that it does not get out of hand. She needs her time in therapy to be increased so that the therapist can deal with many of the issues impacting her and preventing her from developing a healthy emotional state...³

3. On April 17, 2009, Andrea Hankins completed a Speech and Language RE-Evaluation. Her findings and recommendations, *inter alia*, include the following:

[Petitioner] demonstrated strengths in articulation, fluency, hearing, oral peripheral examination, expressive vocabulary/ word definitions (SS 7) and understanding spoken paragraphs (SS 7). She exhibits weaknesses in below receptive vocabulary, and language content (SS 78 moderate), severe deficits in expressive language (SS 61), and language memory (SS 58). Weaknesses were characterized by difficulties following lengthy multi-step oral directions with specific concepts (i.e., temporal concepts before/ after, then) recalling information of increased length and complexity, formulating grammatically correct sentences; and orally defining and explaining word relationships.

A comparison of [Petitioner's] expressive vocabulary skills in 2005 demonstrated a standard score of SS 79 which is in the moderate range with the current score of SS 89, which is in the average range shows improvement in this area. [Petitioner's] receptive vocabulary continues to be in the below average range. A comparison of [Petitioner's] speech and language assessment conducted in 2005, yielded an overall language score of SS 72 (moderate delay) with her current Core language Score of (SS 61) which is in the severe range indicates that [Petitioner's] language skills have decreased and are more than 2.5 standard deviations from the norm.

³ Petitioner's Exhibit ("P.Exh.") No. 3 at 8-9.

Recommendations:

Continue speech and language services to address her language needs...⁴

4. DCPS convened a Multidisciplinary Team (“MDT”) meeting on April 6, 2009. The MDT classified Petitioner with a Speech and Language Impairment and prescribed thirty hours per week of specialized instruction outside general education, one hour per week of adaptive physical education outside general education, one hour per week of occupational therapy (“OT”), one hour per week of behavioral support services, one hour per week of speech-language pathology, thirty minutes per week of physical therapy, and extended year services (“ESY”).⁵

5. DCPS reconvened an MDT meeting on August 10, 2009 to discuss “services and location of services” for the 2009-2010 school year. The parent objected to a Prior Notice that had been issued placing Petitioner at [redacted]. The parent insisted that Petitioner’s IEP required a small class, low student-to-teacher ratio, and requested placement at [redacted]. Carol Helton, DCPS Cluster Supervisor, asserted that DCPS could meet the requirements of Petitioner’s IEP at [redacted]. DCPS also proposed providing Petitioner two hours per week of tutoring throughout the 2009-2010 school year.⁶

6. Petitioner has been attending [redacted] since the beginning of the 2009-2010 school year. All of her classes are self-contained except Health and Physical Education. [redacted] can provide all of the related services prescribed in Petitioner’s IEP. Petitioner’s class sizes vary in size from 12 to 15 students.⁷

7. Petitioner has been accepted at [redacted] is a private school offering full-time special education services. All of [redacted] teachers are certified in special education. The maximum class size is ten, but many classes have between three and six students. There are only three students in the Reading Intervention class in which Petitioner would participate. [redacted] can provide the related services prescribed in Petitioner’s IEP. The tuition at [redacted] is about [redacted] per year, not including related services.⁹

⁴ P.Exh. No. 5 at 7-8.

⁵ P.Exh. No. 2 at 1, 7, and 9.

⁶ P.Exh. No. 6.

⁷ Testimony of [redacted]

⁸ P.Exh. No. 7.

⁹ Testimony of [redacted]

Conclusions of Law

Failure to Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“*Rowley*”),¹⁰ 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.¹¹

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

Petitioner’s mother insists that Petitioner’s needs can be met only at a private special education school. However, DCPS has the obligation to place Petitioner in the least restrictive environment in which her needs can be met:

The Act requires that the schools ensure that: To the *maximum extent appropriate*, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .¹²

Petitioner does not present as a student who is incapable of learning in a public school environment. Although she is performing well below grade level in reading and language arts, she is at or above grade level in mathematics. Her recent speech and language evaluation revealed that she had made progress in vocabulary but had regressed in language skills.

¹⁰ 458 U.S. 176 (1982).

¹¹ *Rowley*, *supra*, at 200-01.

¹² *Gillette v. Fairland Board of Education*, 932 F.2d 551, 553 (6th Cir. 1991).

DCPS placed Petitioner in a full-time, self-contained special education environment at _____ and supplements her curriculum with two hours per week of tutoring. Petitioner is in an out-of-general education environment in all of her classes except Health and Physical Education. Although Petitioner's IEP requires that all of her courses be out-of-general education, DCPS' failure to provide Health and Physical Education out-of-general education, by itself, does not render Petitioner's educational program unlawful. Moreover, _____ conceded that this was an issue that needed to be "fixed." The only other significant issue is class size. At _____ Petitioner's classes would be between 12-15 students. While this is not as small as some private schools, it is significantly smaller than DCPS' general education classes. _____ average class size of 8-10 is smaller, but not significantly.

The Hearing Officer is not persuaded that Petitioner's needs cannot be met at _____. As noted above, she already performs well in math, but will receive math instruction in a self-contained class. Petitioner is well below grade level in reading and language arts, and will receive services in a smaller class environment than she previously experienced, and will receive two hours of tutoring per week. DCPS has developed a program that appears to address Petitioner's academic deficiencies. The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS has 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 24th day of September 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: September 24, 2009