

RECEIVED

SEP 27 2010

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

Student Hearing Office

Terry Michael Banks, Due Process Hearing Officer

810 First Street, NE 2nd Floor

Washington, DC 20003

(202) 481-3457 - Office

(202) 478-2956 - Fax

terry.banks2@dc.gov

Confidential

STUDENT, through the legal guardian¹)	
Petitioner,)	Prehearing Conference: July 22, 2010
)	
v.)	Hearing Date: September 15, 2010
)	Room 1
THE DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS)	Docket No.
)	
Respondent.)	
)	
Student Attending:)	
School)	

HEARING OFFICER'S DECISION

Counsel for Petitioner:	Pamela Halpern, Esquire James E. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005 (202) 742-2000; Fax: (202) 742-2098
--------------------------------	---

Counsel for DCPS:	Blair Matsumoto, Esquire Office of the General Counsel, DCPS 1200 First Street, N.E.; 10 th Floor Washington, D.C. 20002 (202) 442-5000; Fax: (202) 442-5098
--------------------------	---

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 June 22, 2010, Petitioner filed an Amended Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) develop an appropriate Individualized Education Program ("IEP"), (2) conduct manifestation determinations, (3) implement the IEP, and (4) provide an appropriate placement. In a Prehearing Order issued on July 29, 2010, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure to develop an appropriate IEP

Petitioner alleges DCPS inappropriately reduced Petitioner's specialized instruction from 26.5 hours (December 18, 2008 IEP) to 21 hours at an Multidisciplinary Team ("MDT") meeting on December 17, 2009 in light of significant behavioral problems and lack of academic progress. Petitioner asserts that he requires full-time specialized instruction in a structured, therapeutic environment. Petitioner also asserts that his intervention behavior plan is inadequate, because it provides no strategies to correct his behavior.

DCPS asserts that it scheduled an MDT meeting on June 18, 2010 to review Petitioner's IEP, but the parent did not attend. DCPS further asserts that Petitioner's IEP is appropriately designed to afford him educational benefit.

- DCPS' alleged failure to implement the IEP

Petitioner alleges that despite the prescription of full-time specialized instruction out of general education in his December 18, 2008 IEP, he was placed in a general education class for the first two advisory periods of the 2009-2010 school year. DCPS denies that Petitioner placed in a general education class for the first two advisory periods.

- DCPS' alleged failure to conduct manifestation determinations

Petitioner alleges that Petitioner was suspended thirty-two times during the 2009-2010 school year, but DCPS failed to conduct manifestation determinations after Petitioner had been suspended for a total of more than ten days. Petitioner further asserts that DCPS did not conduct a functional behavior assessment or provide any educational services to Petitioner during his suspensions. DCPS asserts that it conducted two manifestation determinations after Petitioner's suspensions exceeded ten days and agreed to provide compensatory education services, but Petitioner's educational advocate requested that the discussion of such services be postponed until an MDT meeting scheduled for July 26, 2010.

- DCPS' alleged failure to provide an appropriate placement

Petitioner alleges that _____ is not an appropriate placement, because Petitioner has not derived educational benefit and _____ has failed to provide the services prescribed in his IEP. DCPS asserts that _____ has, and can continue to, meet Petitioner's educational needs.

The due process hearing was convened and completed on September 15, 2010. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing. In their opening statements, the parties' counsel stipulated that the allegations relating to the IEP and manifestation determinations had been settled, and the only issue in dispute was the appropriate placement for Petitioner.

Witnesses for Petitioner

Petitioner's Mother
_____ Admissions Director,
Campus

Witnesses for DCPS

_____ Principal, _____ School

Findings of Fact

1. Petitioner is a _____ year-old student attending _____

² *Complaint at 1.*

2. Dr. Belton Wilder of Parker Diagnostic Solutions completed a Comprehensive Psychological Evaluation of Petitioner on June 11, 2010. Dr. Wilder diagnosed Petitioner with Attention Deficit Hyperactivity Disorder (“ADHD”), Anxiety Disorder, and Learning Disorder.³ Dr. Wilder’s findings and recommendations, *inter alia*, include the following:

Cognitively, [Petitioner] is functioning in the Borderline Range of intelligence, based on his Full Scale IQ Composite Score of (79) on the WISC-IV. His Verbal Comprehension Composite Score was assessed in the Low Average Range, based on his score of (85) on the WISC-IV. His Perceptual Reasoning Composite Score was assessed in the Low Average Range, based on his score of (86) on the WISC-IV. His Working Memory Composite Score was assessed in the Low Average Range, based on his score of (83) on the WISC-IV. His Processing Speed Composite Score was assessed in the Low Average Range, based on his score of (80) on the WISC-IV.

Academically, as per the WIAT-II, [Petitioner’s] Standard Scores ranged from Extremely Low to Low Average with a strength in the area of Math Reasoning. However, his cognitive skills were not consistently commensurate with his academic achievement skills, thus providing an indication of the presence of a Learning Disability in the areas of Reading, Basic Math, Spelling, Pseudoword Decoding, and Oral Language skills...

Recommendations

[Petitioner] needs to be in a therapeutically structured educational environment with a small teacher-pupil ratio to provide him with individualized instructions for purposes of improving his motivation and attention...

[Petitioner] should be classified as Multiple Disabled under the heading of Other Health Impaired/ADHD and Specific Learning Disabled.⁴

3. DCPS convened a Multidisciplinary Team (“MDT”) meeting on July 26, 2010. The MDT classified Petitioner with Multiple Disabilities and prescribed 26.5 hours of specialized instruction per week and one hour per week of behavioral support services.⁵

4. DCPS proposed to change Petitioner’s placement to _____ School _____ on the original date of the hearing, August 13, 2010. Petitioner’s mother rejected the placement after visiting Pathways.⁶

³ Petitioner’s Exhibit (“P.Exh.”) No. 15 at 6.

⁴ *Id.* at 7-8.

⁵ P.Exh. No. 12 at 1 and 9.

5. Petitioner has been accepted at Edgewood Campus is a private school offering full-time specialized instruction for students whose primary disability is specific learning disability ("SLD"). The maximum class size is ten. All of teachers are certified in special education. Each class has teacher's assistant. employs licensed social workers, a reading specialist, and a speech therapist. It contracts with occupational therapists and physical therapists to provide those related services for its students that require such services. uses a behavior modification plan in which students are observed and rewarded or penalized based on their decorum. If Petitioner were to attend he would receive services from the reading specialist.⁷ is located fifteen minutes from Petitioner's residence.⁸

6. School is a private school offering full-time specialized instruction to disabled students whose primary disability is emotional disturbance ("ED"). All of its students have a primary ED disability. It currently has sixteen students and five certified special education teachers. The maximum class size is six students. employs three behavioral specialists, one licensed social worker, and one licensed clinical counsel. It contracts for speech and occupational therapists.⁹ is located at Maryland.¹⁰ It would take approximately an hour to reach the school from Petitioner's home.¹¹

Conclusions of Law

Failure Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),¹² 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

⁶ Testimony of Petitioner's mother. The parties requested a continuance to permit Petitioner's mother to visit Pathways in anticipation that this matter would be settled. Petitioner's mother's rejection of the proposed settled necessitated a hearing on the relative merits of the parties' proposed placements.

⁷ Testimony of

⁸ Testimony of Petitioner's mother.

⁹ Testimony of

¹⁰ *Id.*

¹¹ Testimony of Petitioner's mother.

¹² 458 U.S. 176 (1982).

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.¹³

In this case, DCPS had not proposed an appropriate placement at the time the Complaint was filed. It proposed _____ on the original hearing date, August 13, 2010. Therefore, the Hearing Officer concludes that Petitioner has met his burden of proving that DCPS failed to provide an appropriate placement.

Federal regulations governing LRE require that:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that... The child’s placement... Is as close as possible to the child’s home.¹⁴

In this case, _____ is located fifteen minutes from Petitioner’s home, while _____ would require a commute of up to an hour. While both _____ and _____ offer small class environments, low student to teacher ratios, and a full range of related services, _____ provides services to students whose primary disability is ED. Petitioner is classified with learning disabilities and ADHD, and Dr. Wilder recommended services for Petitioner’s learning disabilities and ADHD. Therefore, in light of the proximity of _____ to Petitioner’s home, that _____ services are more directly suited to Petitioner’s needs, and Petitioner’s peers at _____ would have educational needs similar to his, the Hearing Officer concludes that _____ would be a more appropriate placement than _____ for Petitioner.

Under *Florence County School District Four v. Carter*,¹⁵ 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.”¹⁶ “[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.”¹⁷

¹³ *Rowley, supra*, at 200-01.

¹⁴ 34 C.F.R. §300.116(b)(3).

¹⁵ 510 U.S. 7 (1993).

¹⁶ *Id.*, 510 U.S. at 11.

¹⁷ *Id.*, 510 U.S. at 15-16.

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 25th day of September 2010, it is hereby

ORDERED, that DCPS shall immediately issue a Prior Notice placing Petitioner at _____ for the 2010-2011 school year including transportation and all other appropriate related services.

IT IS FURTHER ORDERED, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's counsel will contact the appropriate DCPS Placement Specialist and the DCPS Office of Special Education Resolution Team to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.

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 25, 2010