

**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
2009 MAY 27 AM 7: 57

Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: April 8, 2009
)	
Petitioner,)	Prehearing Conference: April 24, 2009
)	
v.)	Hearing Date: May 11, 2009
)	
THE DISTRICT OF COLUMBIA)	Docket No.
PUBLIC SCHOOLS)	
)	
Respondent.)	
)	
Student Attending:)	
School)	

AMENDED HEARING OFFICER'S DECISION

Counsel for Petitioner: Kathy Zeisel, Esquire
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¹ Personal identification information is provided in Attachment 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 _____ School. On April 8, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools (“DCPS”) had failed to (1) complete childfind procedures in a timely manner, (2) evaluate Petitioner adequately, (3) provide an appropriate placement, (4) develop an appropriate Individualized Education Program (“IEP”), and (5) implement appropriate disciplinary procedures.

After a prehearing conference on April 24, 2009, the Hearing Officer set forth the issues to be adjudicated as follows:

- DCPS’ alleged failure timely to complete childfind procedures

Petitioner alleges that DCPS was on notice as early as the 2004-2005 school year, due to Petitioner’s “behavioral issues,” that Petitioner may have been a child with a disability. Petitioner’s mother consented to evaluations on October 11, 2007, but no Multidisciplinary Team (“MDT”) meeting was convened to review the evaluations until February 4, 2008.

DCPS asserts that IDEIA’s two-year statute of limitations applies, which would limit the scope of the proceeding to events occurring after April 8, 2007. DCPS further asserts that a Student Evaluation Plan (“SEP”) was developed on October 11, 2007 that referred Petitioner for comprehensive psychological, social history, and educational evaluations. DCPS completed the evaluations and made an eligibility determination on or about February 4, 2008, within 120 days of the October 11th MDT meeting, and issued a notice of placement on March 10, 2008 placing Petitioner at _____

- DCPS’ alleged failure to provide an appropriate IEP on February 5, 2008

Petitioner alleges Petitioner’s mother was not provided written notice of the MDT meeting on February 5, 2008. Petitioner alleges further that Petitioner’s emotional disturbance (“ED”) classification is inadequate,

because it ignores the effect of his Attention Deficit Hyperactivity Disorder (“ADHD”) on Petitioner. The Intervention Behavior Plan (“IBP”) is inappropriate, because it was based on a functional behavior assessment (“FBA”) that included no classroom observations and was conducted at the eligibility meeting. The IEP failed to prescribe individual counseling and makes no provision for services during emotional crises. The IEP failed to provide a literacy specialist and failed to provide extended year services (“ESY”).

DCPS asserts that the 2008 IEP was based on evaluations available at the time, that the parent agreed to the IEP, and that the IEP was appropriate for Petitioner’s needs. DCPS also asserts that it gave the parent appropriate notices of the MDT meetings on October 11, 2007 and February 5, 2008.

- DCPS’ alleged failure to develop an appropriate IEP on February 12, 2009

Petitioner alleges that the IEP developed on February 12, 2009 was inappropriate, because no representative of the local education agency (“LEA”) was present who was knowledgeable of available resources; the IEP included insufficient emotional and behavioral supports; the IEP included insufficient classroom accommodations; no IBP was reviewed or developed; and ESY was not provided.

DCPS’ asserts that the 2009 IEP is appropriate.

- DCPS’ alleged failure to provide an appropriate placement

Petitioner alleges that the March 10, 2008 placement of Petitioner at _____ was inappropriate, because there was no LEA representative at the MDT meeting knowledgeable of resources at the Prior Notice was deficient there was no one at the meeting competent to interpret evaluation data; _____ was incapable of meeting Petitioner’s academic deficiencies; _____ did not provide necessary services; and Petitioner’s class size (12-13 students) was too large.

DCPS asserts that it provided the necessary and prescribed services for Petitioner at _____ during the 2007-2008 school year.

- DCPS’ alleged failure to provide an appropriate placement

Petitioner alleges that Petitioner’s placement at _____ for the 2008-2009 school year is inappropriate, because it was unilaterally determined by

DCPS without the benefit of an MDT meeting; it suffers from the same defects as the placement at _____ and Petitioner has not made academic progress at _____

DCPS asserts that it issued an appropriate Prior Notice placing Petitioner at _____ and that _____ provided the necessary and prescribed services for Petitioner during the 2008-2009 school year.

- DCPS' failure to comply with appropriate disciplinary procedures during the 2006-2007 and 2007-2008 school years

Petitioner alleges that DCPS failed to conduct manifestation determinations during the 2006-2007 and 2007-2008 school years despite numerous suspensions of Petitioner exceeding a total of more than ten school days for each school year. DCPS denies that Petitioner was suspended or expelled during those school years

- DCPS' failure to comply with appropriate disciplinary procedures during the 2008-2009 school year

Petitioner alleges that Petitioner was suspended on March 3, 2009 for 66 days. DCPS allegedly violated IDEIA by (1) conducting a manifestation determination in the parent's absence; (2) determining that the conduct resulting in the suspension was not a manifestation of Petitioner's disability; (3) placing Petitioner at _____ which could not meet his needs; and (4) failing to issue a Prior Notice placing Petitioner at _____. Petitioner further asserts that he was denied admission to _____

DCPS' asserts that it notified Petitioner's mother of the March 3rd meeting, but concedes the meeting was conducted in her absence. DCPS further asserts that the determination that the behavior that resulted in the suspension was not a manifestation of Petitioner's behavior was correct. DCPS further asserts that the parent declined its offer in mid-March to place Petitioner at _____

- DCPS' alleged failure to conduct appropriate initial evaluations

Petitioner alleges that the evaluations conducted as a result of the October 11, 2007 SEP were inadequate. A parent has the right to request an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests the LEA to assume the cost for an independent evaluation, the LEA must either initiate a hearing to show that its evaluation is _____

appropriate, or fund the independent evaluation.² In this case, Petitioner failed to register his disapproval of the initial evaluations before initiating this proceeding. Therefore, the MDT meeting on February 4, 2008 was convened, and decisions were made, under the assumption that Petitioner did not dispute the validity of the current evaluations. In the interests of administrative economy, the Hearing Officer will adjudicate the issue of the adequacy of the initial psychoeducational evaluation in this proceeding. However, for purposes of determining the appropriateness of the initial IEP and placement, the evaluations will be presumed to be valid.

The due process hearing was convened on May 11, 2009 and completed on May 12, 2009. The parties' Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing.³

Record

Due Process Complaint Notice dated April 8, 2009
DCPS Resolution Session Waiver dated April 10, 2009
Motion for Default and Summary Judgment dated April 23, 2009
District of Columbia Public School's Response to Petitioner's Due Process Complaint dated April 24, 2009
Prehearing Order dated May 1, 2009
Petitioner's Motion for Amendments to Pre-Hearing Order dated May 1, 2009
Petitioner's Five-Day Disclosure dated May 5, 2009 (Exhibits 1-30)
Notice of Additional Disclosure dated May 5, 2009 (Exhibit No. 31)
Amended Prehearing Order dated May 6, 2009
DCPS' Five-Day Disclosure dated May 6, 2009 (Exhibits 1-7)
Motion to Preclude DCPS Placement dated *Evidence of* May 8, 2009
Attendance Sheet dated May 11-12, 2009
Three (3) CD-Roms of Hearing conducted on May 11-12, 2009
Petitioner's Closing Statement dated May 15, 2009
District of Columbia Public School's Closing Argument dated May 15, 2009

² 34 C.F.R. §300.502(b)(2).

³ The Hearing Officer denied Petitioner's *Motion for Default and Summary Judgment* dated April 23, 2009 and *Motion to Preclude DCPS Placement* dated *Evidence of* May 8, 2009 at the conclusion of the parties' opening statements.

Witnesses for Petitioner

Petitioner's Mother

██████████ Investigator, Children's Law Center
Admissions Specialist,
██████████ Educational Consultant

Witnesses for DCPS

██████████ Special Education Coordinator,
██████████ Social Worker,
██████████ Cluster Supervisor M.S. Programs, DCPS

Findings of Fact

1. Petitioner is an ██████████ year-old student attending
2. During the hearing, the parties reached the following agreement: DCPS will fund an independent psychoeducational evaluation and an independent functional behavior assessment ("FBA").
3. At the end of Petitioner's ██████████ grade year, the 2005-2006 school year, Petitioner received the following grades: Below Basic in Reading and Mathematics, Basic in Writing, Science and Music, and Proficient in Listening Skills and Speaking Skills. He was sent to summer school and his teacher indicated that he would be retained in ██████████ grade.⁵ Petitioner was not retained after attending summer school.⁶
4. At the end of the 2006-2007 school year, Petitioner received Below Basic grades in all subjects.⁷
5. DCPS convened a Multidisciplinary Team ("MDT") meeting on October 11, 2007. The MDT developed a Student Evaluation Plan ("SEP") that required DCPS to conduct the following evaluations: psychological, educational, and social history.⁸
6. ██████████, DCPS School Psychologist, completed a Report of Psychological Evaluation on January 8, 2008. Her findings and recommendations are as follows:

⁴ *Complaint* at 1.

⁵ Petitioner's Exhibit ("P.Exh.") No. 14.

⁶ Testimony of Petitioner's mother.

⁷ P.Exh. No. 15. The second of the three pages of Petitioner's Report Card was not disclosed, and the third page was illegible.

⁸ P.Exh. No. 1.

[Petitioner], a year old [REDACTED] and a grade student who attends School was referred for a psychological evaluation to determine his cognitive functioning, social emotional functioning and to determine his eligibility for Special Education. His general cognitive ability as estimated by the WISC-IV, cannot be easily summarized because his verbal reasoning abilities are much better developed than his non verbal reasoning abilities. [Petitioner's] reasoning abilities on verbal tasks are generally in the Average range (VCI=91), while his nonverbal reasoning abilities are significantly lower and in the Extremely Low range (PRI=67).

His visual motor functioning is in the Average range.

[Petitioner] qualifies for Special Education services as a student with clinically elevated anxiety, depression, poor self regulation, inadequate social skills and behavioral dyscontrol.⁹

7. DCPS completed an Educational Evaluation on January 24, 2008. The examiner concluded that "When compared to others at his age level, [Petitioner's] ability to apply academic skills is within the average range of others at his age level. His academic skills are low average. His fluency with academic tasks is low. When compared to others at his age level, [Petitioner's] performance is average in math calculation skills and math reasoning; low average in written language and written expression; and low in broad reading and basic reading skills."¹⁰

8. DCPS convened an MDT meeting on February 5, 2008 to determine Petitioner's eligibility for special education services. The MDT determined that Petitioner was eligible for services and classified Petitioner as emotionally disturbed ("ED"). The MDT prescribed 26.5 hours of specialized instruction and one hour per week of psychological counseling. Petitioner's mother signed the IEP and checked the box indicating that she agreed with its contents.¹¹ The MDT concluded that "[Petitioner] would benefit from a small structured classroom setting with a behavioral management component. Which should include counseling services for an hour a week to address his emotional and behavioral concerns. He would also benefit from the implementation of a behavioral intervention plan. This program/placement should be implemented outside of the neighborhood school."¹² The MDT issued a Prior Notice placing Petitioner at his neighborhood school.¹³

⁹ P.Exh. No. 10 at 16.

¹⁰ P.Exh. No. 11 at 2.

¹¹ P.Exh. No. 2 at 1.

¹² *Id.*, Meeting Notes at 2.

¹³ P.Exh. No. 4.

9. On or about March 10, 2008, DCPS issued a Prior Notice placing Petitioner at ¹⁴ At Petitioner was in a class of 15 students. He was suspended for the last two weeks of the school year.¹⁵

10. DCPS placed Petitioner at for the 2008-2009 school year. There were 15 students in his class. The special education teacher was assisted by a teacher's aide. Throughout the first half of the school year, Petitioner routinely used very profane language at school.¹⁶

11. On February 17, 2009 DCPS updated Petitioner's IEP. The level of services was unchanged from the February 5, 2008 IEP.¹⁷

12. On or about February 27, 2009, Petitioner was suspended for 66 school days for a staff member with a on the playground the previous day.¹⁸

13. DCPS convened an MDT meeting on March 3, 2009 to determine whether the behavior that resulted in Petitioner's suspension was a manifestation of his disability. informed Petitioner's mother of the meeting on the day of the meeting. When called her back to have her participate in the meeting by telephone, was unable to reach the parent. DCPS proceeded with the meeting in the mother's absence. The MDT made the following determination: "The team has decided that his is not a result of his disability. [Petitioner] assaulting a teacher is not a result of his disability. [Petitioner] knows right from wrong. DCPS will move forward ... for 45 days at [Petitioner] assaulted a teacher with a rock."¹⁹ supported the MDT's conclusions, because Petitioner "knows right from wrong," "I have to keep my staff protected," and Petitioner "knew the consequences of his actions." Petitioner was placed at where all students who commit "level two" infractions are sent upon being suspended. The MDT conducted no analysis as to the capability of to meet Petitioner's needs, and did not discuss the continuing viability of Petitioner's IEP or intervention behavior plan ("IBP"). testified that there was no need to review evaluations or the IEP, because the only issue was whether Petitioner knew right from wrong.²⁰

14. The MDT on March 3, 2009 relied on a DCPS form, "Manifestation Determination," that directed the MDT to find that the student's behavior was not a manifestation of his disability if (1) The student understood the impact and consequences of the behavior subject to disciplinary action, and (2) The student had the ability to control the behavior subject to disciplinary action.²¹

¹⁴ P.Exh. No. 5.

¹⁵ Testimony of Petitioner's mother.

¹⁶ P.Exh. Nos. 17 and 18.

¹⁷ P.Exh. No. 6

¹⁸ P.Exh. No. 20; testimony of Petitioner's mother and

¹⁹ P.Exh. No. 7.

²⁰ Testimony of

²¹ P.Exh. No. 7 at 3.

15. informed Petitioner's mother that it would not allow Petitioner to enroll. Petitioner's mother contacted the Office of Special Education ("OSE") at DCPS headquarters. Two to three weeks later, someone from OSE contacted Petitioner's mother and directed her to enroll Petitioner at . No MDT meeting was held to determine this placement, and Petitioner's mother received no Prior Notice. Petitioner's mother was unwilling to send Petitioner to because she believes it is a "typical neighborhood school" and "no neighborhood school" is appropriate for Petitioner. Petitioner's mother believes that Petitioner is overly influenced by peer pressure at his neighborhood schools. Petitioner's mother refused to allow Petitioner to attend .

16. At Petitioner was the school's ED Cluster Program. The Program has 16 students in two classes. Petitioner was in a self-contained class of eight students. His teacher was certified in special education and was assisted by an aide. has behavior technicians who are available to assist when students become disruptive.²³

17. determined that it could not meet Petitioner's needs. At Petitioner would have been in a class of eight ED students. His teacher would have been certified in special education. His non-core courses would have been with general education students. Like utilizes behavior technicians to help disruptive students to "de-escalate." ED students are on a behavior modification program that rewards them for positive behaviors.²⁴

Conclusions of Law

Childfind Violations

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.²⁵ 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.²⁶ Obviously, 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.²⁷ Once a child has been determined to be eligible for services, he or she must be reevaluated at least every three years.²⁸

Petitioner's counsel argues that DCPS should have found Petitioner eligible for special education services as early as the 2003-2004 school year. Her argument fails on both factual and legal grounds. The evidence in the record does not persuade the Hearing

²² Testimony of Petitioner's mother.

²³ Testimony of

²⁴ Testimony of

²⁵ 34 C.F.R. §300.304(c)(4).

²⁶ 34 C.F.R. §300.304(b)(2).

²⁷ 34 C.F.R. §300.305(a).

²⁸ 34 C.F.R. §300.303(b)(2).

Officer that DCPS should have been on notice of Petitioner's disability before the end of the 2006-2007 school year. There was no credible evidence offered as to sub par academic performance before the 2005-2006 school year. Although Petitioner was threatened with retention at the end of the 2005-2006 school year, he was promoted after attending summer school. Moreover, he was proficient in two areas and Basic in Writing, Science, and Music. This is not a profile that necessarily suggests the student is disabled. Petitioner's grades were markedly lower at the end of the 2006-2007 school year. Early in the following school year, on October 11, 2008, DCPS convened an MDT meeting to develop a SEP to determine Petitioner's eligibility for special education services. DCPS completed the evaluations and made an eligibility determination on or about February 4, 2008, within 120 days of the October 11th MDT meeting, and issued a notice of placement on March 10, 2008 placing Petitioner at ²⁹ The Hearing Officer concludes that DCPS did not unreasonably delay initiating evaluations to determine Petitioner's eligibility for special education services.

Moreover, the statute of limitations for IDEIA claims is two years.³⁰ Petitioner's counsel argues that there is an exception to the two year limitation where the LEA has engaged in a continuing violation or where the LEA withheld crucial information from the parent that impaired her ability to exercise her rights.³¹ The Hearing Officer concludes that the exception does not apply in this case. DCPS did not withhold any information from Petitioner's parent. And inasmuch as the Hearing Officer has concluded that DCPS initiated childfind procedures at the appropriate time, the continuing violation exception is also unavailing.

Failure to Develop Appropriate IEPs

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),³² 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

²⁹ Local law requires DCPS to complete initial evaluations and to make an eligibility determination within 120 days of the referral for evaluations. D.C. Code §30-2561.02; 5 D.C.M.R. §3004.1(b).

³⁰ 20 U.S.C. §1415(f)(3)(C).

³¹ 20 U.S.C. §1415(f)(D).

³² 458 U.S. 176 (1982).

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).³³

Petitioner's counsel offers six reasons why Petitioner's IEPs were insufficient: (1) the IEPs did not correctly classify Petitioner, (2) the accommodations made in the IEPs are insufficient to account for his deficits in reading and writing, (3) social-emotional goals were insufficient, (4) the IEPs prescribe an insufficient amount of related services, (5) the IEP fails to address extended school year ("ESY") in any way, and (6) the IEP team did not order a new functional behavior assessment or develop a new intervention behavior plan ("IBP"). Counsel's argument is based entirely on the testimony of Dr. Iseman. While the Hearing Officer has great respect for Dr. Iseman, Dr. Iseman did not evaluate Petitioner and did not even indicate that she had a conversation with him. Thus, Dr. Iseman's entire testimony and recommendations are based on a review of evaluations that counsel alleged were inadequate. Prior to this proceeding, Petitioner never challenged the validity of those evaluations. Thus, the MDTs on February 5, 2008 and February 17, 2009 justifiably relied on the evaluations that they were provided to develop Petitioner's educational programs.

The strongest argument that the IEPs are inappropriate is grounded on DCPS' alleged misclassification of Petitioner. With respect to Petitioner's disabilities, counsel argues that DCPS was aware of Petitioner's ADHD and Dr. Iseman testified that Petitioner should also have been classified with a learning disability. The only problem with these arguments is that they are not supported by current evaluations. There is no evidence that DCPS was presented with a diagnosis of Petitioner's ADHD. And while Dr. Iseman testifies that a competently conducted educational evaluation will likely discover that Petitioner suffers from a learning disability, that evaluation has not yet been conducted. During the hearing, the parties agreed that DCPS would fund an independent psychoeducational evaluation and an independent functional behavior assessment. The Hearing Officer believes that the issue of Petitioner's disabilities should be reconsidered upon the conclusion of the independent psychoeducational evaluation. Moreover, in light of the allegation regarding Petitioner's ADHD, the Hearing Officer will authorize an independent comprehensive psychological evaluation that will encompass all areas of suspected disability. As for the remaining four alleged deficiencies of the IEPs, the Hearing Officer has read the IEPs and does not disagree that the IEPs could have benefited from additional detail. However, the IEPs prescribed full-time specialized instruction in a small-class setting and an hour per week of psychological counseling. This prescription is consistent with the recommendations in the current psychological evaluation, and is consistent with the findings of the current educational evaluation. The

³³ *Id.* at 1
81-82.

Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS failed to develop appropriate IEPs in 2008 and 2009.

Inappropriate Initial Evaluations

As discussed above, the parties agreed during the hearing that DCPS would fund an independent psychoeducational evaluation and an independent FBA. The Hearing Officer will broaden the authority to include a comprehensive psychological evaluation to put to rest any questions about the existence of ADHD.

Inappropriate Disciplinary Procedures

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local education agency ("LEA"), the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or (2) if the conduct in question was the direct result of the LEA's failure to implement the IEP.³⁴

If the MDT determines that the conduct was a manifestation of the child's disability, the MDT must either (1) conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (2) review the existing behavioral intervention plan, and modify it, as necessary, to address the behavior. The LEA must also return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.³⁵

DCPS's manifestation determination was flawed in two significant respects. First, as is specified above, the regulations contemplate that the parent will participate in the manifestation determination. The LEA has a heavy burden to ensure the presence of the child's parent at each IEP meeting.³⁶ If neither parent can attend, the LEA should facilitate parental participation by phone.³⁷ In the case of a parent who is difficult to reach, or who persistently fails to attend meetings, LEA should maintain detailed records of its attempts to encourage a parent to attend a meeting. The regulations suggest that, in the event a school decides to proceed with an IEP meeting without a parent, it should have records of telephone calls made or attempted to the parent, copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits.³⁸ In this case,

³⁴ 34 C.F.R. §300.530(e)(1).

³⁵ 34 C.F.R. §300.530(f).

³⁶ 34 C.F.R. §300.322(a).

³⁷ 34 C.F.R. §300.322(c).

³⁸ 34 C.F.R. §300.322(d).

despite an extremely serious suspension proposal, Petitioner's mother was notified of the MDT meeting, by phone, on the day of the proposed hearing. When _____ could not add her to a conference call fifteen minutes later, _____ proceeded with the meeting in the parent's absence. The parent was given insufficient notice of the meeting, and DCPS exerted minimal effort to ensure her presence at the meeting.

Second, the MDT's determination that Petitioner's behavior was not a manifestation of his disability was equally flawed. According to _____ the team made its determination, and _____ supported the MDT's conclusions, because Petitioner "knows right from wrong," "I have to keep my staff protected," and Petitioner "knew the consequences of his actions." Whether an individual knows right from wrong or knew the consequences of his actions are the appropriate inquiries for determining criminal insanity. They have no probative value in determining whether a child's misbehavior is a product of his disability.

The appropriate inquiry is whether "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or (2) if the conduct in question was the direct result of the LEA's failure to implement the IEP." The MDT did not make the appropriate inquiry in its manifestation determination. In fact, despite the clear directive in the regulations, _____ was emphatic that it was not necessary to consider Petitioner's IEP in a manifestation determination. Petitioner is classified as emotionally disturbed. Throughout the school year, he engaged in disrespectful and disruptive behavior. Petitioner's throwing a rock on the playground at a staff member was different in its methodology and degree of outrageousness, but it was characteristic of his antisocial, disrespectful behavior throughout the school year. _____ eagerness to move Petitioner out of _____ to make life easier for _____ staff was transparent but unsupportable under the applicable regulations. The Hearing Officer concludes that Petitioner has met his burden of proving that DCPS failed to employ the appropriate legal standard in making its manifestation determination on March 3, 2009. Consequently, DCPS must also return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.³⁹

Inappropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),⁴⁰ 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

³⁹ 34 C.F.R. §300.530(f).

⁴⁰ 458 U.S. 176 (1982).

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.⁴¹

As a consequence of DCPS’ flawed manifestation determination, it is obligated to return Petitioner to . However, testified that informed her that it could no longer meet Petitioner’s needs. Therefore, DCPS placed Petitioner at

At Petitioner would have been in a class of eight ED students. His teacher would have been certified in special education. His non-core courses would have been with general education students. utilizes behavior technicians to help disruptive students to “de-escalate.” ED students are on a behavior modification program that rewards them for positive behaviors.

Petitioner’s primary criticism of is that Petitioner requires a more restrictive setting than was offered at but is less restrictive than However, as the Hearing Officer discussed above, Petitioner’s current evaluations recommend that he can derive educational benefit in a full-time ED program in a small-class environment. Although Petitioner would take non-core courses with general education students at the Hearing Officer is not persuaded that this invalidates as an appropriate placement. Petitioner’s mother expressed disinterest in because it is a neighborhood school. She is unwilling to approve of any school where Petitioner has a large number of friends for fear that he will be negatively influenced by them. Unfortunately, however, DCPS is statutorily obligated to favor placements at neighborhood schools.⁴² Clearly, peer group pressure is not a valid justification for overruling a statutorily imposed preference. The Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS has failed to provide an appropriate placement.

However, the placement determination must be made “by a group of persons, *including the parents*, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and ... is based on the child’s IEP.”⁴³ Thus, a placement determination made by a DCPS official or a DCPS entity that does not include the parents, that is reached without consideration of the capability of the proposed placement to meet the needs identified in the IEP, and that is made by a group that otherwise fails to meet the requirements of an appropriate IEP team, is invalid.

⁴¹ Rowley, *supra*, at 200-01.

⁴² 5 D.C.M.R. §3013.1. See also 34 C.F.R. §300.116.

⁴³ 34 C.F.R. §300.116(a)(1), emphasis added. Each public agency must ensure that a parent of a child with a disability is a member of any group that makes decisions on the educational placement of the parent’s child. 34 C.F.R. §300.501(c)(1).

In *W.G. v. Board of Trustees of Target Range School District No. 23*,⁴⁴ the school system gave no serious consideration to any proposal but the one it proposed. The Ninth Circuit agreed with the district court that the school district had independently developed a proposed IEP that would place the student in a predetermined program.⁴⁵ The court held that in order to fulfill the goal of parental participation in the IEP process, the school district was required to conduct, not just an IEP meeting, but a “*meaningful*” IEP meeting.⁴⁶

In *Deal v. Hamilton County Board of Education*,⁴⁷ the Sixth Circuit reversed a district court decision in which the lower court denied reimbursement for a unilateral private placement by the parents. The parents had alleged that they had been denied a meaningful opportunity to participate in a placement determination in that the school system refused to consider funding a program for their autistic child that seemed to be effective.

The facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program... The clear implication is that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services. This is predetermination.

The School System seemed to suggest, at oral argument, that it is entitled to invest in a program such as TEACCH and then capitalize on that investment by using the TEACCH program exclusively. But this is precisely what it is not permitted to do, at least without fully considering the individual needs of each child. A school district unquestionably may consider cost in determining appropriate services for a child. The school district is required, however, to base its placement decision on the child's IEP, 34 C.F.R. § 300.552, rather than on the mere fact of a pre-existing investment. In other words, the school district may not, as it appears happened here, decide that because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability, *regardless of any evidence to the contrary of the individualized needs of a particular child*. A placement decision may only be considered to have been based on the child's IEP when the child's individual characteristics, including demonstrated response to particular types of educational programs, are taken into account.⁴⁸

⁴⁴ 960 F.2d 1479 (9th Cir. 1992).

⁴⁵ *Id.* at 1484.

⁴⁶ *Id.* at 1485.

⁴⁷ 392 F.3d 840 (6th Cir. 2004).

⁴⁸ *Id.*, 392 F.3d at 858-59, citations omitted. *See also, Spielberg ex rel. Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258-59 (4th Cir. 1988)(placement must be based on the IEP, and parents' after the fact involvement in the decision does not satisfy the obligation to provide a meaningful opportunity to participate in the decision).

The decision to place Petitioner at [REDACTED] was not made by an appropriate IEP team. [REDACTED], who made the placement determination, did not participate on the MDT that developed Petitioner's IEP. Even though Petitioner failed to prove that [REDACTED] is not an appropriate placement, Petitioner's parent is entitled to a placement meeting at which she can air her concerns about [REDACTED] with members of the team who are aware of Petitioner's educational needs. Therefore, the Hearing Officer will order DCPS to reconvene an MDT meeting upon the completion of the independent evaluations to revisit Petitioner's classification, update his IEP, and to consider placement alternatives.

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 26th day of May 2009, it is hereby

ORDERED, Petitioner is authorized to obtain an independent functional behavior assessment and an independent comprehensive psychological evaluation (including analyses of cognitive, educational, social/emotional, and ADHD criteria) *and is not constrained by 5 D.C.M.R. Section 3027.5*. Petitioner's counsel shall provide copies of the completed assessment to the Special Education Coordinator at [REDACTED] and the DCPS Office of Special Education ("OSE") Legal Unit by facsimile transmission and first-class mail along with a written request to schedule the MDT meeting described below.

IT IS FURTHER ORDERED, that within fifteen (15) school days⁴⁹ of its receipt of the independent evaluations, DCPS shall convene an MDT meeting at [REDACTED] to review all current evaluations, revisit Petitioner's disability classification, update Petitioner's IEP, and consider placement alternatives. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel, [REDACTED] Esquire.

IT IS FURTHER ORDERED, that DCPS shall afford Petitioner's parent an opportunity to participate in any meeting in which Petitioner's placement is discussed or determined. The DCPS placement representative shall advise Petitioner's parent of the advantages and disadvantages for Petitioner with respect to each school that is discussed, including any schools proposed by the parent. DCPS shall provide Petitioner's parent an explanation for the placement DCPS proposes, and the reasons for the proposal shall be provided in the Meeting Notes. DCPS shall issue a Prior Notice within seven days if Petitioner is placed in a public facility or within 30 days if Petitioner is placed in a private facility.

⁴⁹ For purposes of this order, "school days" refers to days on which classes are held during the regular school year. It does not include summer school. Thus, in the event the independent evaluations are completed near to or after the end of the 2008-2009 school year, the MDT meeting shall be convened early in the 2009-2010 school year when an appropriate IEP team is more likely to be available.

IT IS FURTHER ORDERED, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

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 Special Education Coordinator at _____ and the DCPS OSE Legal Unit to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.⁵⁰

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: May 26, 2009

⁵⁰ If DCPS fails to contact Petitioner's counsel to coordinate scheduling the MDT meeting by a date that would make compliance with this Order feasible, Petitioner's counsel shall initiate telephone calls and electronic correspondence to attempt to effect compliance within the timelines set out herein.