

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

**Office of Review and Compliance
Student Hearing Office**

**Terry Michael Banks, Due Process Hearing Officer
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Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: March 16, 2009
)	
Petitioner,)	Prehearing Order: April 19, 2009
)	
v.)	Hearing Date: May 6, 2009
)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS)	Docket No.
)	
and)	
)	
THE OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION)	
)	
Respondents.)	
)	
Student Attending:)	
)	

2009 MAY 18 PM 12:08
STUDENT HEARING OFFICE
OSSE

HEARING OFFICER'S DECISION

Counsel for the Petitioner:	Donovan Anderson, Esquire 2041 Martin Luther King Avenue, S.E. Washington, D.C. 20020 (202) 610-1400; Fax: (202) 610-1881
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¹ Personal identification information is provided in Attachment A.

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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 _____ School. On December 29, 2008, Petitioner filed a Due Process Complaint Notice alleging that Options had failed to (1) develop an appropriate Individualized Education Program (“IEP”), (2) provide behavioral supports, (3) provide a safe educational environment, and (4) provide an appropriate placement. On February 6, 2009, Petitioner’s counsel filed a letter with the DCPS Student Hearing Office withdrawing the Complaint. On March 6, 2009, this Hearing Officer issued a Hearing Officer’s Decision (“HOD”) dismissing the Complaint without prejudice.

On March 16, 2009, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) and the Office of the State Superintendent of Education (“OSSE”) had failed to (1) provide an appropriate placement, (2) provide the parent a meaningful opportunity to participate in the placement determination, and (3) provide the parent an explanation for denying her placement request. On March 26, 2009, Petitioner and DCPS filed a *Joint Stipulation and Motion to Dismiss* (“*Motion to Dismiss*”). The filing proposed dismissing DCPS as a party since, as of “October 1, 2008, DCPS no longer coordinates or oversees the placement process for students enrolled at LEA Charter Schools as a result of policies and procedures issued by the District of Columbia Office of the State Superintendent of Education.” OSSE filed no objection to the *Motion to Dismiss*.

On April 29, 2009, OSSE filed *Respondent Office of the State Superintendent of Education’s Motion for Summary Judgment and Memorandum of Law*. OSSE argued that it was entitled to judgment, because as the State Education Agency (“SEA”), it has unilateral authority to determine the location where special education students will be placed. Since “Petitioner’s only objection is to the geographic location of the school,” OSSE argued, there were no disputed issues of fact that precluded a summary judgment. The Hearing Officer did not rule on the motion prior to the hearing, but read and considered the filing before developing the Conclusions of Law below.

The due process hearing was convened and completed on May 6, 2009. The parties’ Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated March 16, 2009
Joint Stipulation and Motion to Dismiss dated March 26, 2009
Respondent Office of the State Superintendent of Education's Response to the Petitioner's Complaint dated March 26, 2009
Prehearing Order: April 19, 2009, 2009
Respondent Office of the State Superintendent of Education's Motion for Summary Judgment and Memorandum of Law dated April 29, 2009
OSSE's Five-Day Disclosure dated April 29, 2009 (Exhibits 1-8)
Petitioner's Five-Day Disclosure dated April 29, 2009 (Exhibits 1-10)
OSSE's Five-Day Disclosure dated May 5, 2009 (Exhibit No. 9)
Attendance Sheet dated May 6, 2009
CD-Rom of Hearing conducted on May 6, 2009

Witnesses for Petitioner

Petitioner's Grandmother (Guardian)
Petitioner
Vice-President, Academy

Witnesses for OSSE

Program Supervisor of Programs
Yuliana De Arroyo, Placement Oversight Manager, OSSE
Avni Patel, Change in Placement Coordinator, OSSE

Findings of Fact

1. Petitioner is a year-old student attending
2. On September 30, 2008, Options convened a Multidisciplinary Team ("MDT") meeting to develop an annual IEP. The MDT classified Petitioner with a learning disability ("LD") and emotional disturbance ("ED") and prescribed 16 hours per week of specialized instruction and 30 minutes per week of psychological counseling. Petitioner's grandmother participated in the meeting by telephone and indicated her agreement with the IEP.³

² *Complaint* at 1.

³ Petitioner's Exhibit ("P.Exh.") No. 2, IEP at 1

3. On January 15, 2009, [redacted] reconvened an MDT meeting. The MDT acceded to the grandmother's request to increase the level of specialized instruction. Petitioner's level of specialized instruction was increased to 27 hours per week.⁴

4. On February 6, 2009, [redacted] reconvened an MDT meeting and increased Petitioner's psychological counseling to one hour per week.⁵

5. On February 6, 2009, [redacted] filed a "request for change in placement" for Petitioner with OSSE.⁶

6. On March 3, 2009, [redacted] convened an MDT meeting to discuss placement. Petitioner's grandmother expressed dissatisfaction with [redacted] "The parent stated that the student needs a smaller group and new setting and start all over again. The parent stated that the student should go to a more restricted environment and that she understands what that means."⁷ Petitioner's grandmother requested that Petitioner be placed at [redacted] Academy, which had accepted Petitioner. Petitioner's counsel described [redacted] as a "lateral," rather than a more restricted, placement.⁸ [redacted] original position was that it could continue to meet Petitioner's educational needs. When Petitioner's grandparent continued to resist Petitioner's continued placement at [redacted] deferred the placement decision to OSSE.⁹

7. OSSE's original position was that Petitioner should remain at [redacted]

Through its thorough review of documents, assessments/evaluations, and discussion with key stakeholders, it is the recommendation of the OSSE that a change in placement into a more restrictive environment is not warranted at this time for [Petitioner]. It is recommended by the OSSE that technical assistance (TA) be provided to [redacted] in the areas of effective development of IEPs that place emphasis on the student's area of difficulty and include goals and objectives that are specific, measurable, and aligned to identified student needs. It is believed that with at robust IEP, supported by an effective behavioral intervention plan, [redacted] can successfully serve students with the similar circumstance(s) in this academic setting.¹⁰

8. In light the grandmother's insistence on a change in placement, the MDT agreed to recommend such a change. Ms. Patel, who participated in the March 3rd MDT meeting, researched potential placement sites for Petitioner including [redacted] Academy, [redacted] School (D.C.) and [redacted] School (Annandale, Virginia). OSSE sent referral [redacted]

⁴ P.Exh. No. 2 at 2.

⁵ *Id.* at 1.

⁶ P.Exh. No. 5 at 1.

⁷ P.Exh. No. 4 at 1.

⁸ *Id.* at 1-2.

⁹ *Id.*; testimony of Ms. Patel.

¹⁰ P.Exh. No. 5 at 1.

packets to _____ and _____ but did not receive a response from _____ within ten days.¹¹

9. _____ accepted Petitioner on March 12, 2009 “contingent upon a successful interview and visit to the school.”¹²

10. OSSE issued a Prior Notice on March 12, 2009 placing Petitioner at Phillips School in Annandale.¹³

11. Petitioner’s grandmother was not interested in having Petitioner placed at Phillips due to its location in Annandale, Virginia. She made no genuine effort to complete the visit and interview required in the March 12, 2009 letter of acceptance.¹⁴

12. At a Resolution Session meeting on March 30, 2009, OSSE offered to place Petitioner at _____ School within the District of Columbia. Petitioner’s grandmother declined OSSE’s offer, preferring a placement at _____ Academy.¹⁵

13. _____ is a private school offering full-time special education services. The maximum class size is nine. All classes are self-contained to minimize the distractions associated with transitions. _____ utilizes a behavior modification system; it is a point system that rewards students throughout each day for positive behaviors. Each student has an individualized behavior plan. All classes at Phillips are taught by certified special education teachers, and there is a teacher’s assistant in each class. Licensed social workers provide psychological counseling.¹⁶

Conclusions of Law

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“*Rowley*”),¹⁷ 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...

¹¹ Testimony of Ms. Patel.

¹² P.Exh. No. 8.

¹³ P.Exh. No. 7.

¹⁴ Testimony of Petitioner’s grandmother and Ms. Thompson.

¹⁵ Exh. No. 1 to OSSE’s *Motion for Summary Judgment*.

¹⁶ Testimony of Ms. Thompson.

¹⁷ 458 U.S. 176 (1982).

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.¹⁸

Thus, Petitioner's burden in this case was to prove that OSSE failed to provide a placement that promised to provide educational benefit to Petitioner.

The MDT on March 3rd agreed to a change in placement for Petitioner only because of Petitioner's grandmother's insistence that the placement be changed. Both and OSSE asserted that was capable of meeting Petitioner's needs. found Petitioner eligible for services at the beginning of the school year and increased the level of services at the grandmother's request in January and again in February. The Hearing Officer was not made aware of any inadequacy of program other than Petitioner's testimony that was "boring." This vague characterization would be insufficient to disqualify as a viable placement for Petitioner.

OSSE ultimately issued a Prior Notice placing Petitioner at Petitioner objected to on two grounds: its distance from Petitioner's home in northeast Washington, and the contingency in acceptance letter. District law sets forth the following criteria for determining an appropriate placement: the decision must be

- (a) 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;
- (b) Made in conformity with the Least Restrictive Environment (LRE) provision of the Act and § 3011 of this Chapter;
- (c) Made within timelines consistent with applicable local and Federal law;
- (d) Determined at least annually after his or her initial placement;
- (e) Based on the child's IEP; and
- (f) Is as close as possible to the child's home.¹⁹

The LEA shall place each child in need of special education who requires a non-public day school in a program within the District if a suitable program is available therein. Only if there is no appropriate program within the District shall a child be placed in a program outside of the District.²⁰

¹⁸ Rowley, *supra*, at 200-01.

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

²⁰ 5 D.C.M.R. §3013.6. See also D.C. Code §38-2561.02.

Thus, proximity to the child's home is a factor that must be taken into account, and non-public placements within the District are preferable to placements outside the city. In this case, OSSE sent a placement packet to _____ School, which is located in the District. OSSE initially eliminated _____ as an option, because _____ did not respond to the referral within ten days. However, at the Resolution Session on March 30th, when Petitioner's grandmother raised _____ location as a problem, OSSE again offered to place Petitioner at _____. The grandmother rejected the offer, expressing her preference for _____ Academy. The Hearing Officer concludes that OSSE gave due consideration to placing Petitioner at a non-public school within the District. The grandmother rejected the offer to place Petitioner at _____ because she preferred to _____ not because of anything having to do with proximity to her home.

Petitioner's second objection to _____ was the contingency in the acceptance letter. Petitioner's acceptance was contingent upon a successful interview and visit. From the testimony of the grandmother, it is apparent to the Hearing Officer that she made no genuine effort to complete the interview process at _____ because she was steadfast in her insistence that Petitioner be placed at _____ Academy. According to Thompson, it was very unlikely that Petitioner would have been disqualified during the interviewing process because of the information already available to _____. The Hearing Officer concludes that the contingency in _____ March 12th acceptance letter in no way undermined the validity of the Prior Notice placing Petitioner at _____.

Petitioner offered no evidence to prove that _____ could not provide educational benefit to Petitioner. OSSE, on the other hand, offered persuasive testimony from Ms. Thompson that _____ is capable of meeting Petitioner's educational needs. The only negative aspect of the placement at _____ is _____ location from Petitioner's home. But the issue is whether OSSE investigated the availability of District-based non-public schools before it proposed _____ as a placement. When OSSE issued the Prior Notice, it had not received a response from _____ the only other school it determined capable of meeting Petitioner's needs. Thus, at the time the Prior Notice was issued, there were no District-based non-public schools that OSSE deemed capable of meeting Petitioner's needs. Under these circumstances, the placement at _____ was appropriate. Subsequently, _____ became an available option, but Petitioner's grandmother rejected _____ at the Resolution Session meeting. However, the issue presented to the Hearing Officer is the proposal in the March 12th Prior Notice to place Petitioner at _____ not OSSE's settlement proposal on March 30th. The Hearing Officer concludes that Petitioner has failed to meet his burden of proving that _____ would be unlikely to provide educational benefit to Petitioner.

OSSE's Procedural Violations

Petitioner argues that OSSE committed several procedural violations that invalidate the placement at _____. First, Petitioner argues that OSSE failed to provide the parent a meaningful opportunity to participate in the placement determination, because the decision to place Petitioner at _____ was made by unilaterally by Ms. Patel

without the benefit of a second placement meeting. Second, Petitioner argues that OSSE was obligated to explain its refusal to honor Petitioner's grandmother's request for a placement at Academy in the Prior Notice.

Opportunity to Participate in the Placement Decision

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."²¹ 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 suspect.

In *W.G. v. Board of Trustees of Target Range School District No. 23*,²² 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.²³ 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.²⁴

In *Deal v. Hamilton County Board of Education*,²⁵ 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

²¹ 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).

²² 960 F.2d 1479 (9th Cir. 1992).

²³ *Id.* at 1484.

²⁴ *Id.* at 1485.

²⁵ 392 F.3d 840 (6th Cir. 2004).

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.²⁶

In this case, the grandmother took part in an MDT meeting on March 3rd in which Petitioner's educational needs were thoroughly discussed. In fact, it was only because of the grandmother's insistence that the MDT agreed to change Petitioner's placement, despite no showing that [redacted] was incapable of meeting Petitioner's needs. Ms. Patel represented OSSE at that meeting and participated in the discussion of Petitioner's needs. After the meeting, Ms. Patel investigated non-public alternatives and concluded that [redacted] School and [redacted] could meet Petitioner's needs. Under these circumstances, the Hearing Officer concludes that the grandparent was not deprived of a meaningful opportunity to participate in the placement decision. As the SEA, OSSE has the ultimate authority to make the placement decision. The decision in this case was made by the SEA representative who participated in the MDT meeting in which Petitioner's needs were explored thoroughly with the grandparent. Ms. Patel's investigation of placement alternatives and final decision was informed by the factors discussed at that meeting.

Prior Notice Deficiencies

The regulations require DCPS to provide a written explanation in a Prior Notice if it proposes taking action or refuses to take action in contravention to the parents' desires.²⁷ In this case, OSSE refused to place Petitioner at [redacted] as requested by [redacted]

²⁶ *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).

²⁷ The regulation prescribing the contents of a Prior Notice, 34 CFR §300.503(b), provides;

(b) Content of notice. The notice required under paragraph (a) of this section must include--

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

Petitioner's grandmother. The Prior Notice offered no explanation for OSSE's refusal to honor the grandmother's request. However, even assuming that OSSE violated its procedural obligations, an IDEIA claim is viable only if those procedural violations affected the student's *substantive* rights.²⁸ Had OSSE proposed a placement that was not based on a discussion with the grandparent, had it proposed a placement that was not based on the school's ability to implement Petitioner's IEP, and had it proposed a placement at which it was not clearly apparent that Petitioner's needs could be met, the Hearing Officer would have invalidated the Prior Notice for failing to provide the explanation required by the regulations. In this case, however, the testimony of Ms. Thompson satisfies the Hearing Officer that _____ is capable of meeting Petitioner's educational needs. Therefore, Petitioner suffered no actual educational harm as a result of OSSE's procedural violation.

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 16th day of May 2009, it is hereby

ORDERED, that as to DCPS and OSSE, the *Complaint* is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED, that this Order is effective immediately.

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected;

(7) A description of any other factors that are relevant to the agency's proposal or refusal.

²⁸ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), citing *Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error"); *C.M. v. Board of Education*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *M.M. ex rel. D.M. v. School District*, 303 F.3d 523, 533-34 (4th Cir. 2002) ("If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations."); *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) ("[P]rocedural flaws do not automatically render an IEP legally defective. Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits." (citations omitted)); *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws "automatically require a finding of a denial of a FAPE"); *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements where the alleged violations did not result in a "substantive deprivation" of the student's rights); *Burke County Board of Education v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education where procedural faults committed by Board did not cause the child to lose any educational opportunity).

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 16, 2009