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
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Confidential

STUDENT, through the legal guardian[1]	)	Complaint Filed: February 12, 2009
	)	
Petitioner,	)	Prehearing Order: March 6, 2009
	)	
v.	)	Hearing Date: March 16, 2009
	)	April 1, 2009
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	April 8, 2009
	)	
	)	Docket No.
Respondent.	)	
	)	
Student Attending:	)	
	)	

HEARING OFFICER'S DECISION

Counsel for Petitioner:	Domiento C.R. Hill, 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:	Laura George, Esquire Office of the General Counsel, DCPS 825 North Capitol Street, N.E.; 9th Floor Washington, D.C. 20002

[1] Personal identification information is provided in Attachment A.

Jurisdiction

This hearing was conducted in accordance with the rights established under the Individuals With Disabilities Education Improvement Act ("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.

Introduction

Petitioner is a year-old student attending

On June 27, 2008, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed timely to (1) conduct reevaluations of Petitioner, (2) develop an appropriate Individualized Education Program ("IEP"), and (3) provide an appropriate placement. The due process hearing was convened on August 13, 2008. During his opening statement, Petitioner's counsel withdrew the allegations relating to reevaluations. On September 2, 2008, this Hearing Officer issued a Hearing Officer's Decision ("HOD") concluding that Petitioner had failed to meet his burden of proof as to the remaining issues and dismissing the Complaint with prejudice.

On September 26, 2008, Petitioner filed a Due Process Complaint Notice alleging that DCPS had failed to (1) conduct a triennial occupational therapy ("OT") evaluation, (2) convene a Multidisciplinary Team ("MDT") meeting to review the evaluation and "make the appropriate educational decisions," (3) respond to Petitioner's request for an independent psychological evaluation, and (4) convene an appropriate IEP team on August 22, 2008. The due process hearing was convened on October 31, 2008. In his opening statement, Petitioner's counsel withdrew the first and third allegations. On November 10, 2008, this Hearing Officer issued an HOD dismissing the Complaint, concluding that "Petitioner has failed to meet his burden of proving that DCPS has failed to develop an appropriate annual IEP or that the failure to revise his current IEP has caused educational harm.[2]"

On February 12, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that DCPS had failed to (1) develop an annual IEP, (2) review an independent evaluation, (3) convene a Multidisciplinary Team ("MDT") meeting, and (4) provide an appropriate placement. At the prehearing conference on March 3, 2009, Petitioner's counsel withdrew the first three claims. The due process hearing was convened on April 1, 2009. The parties' Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing. A second day of hearings was necessitated by the unavailability of one of Petitioner's witnesses. That hearing was completed on April 8, 2009.

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[2] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006); *Catalan v. District of Columbia*, 478 F.Supp. 2d 73, 75-6 (D.D.C. 2007).

Record

Due Process Complaint Notice dated February 12, 2009
DCPS' Response to Parent's Administrative Due Process Complaint Notice dated February 25, 2009
Prehearing Order dated March 6, 2009
DCPS' Motion for Continuance dated March 13, 2009
Interim Order dated March 16, 2009
DCPS' Five-Day Disclosure dated March 9, 2009 (Exhibits 1-12)
DCPS' Five-Day Disclosure dated March 25, 2009 (Exhibits 1-13)
Petitioner's Five-Day Disclosure dated March 25, 2009 (Exhibits 1-32)
Attendance Sheets dated March 16, 2009 and April 1, 2009
Interim Order dated April 1, 2009
CD-Roms of Hearing conducted on April 1, 2009 and April 8, 2009

Witnesses for Petitioner

Dori B. Cook, Educational Advocate, James E. Brown & Associates
Kevin Carter, Educational Advocate, James E. Brown & Associates
Admissions Specialist,

Witnesses for DCPS

Special Education Coordinator,
Educational Center
Special Education Coordinator,

Findings of Fact

1. Petitioner is a year-old student attending

2. On December 12, 3008, Drs. Natasha Nelson of Interdynamics completed a Comprehensive Psychological Evaluation. Dr. Nelson diagnosed Petitioner with a Learning Disorder, NOS, Attention Deficit Hyperactivity Disorder ("ADHD"), and Oppositional Defiant Disorder ("ODD").[4] Dr. Nelson's findings and recommendations, *inter alia*, include the following:

> Records indicate that [Petitioner] is a youngster who has behavioral difficulties and cognitive deficiencies. He is also prone to cry and tantrums when he does not get his way. Most recently, during a tantrum, he threw

[3] *Complaint* at 1.
[4] Petitioner's Exhibit ("P.Exh.") No. 20 at 9.

objects around his class, causing teachers to have to evacuate students so that they would not be harmed.

A review of [Petitioner's] current IEP, suggests that he is a student with Development Delays...

Results of this evaluation indicate that [Petitioner] meets criteria for Learning Disorder Not Otherwise Specified. He also evidences profound difficulties with working memory and his ability to process information quickly and accurately. His difficulties will make it very difficult for him to keep up in a general education classroom. It is thereby recommended that he receive special instruction in a special education self contained classroom. [Petitioner] has also been previously diagnosed with Attention Deficit Hyperactive Disorder and Oppositional Defiant Disorder.

Petitioner's Low Average scores on the VMI suggest that he may evidence some problems with visual motor integration, and thus will require a consultation with an occupational therapist to determine is this deficiency impacts his school work, and if he will require intervention in this arena. [Petitioner] evidences a speech problem; and thus, he should continue his consultation with a speech and language therapist as necessary.

RECOMMENDATIONS:

[Petitioner] should be placed in a school setting with a very small teacher to student ratio. In this type of environment, he should be able to receive more one-on-one attention and guidance in performing his school related activities. He had deficits in mathematics, written expression, reading, working memory, and processing speed. Problems in these areas will make it very difficult for him to succeed in a general education classroom...[5]

3. On February 24, 2009, Dr. Lynn Barganier of DCPS completed a Psychological Reevaluation of Petitioner. Dr. Barganier's findings and recommendations, *inter alia*, include the following:

[Petitioner] was referred to assess his current functioning. When he was previously tested, Tony received cognitive scores that fell in the Deficient range both in May and December 2008. An adaptive measure was completed by his teacher due to his low cognitive scores. Results of Scales of Independent Behavior-Revised suggest Deficient adaptive skills. [Petitioner] also has a history of ADHD and significant behavior problems, which continue to have a significant impact on his learning. Presently, [Petitioner] appears to meet the DCPS criteria of a student with Multiple Disabilities which includes Mild to Moderate Mental Retardation, ADHD and ED. The following recommendations are suggested:

[5] *Id.* at 8-9.

A full-time placement that can address all of his needs.
A behavior intervention program...[6]

4. DCPS convened a Multidisciplinary Team ("MDT") on February 24, 2009. The MDT developed an IEP classified Petitioner with Multiple Disabilities: Mental Retardation ("MR"), other health impaired ("OHI"), and emotional disturbance ("ED").[7] The MDT prescribed 30.25 hours per week of specialized instruction, one hour per week of speech and language services, and 45 minutes per week of occupational therapy ("OT").[8] His general education teacher reported that

> [Petitioner] is in need of additional help. It is clear that he is in need of adjustment of his medication. Academically he is on the Pre-primer level. He is the type of person that you cannot say no to because he has emotional fits when he does not get his way. It gets to a degree where he becomes violent, throws objects and has hit a teacher. He needs a lot of one-on-one attention. When you work with him one-on-one he cooperates a little bit, but once you bring your attention to another student he has a fit. He will do much better in a smaller setting. Around children he likes to touch and hit. He does not know how to respect the space of others. Lately he has not been eating the lunch in the cafeteria.[9]
>
> His behavior is consistent. He gets in trouble in all of his resource classes.

Petitioner's speech therapist reported as follows:

> At first he would not participate, would scream, kick and become aggressive with other students. When she started seeing him individually, he did not like it because he wanted to be with friends, so she later changed it back. If he is doing computer activities, play activities or paper and pencil activities, she had to help him hand over hand... He does have an understanding of the routine, but he does not adhere to it... The limited progress that he has made is significantly hampered by his behavioral and emotional state. By the time they get started with work there is just a little time left. He is unable to do some work with hand over hand coordination. His behavior is really interfering with his ability to learn.[10]

The MDT did not determine a placement for Petitioner. Instead, "A site review package will be sent to central office for review."[11]

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[6] P.Exh. No. 21 at 4-5.
[7] P.Exh. No. 25 at 1; P.Exh. No. 26, Meeting Notes at 3.
[8] Petitioner's Exhibit ("P.Exh.") No. 3 at 1.
[9] P.Exh. No. 26 at 1.
[10] *Id.* at 2.
[11] *Id.* at 3.

5. one of Petitioner's Educational Advocates, was informed that DCPS would propose as a placement for Petitioner. visited prior to the convening of another MDT meeting. met who would be Petitioner's special education teacher at When advised that Petitioner was ED, stated that her class was for MR students and that she was not trained to handle ED students.[12]

6. DCPS convened an MDT meeting on March 18, 2009 at which it proposed to place Petitioner at The program at is for MR students. Petitioner would be in a class that currently has nine students. There are three dedicated aides and one non-dedicated aide in the classroom.[13] objected to the placement at and requested that Petitioner be placed at where Petitioner had been accepted.[14]

7. Petitioner has been accepted at is a private school offering full-time special education services. The average student to teacher ratio at is 6:1. It has 223 students, 220 of which are funded by DCPS. If Petitioner were to attend he would be in a class that currently has five students. Four of the students have multiple disabilities; two are ED/OHI and one is MR/OHI. One student is ED. The teacher is certified in special education, including MR and ED, and she has two dedicated aides. employs full-time speech and OT therapists. It also utilizes a behavior management plan in which the students are rewarded for positive behavior. utilizes a behavior specialist and a clinical therapist to "de-escalate" students' disruptive behavior.

Conclusions of Law

Inappropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[15] 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

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[12] Testimony of was present during part of the discussion between and confirmed that said she was not certified to handle Ed students.

[13] Testimony of testified that "if" Petitioner were ED, there should have been goals for counseling on his IEP as well as a functional behavior assessment ("FBA") and an intervention behavior plan ("IBP"). She also testified that "We can still accept him if he is ED" and that Emery could reconvene an MDT, develop an IBP, and assign Petitioner an aide if his behavior warrants.

[14] P.Exh. No. 29.

[15] 458 U.S. 176 (1982).

> 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.[16]

The basic difference between the parties' positions is the extent to which Petitioner is ED or MR. DCPS placed Petitioner in MR program on the basis that Petitioner's "primary" disability is MR. Petitioner's counsel argues that Petitioner's history of disruptive behavior warrants a program that addresses Petitioner's social emotional problems. The Hearing Officer's review of Petitioner's records suggests that Petitioner's counsel's position is more persuasive.

Dr. Nelson found that Petitioner qualified for services with a Learning Disorder, NOS. She noted that Petitioner "has also been previously diagnosed with Attention Deficit Hyperactive Disorder and Oppositional Defiant Disorder." Dr. Bargainier noted that Petitioner had "significant behavior problems, which continue to have a significant impact on his learning," and that Petitioner met the criteria for "Multiple Disabilities which includes Mild to Moderate Mental Retardation, ADHD and ED."

At the MDT meeting on February 24, 2009, much of the discussion focused on Petitioner's disruptive behavior in class. As noted in the Findings of Fact, both his general education teacher and his speech therapist described a student who requires considerable attention both to impart meaningful instruction, but also to prevent him from disturbing the learning environment of his classmates. It is also alarming that a six year old student has "hit a teacher." Based upon the behavior described in the meeting notes of the February 24th MDT meeting, the Hearing Officer is unaware of the basis of DCPS' position that Petitioner's "primary" disability is MR, which is the only justification for placing him in Emery's MR program.

Once again, the Hearing Officer notes that the decision to place Petitioner at Emery was made not by the MDT that discussed his behavioral problems, but by the "central office." 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." [17] 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

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[16] *Rowley, supra,* at 200-01.

[17] 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).

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.

In *W.G. v. Board of Trustees of Target Range School District No. 23*,[18] 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.[19] 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.[20]

> In *Deal v. Hamilton County Board of Education*,[21] 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.
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> 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.
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> 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

[18] 960 F.2d 1479 (9th Cir. 1992).
[19] *Id.* at 1484.
[20] *Id.* at 1485.
[21] 392 F.3d 840 (6th Cir. 2004).

response to particular types of educational programs, are taken into account.[22]

This case highlights the danger of delegating the placement decision to individuals who have no direct knowledge of a student's needs. The "central office" apparently determined that because MR was the first of the listed multiple disabilities, it was Petitioner's "primary" disability, and ordered the LEA representative at the March 18th MDT meeting to propose a placement in MR placement. It is inconceivable to the Hearing Officer that Petitioner's general education teacher and speech therapist would agree that Petitioner's emotional problems are of less significance than his cognitive potential. The staff was then placed in the unfortunate position of justifying the "central office's" decision. who has never met Petitioner, and certainly has never tried to teach him, questioned the validity of the ED classification, because the IEP did not include ED goals, counseling, or and IBP. While may have been correct in her criticism of the incompleteness of the IEP, it is apparent that Petitioner's emotional problems have a significant and negative impact on his ability to learn.

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.[23] In this case, DCPS introduced neither MDT meeting notes for the placement meeting on March 18th nor a Prior Notice placing Petitioner at objected to the proposed placement at Emery on Petitioner's behalf at the meeting on March 18th and requested that DCPS place Petitioner at DCPS issued no written document explaining the justification for placing Petitioner in the MR program at Emery and for denying Petitioner request, as required by 34 CFR Section 300.503(b).

would be an appropriate placement for Petitioner. It offers full-time special education services in a small-class environment. teachers are certified in special

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[22] *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).

[23] 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;
(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.

education, and Petitioner's teacher at is certified in both MR and ED. Petitioner would be in a small class of six students, and would be governed by an intervention behavior plan. Finally, employs the service providers that can provide the related services prescribed in Petitioner's IEP.[24]

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."[25] "[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."[26]

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented during the hearings, and the representations of the parties' counsel at the hearing, this 18th day of April 2009, it is hereby

ORDERED, that DCPS shall immediately issue a Prior Notice placing and funding Petitioner at RCA, including transportation and all other appropriate related services.

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: April 18, 2009

[24] Testimony of Ms. Lindsey.
[25] *Florence County School District Four v. Carter*, 510 U.S. 7, 11 (1993).
[26] *Id.*, 510 U.S. at 15-16.