

**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**

<b>STUDENT, through the legal guardian<sup>1</sup></b>	)	Complaint Filed: April 15, 2009
	)	
<b>Petitioner,</b>	)	Prehearing Order: May 28, 2009
	)	
<b>v.</b>	)	Hearing Dates: June 16-17, 2009
	)	
<b>THE DISTRICT OF COLUMBIA</b>	)	Docket No.
<b>PUBLIC SCHOOLS</b>	)	
	)	
<b>Respondent.</b>	)	
	)	
<b>Student Attending:</b>	)	
	)	

**HEARING OFFICER'S DECISION**

**Counsel for Petitioner:** Gregory Pace, Esquire  
The Children's Law Center  
616 H Street, N.W.  
Third Floor  
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**Counsel for DCPS:** Linda M. Smalls, Esquire  
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<sup>1</sup> Personal identification information is provided in Appendix A.

## **Jurisdiction**

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

## **Background**

Petitioner is a            year-old student attending

On April 15, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) convene an appropriate Individualized Education Program ("IEP") team, (2) determine an appropriate disability classification, (3) issue a Prior Notice upon a change in classification and services, (4) develop appropriate IEPs, (5) provide an appropriate placement, (6) provide extended year services ("ESY"), (7) provide necessary related services, (8) provide a dedicated aide. In a Prehearing Order on May 28, 2009, the Hearing Officer determined the issues to be adjudicated at the hearing to be as follows:

- DCPS' alleged failure timely to convene an appropriate IEP team

Petitioner alleges that there was no LEA representative at the January 16, 2008 IEP meeting knowledgeable of all resources available for Petitioner. DCPS asserts that it was adequately represented at the meeting by the school's Special Education Coordinator; since a change in placement was not an issue at the meeting, no representative from DCPS headquarters was necessary.

- DCPS' alleged failure to determine an appropriate disability classification

Petitioner alleges that DCPS wrongfully changed Petitioner's disability classification at the January 16, 2008 Multidisciplinary Team ("MDT") meeting from emotional disturbance ("ED")/ learning disabled ("LD")/ other health impairment ("OHI") to ED. DCPS asserts that the parent participated in the meeting and agreed to the change in Petitioner's classification. DCPS also asserts that Petitioner's IEP has goals and objectives in core subjects and has made academic progress.

- DCPS' alleged failure to issue a Prior Notice upon a change in classification and services

Petitioner alleges that DCPS failed to issue a Prior Notice when it changed Petitioner's classification and reduced her counseling services at the January 16, 2008 MDT meeting.

- DCPS' alleged failure timely to develop appropriate IEPs

Petitioner alleges that Petitioner's January 2008 IEP was inappropriate because (1) there was no indication of how progress would be measured, (2) there was no indication of how the parent would be informed of Petitioner's progress, (3) there was no delineation between group and individual counseling services, (4) no extended year services ("ESY") were prescribed, and (5) no dedicated aide was prescribed. Petitioner asserts the same allegations regarding Petitioner's current IEP except for the allegation regarding counseling services.

DCPS asserts that the IEP provides adequate measurement and reporting methodologies.

- DCPS' alleged failure to provide an appropriate placement

Petitioner alleges that \_\_\_\_\_ has not proved to be an appropriate placement for the following reasons: Petitioner is not afforded the full-time therapeutic setting he requires; Petitioner requires a more comprehensive behavioral intervention program than has been provided at \_\_\_\_\_. Petitioner struggles with transitions; Petitioner has "meltdowns" in the classroom and often cries throughout the school day; and social and emotional goals were not implemented. DCPS asserts that \_\_\_\_\_ provided all of Petitioner's prescribed services and that Petitioner has derived educational benefit at \_\_\_\_\_.

- DCPS' alleged failure timely to provide ESY

Petitioner alleges that DCPS failed to provide Petitioner ESY in 2008.

- DCPS' alleged failure to provide necessary related services

Petitioner alleges that DCPS did not provide the related services prescribed in his IEPs. DCPS asserts that Petitioner was provided the counseling services prescribed to him in his 2008 and 2009 IEPs.

- DCPS' alleged failure timely to (8) provide a dedicated aide

Petitioner alleges that DCPS failed to provide Petitioner a dedicated aide at the end of the 2007-08 school year and for the first six months of the 2008-09 school year.

The due process hearing was convened on June 16, 2009 and completed on June 17, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.<sup>2</sup>

## **Record**

*Due Process Complaint Notice* dated April 15, 2009  
*DCPS Resolution Session Waiver* dated April 17, 2009  
*District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice* dated April 27, 2009  
*Prehearing Order* dated May 28, 2009  
*DCPS' Five-Day Disclosure* dated June 9, 2009 (Exhibit Nos. 1-12)  
*Petitioner's Five-Day Disclosure* dated June 9, 2009 (Exhibit Nos. 1-11)  
*Attendance Sheets* for hearing conducted on June 16-17, 2009  
*Parent's Proposed Findings of Fact and Conclusions of Law* dated June 24, 2009  
*District of Columbia Public Schools' Post-Hearing Brief* dated June 24, 2009

## **Witnesses for Petitioner**

Petitioner's Mother  
Dr. Sheila Iseman, Educational Consultant  
Executive Director,  
Co-Executive Director,

## **Witnesses for DCPS**

Special Education Teacher,  
Special Education Teacher,  
Special Education Coordinator,

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<sup>2</sup> DCPS objected to the admission of Petitioner's Exhibit ("P.Exh.") Nos. 2, 5, and 7. The Hearing Officer overruled the objection to P.Exh. No. 2, Petitioner's IEP, as incomplete, because it was the only documentation offered by either party as to Petitioner's educational program. P.Exh. No. 5 was admitted as evidence of an objection to the IEP, not as to the validity of the allegations in the document. P.Exh. No. 7 was admitted as a part of Petitioner's educational record.

## Findings of Fact

1. Petitioner is a        year-old resident of the District of the Columbia who recently completed the        grade at

2. Petitioner has attended        since the 2008-2009 school year, when she was in third grade.<sup>4</sup>

3. Prior to attending        during the 2006-2007 school year, Petitioner attended the second grade at        School        <sup>5</sup> There were behavior issues and safety issues at        as Petitioner had difficulty remaining in her seat and reportedly left her classroom on a regular basis and wandered the halls.<sup>6</sup>

4. Because of Petitioner's behaviors at        Petitioner's mother requested a neuropsychological evaluation of Petitioner.

5. Based on the results of the February 23, 2007 neuropsychological evaluation, Dr. David Marcus, Ph.D., found that Petitioner demonstrated "impaired executive functioning, the skills relating to self-regulation (e.g. impulse control, emotional regulation) and metacognition (e.g. problem solving, planning skills, organization)."<sup>8</sup> Based on the test results, Dr. Marcus found that Petitioner met the diagnostic criteria for Attention Deficit/Hyperactivity Disorder, Combined Type ("ADHD") and a Learning Disorder, Not Otherwise Specified ("LD").<sup>9</sup> Dr. Marcus recommended the completion of a functional behavioral assessment ("FBA"), and the implementation of school wide behavior management plan.<sup>10</sup> Additionally, Dr. Marcus recommended that Petitioner receive a minimum of one hour of individual counseling per week, and that her school program include an on-site psychologist and/or psychiatrist. Dr. Marcus stated that "Petitioner should also have access to her therapist if necessary due to behavioral or emotional difficulties she may be having on a particular day."<sup>11</sup>

6. DCPS convened a Multi-Disciplinary Team ("MDT") meeting convened at        on June 11, 2007. The MDT determined that Petitioner was eligible for special education services under the disability classification of multiple disabilities ("MD"): emotional disturbance ("ED"), learning disabled ("LD"), and other health-impaired ("OHI"). The MDT prescribed full-time specialized instruction and one hour

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<sup>3</sup> Complaint at 1.

<sup>4</sup> Testimony of Petitioner's mother.

<sup>5</sup> Parent's testimony. P.Exh. No. 1 at 2

<sup>6</sup> Parent's testimony; P.Exh. No. 1 at 2.

<sup>7</sup> P.Exh. No. 1 at 1.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.*

per week each of individual and group counseling. The MDT agreed that Petitioner would be placed at

7. Petitioner attended the third grade at \_\_\_\_\_ during the 2007-2008 school year. A dedicated aide was assigned to Petitioner in September 2007.<sup>13</sup> The aide worked with Petitioner through the first half of the 2007-2008 school year.<sup>14</sup> Thereafter, the aide became ill, and no replacement was offered until March of 2009.<sup>15</sup>

8. There were 11 students in Petitioner's class for the 2007-2008 school year, and she was the only girl. At the beginning of the school year, Petitioner would sometimes refuse to do her work and refuse to come into the classroom at the beginning of the school day. The dedicated aide was assigned to her to facilitate her coming into and staying in the classroom. The aide was successful in keeping Petitioner in the classroom. By the end of the school year, Petitioner's behavior was "under control" and was not a concern to her teacher, despite the fact that the dedicated aide had left. Petitioner was "confident in what she was doing." She was not walking out of the classroom or crying in class by the end of the school year.<sup>16</sup>

9. DCPS convened an MDT meeting on January 16, 2008 to review and update Petitioner's IEP.<sup>17</sup> The MDT changed Petitioner's disability classification from MD:ED/LD/OHI to ED. The MDT also reduced Petitioner's counseling services to one hour per week.<sup>18</sup> The IEP developed by the MDT indicated that she was performing at the following grade equivalents as of January 9, 2008: 2:0 in Math Calculation, 1:9 in Math Reasoning, 1:5 in Reading Comprehension, and 1:9 in Reading Basic.<sup>19</sup>

10. Additionally, the January 2008 MDT prescribed extended year services ("ESY").<sup>20</sup> Petitioner's mother subsequently completed the enrollment forms for ESY; however, DCPS did not provide ESY to Petitioner during the summer of 2008.<sup>21</sup>

11. In order to provide Petitioner with therapeutic services over the summer, Petitioner's mother enrolled Petitioner in Positive Nature in late April of 2008. Positive Nature is a day treatment provider that provides therapeutic services to emotionally disturbed children and their families. Through a contract with the D.C. Department of Mental Health ("DMH"), Positive Nature provides services to approximately 65 children a year, including children who are on long-term suspension, and children coming out of psychiatric hospitalization.<sup>22</sup>

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<sup>12</sup> P.Exh. No. 2.

<sup>13</sup> DCPS Exh. No. 10.

<sup>14</sup> P.Exh. No. 4 at 6.

<sup>15</sup> Testimony of Dr. Iseman.

<sup>16</sup> Testimony of Mr. Abah.

<sup>17</sup> P.Exh. No. 3.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> DCPS No. 5 at 2.

<sup>20</sup> P.Exh. No. 3 at 1.

<sup>21</sup> Testimony of Petitioner's mother.

<sup>22</sup> Testimony of Ms. Murphy.

12. Petitioner attended Positive Nature during the summer of 2008 for nine hours a day, five days a week. Among other activities, Petitioner participated in group therapy, where she worked on goals involving female peer socialization. Throughout the summer, Petitioner made steady progress towards her behavioral goals, formed friendships, and was an active participant in the program.<sup>23</sup>

13. Petitioner's teacher at \_\_\_\_\_ for the 2008-2009 school year was Ms. Mahler. Petitioner was the only girl in a class of twelve students. The classroom included a teacher's assistant and two dedicated aides. Petitioner had no dedicated aide at the beginning of the school year. At the beginning of the school year, Petitioner was quiet and retiring, was embarrassed to speak in front of her classmates, and would cry if she was being ignored.<sup>24</sup>

14. DCPS convened an MDT meeting on February 4, 2009 to review and update Petitioner's IEP. The MDT restored Petitioner's classification to MD: ED/LD/OHI but maintained counseling services at one hour per week.<sup>25</sup> DCPS did not perform a FBA for Petitioner, and several of the academic goals of her 2009 IEP are identical to goals contained in her 2008 IEP.<sup>26</sup>

15. Petitioner was performing at the following grade equivalents as of January 6, 2009: 3:3 in Broad Math, 3:4 in Math Calculation, 3:3 in Applied Problems, 4:0 in Math Fluency, 4:2 in Broad Written Language, 4:0 in Spelling, 3:5 in Writing Samples, and 4:9 in Writing Fluency.<sup>27</sup>

16. At the IEP meeting, Petitioner's educational advocate requested a dedicated aide for Petitioner as had been prescribed in her previous IEP. Ms. Mahler saw no need for the aide and did not believe the aide served a useful purpose. Petitioner's behavior improved markedly during the second and third quarters of the school year, but she began to "backslide" during the last month when she began to talk about the possibility of going to another school, and she "became less invested in the program" at Robinson. Petitioner "held her own" with the boys in the class throughout the school year. Walking out of the classroom "was not a major concern" until the last month. Petitioner participated "readily" in class and was comfortable speaking in front of the class. There were times when she was embarrassed to speak and would speak in a lower voice, but she was not intimidated by the boys in her class.<sup>28</sup>

17. Petitioner has been accepted at the Episcopal Center for Children ("ECC"). ECC is a full-time special education and treatment center for emotionally disturbed children between the ages of 5 and 12. The current enrollment is 62 students.

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<sup>23</sup> *Id.*

<sup>24</sup> Testimony of Ms. Mahler.

<sup>25</sup> P.Exh. No. 4 at 1.

<sup>26</sup> P.Exh. No. 4.

<sup>27</sup> DCPS No. 3 at 2 and 4.

<sup>28</sup> Testimony of Ms. Mahler.

The maximum class size is 5. All of ECC's teachers are certified in special education, and all have Masters degrees. It employs one full-time and one part-time psychologist and two psychiatrists. ECC uses a school-wide behavior modification program in which students are graded each thirty minutes throughout the day on their behavioral goals. OSSE has issued ECC a certificate approving it as a special education school.<sup>29</sup>

## **Conclusions of Law**

### ***Failure to Convene an Appropriate IEP Team***

Petitioner alleged that there was no LEA representative at the January 16, 2008 IEP meeting knowledgeable of all resources available for Petitioner. The IEP team must include the parents of the child, at least one regular education teacher of the child, at least one special education teacher of the child, a representative of the public agency who is qualified to provide or supervise special education services, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the public agency, and an individual who can interpret the instructional implications of evaluation results.<sup>30</sup> The testimony and documentary evidence revealed that the absence of a representative from DCPS headquarters had no effect on the development of Petitioner's IEP. Placement was not an issue and the MDT prescribed ESY for Petitioner. Therefore, there was no issue as to the "availability of resources of the public agency," and Petitioner suffered no harm from absence of a DCPS headquarters representative.<sup>31</sup>

### ***Failure to Determine an Appropriate Disability Classification Failure to Issue a Prior Notice Upon a Change in Classification and Reduction in Services***

Petitioner alleges that DCPS wrongfully changed Petitioner's disability classification at the January 16, 2008 MDT meeting from ED/LD/OHI to ED. 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> Once a child has been determined to be eligible for services, he or she must be reevaluated at

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<sup>29</sup> Testimony of Mr. Korz.

<sup>30</sup> 34 C.F.R. §300.321(a).

<sup>31</sup> *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).

<sup>32</sup> 34 C.F.R. §300.304(c)(4).

<sup>33</sup> 34 C.F.R. §300.304(b)(2).

<sup>34</sup> 34 C.F.R. §300.305(a).

least every three years.<sup>35</sup> An LEA may not terminate services without first conducting reevaluations.<sup>36</sup>

In this case, the January 2008 MDT inexplicably changed Petitioner's classification and reduced Petitioner's counseling services from two hours to one hour per week. However, Petitioner continued to receive full-time specialized education. According to Mr. Abah, Petitioner's teacher during the 2007-2008 school year, by the end of the school year, Petitioner's behavior was "under control" and was not a concern. Petitioner was not walking out of the classroom or crying in class by the end of the school year. Moreover, the one hour of counseling, though less than prescribed the previous year, was consistent with the recommendation in Dr. Marcus' 2007 evaluation. At the February 4, 2009 IEP meeting, the MDT restored Petitioner's classification to ED/LD/OHI, but it maintained the one hour per week of counseling services. Ms. Mahler testified that Petitioner's behavior improved steadily throughout the school year up until the last month when she became less "invested" in Robinson in anticipation of going to another school.

The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that the change in classification at the 2008 MDT meeting caused educational harm. Her academic program was unchanged and her behavior was not a matter of concern for the last half of the 2007-2008 school year or for most of the 2008-2009 school year.

#### ***Failure to Provide Appropriate IEPs***

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),<sup>37</sup> 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 initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for

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<sup>35</sup> 34 C.F.R. §300.303(b)(2).

<sup>36</sup> 34 C.F.R. §300.305(e).

<sup>37</sup> 458 U.S. 176 (1982).

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).<sup>38</sup>

Petitioner alleged that the January 2008 IEP was inappropriate because (1) there was no indication of how progress would be measured, (2) there was no indication of how the parent would be informed of Petitioner’s progress, (3) there was no delineation between group and individual counseling services, (4) no extended year services (“ESY”) were prescribed, and (5) no dedicated aide was prescribed. Petitioner asserted the same allegations regarding Petitioner’s February 2009 except for the allegation regarding counseling services. As for the first two allegations, parents are generally notified of progress through report cards and IEP report cards. As for the need for a delineation between group and individual counseling, the Hearing Officer was not persuaded by the testimony of Dr. Iseman that the counseling services prescribed for Petitioner were insufficient to meet her needs. As discussed above, the one hour of counseling prescribed for Petitioner was consistent with the recommendation in Dr. Marcus’ evaluation, and the testimony of Petitioner’s teachers for the last two years at Robinson painted a picture of a student who, for the most part, was emotionally under control and improving.

The evidence presented at the hearing refuted the fourth and fifth allegations. The January 2008 IEP did, in fact, prescribe ESY services, as conceded in *Petitioner’s Proposed Findings of Fact*. The Meeting Notes also confirmed that the MDT recommended that Petitioner receive a dedicated aide. In fact, DCPS provided a dedicated aide for the first half of the 2007-2008 school year, but did not replace the aide when the aide became sick. The aide was restored at the 2009 IEP meeting when Petitioner’s advocate noted that she had been provided aides in previous IEPs. The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS failed to develop appropriate IEPs for Petitioner.<sup>39</sup>

### ***Failure to Provide ESY Services***

Petitioner offered uncontroverted evidence that DCPS failed to provide ESY services in the summer of 2008. However, Petitioner offered no evidence that Petitioner was harmed as a result of not receiving these services. Petitioner received therapeutic services from Positive Nature beginning in April 2008 and throughout the summer of 2008 for nine hours a day, five days a week. There was no persuasive testimony or other

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<sup>38</sup> *Id.* at 181-82.

<sup>39</sup> Petitioner’s counsel offered testimony at the hearing that the IEP was inappropriate because the Intervention Behavior Plan (“IBP”) was inherently suspect due to the absence of a functional behavior assessment (“FBA”). This issue was not raised in the *Complaint* or in the prehearing conference. Thus it was not included as a permissible issue to be adjudicated at the hearing. In any event, the Hearing Officer concludes herein that Petitioner’s behavior was not a matter of significant concern to his teachers during the 2007-2009 school years. Thus, even if Petitioner’s IBP were deficient, because her behavior was not a matter of concern, the allegedly deficient IBP would not have rendered the IEP inappropriate.

evidence that Petitioner regressed over the summer as a result of not receiving ESY instead of the intensive services she received at Positive Nature. On the contrary, Petitioner's witnesses testified that Petitioner derived significant emotional benefit from the services provided by Positive Nature. Therefore, while DCPS failed to meet its obligation to provide ESY in the summer of 2008, Petitioner suffered no educational harm as a result of the deprivation of ESY services.<sup>40</sup>

#### ***Failure to Provide Necessary Related Services***

Petitioner alleges that DCPS did not provide the counseling services prescribed in her IEPs. However, Petitioner offered no persuasive evidence that DCPS failed to provide the hour of counseling prescribed in the 2008 and 2009 IEPs. DCPS' Exh. No. 12 reveals that Petitioner regularly received weekly counseling throughout the 2008-2009 school year. While Petitioner's representatives asserted the need for individual, rather than group counseling, they failed to make the case that group counseling was insufficient to meet Petitioner's emotional needs, as discussed above. Both Mr. Abah and Ms. Mahler testified that Petitioner's behavior was under control and steadily improving throughout the respective school years. DCPS provided hourly counseling sessions each week consistent with Petitioner's 2008 and 2009 IEPs. The Hearing Officer concludes that Petitioner failed to meet her burden of proof as to this issue.

#### ***Failure to Provide a Dedicated Aide***

DCPS did not provide a dedicated aide to Petitioner for the last half of the 2007-2008 school year and until March 2009. However, as with the ESY services, there is no evidence that Petitioner suffered any harm as a result of the lack of a dedicated aide. Mr. Abah testified that the only purpose for the aide was to keep Petitioner in the classroom. However, despite the absence of the aide for the last half of the 2007-2008 school year, Mr. Abah testified that by the end of the school year, Petitioner was not walking out of the classroom despite the departure of the aide. Petitioner's behavior was "under control" and was not a concern to Mr. Abah. Ms. Mahler was more emphatic about the irrelevance of the aide. She saw no need for the aide, was never told the purpose of the aide, and testified that Petitioner's walking out of class was not a concern until the last month of the 2008-2009 school year, when Petitioner had an aide but anticipated going to another school. The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that she suffered any educational harm as a result of the lack of a dedicated aide for an admittedly extended period of time.

#### ***Failure to Provide an Appropriate Placement***

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),<sup>41</sup> the Supreme Court held that the local education agency ("LEA") must provide an environment in which the student can derive educational benefit.

<sup>40</sup> *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).

<sup>41</sup> 458 U.S. 176 (1982).

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon the States which receive funding under the Act...The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specifically designed instruction," expressly requires the provision of "such... supportive services... as may be required to assist a handicapped child to *benefit* from special education"...We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.<sup>42</sup>

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

Petitioner's counsel and witnesses described Petitioner's as a cowering little girl, intimidated and incapacitated by being in an all-male environment. Petitioner's counsel cited no legal authority that Petitioner's status as the only girl in her class of twelve constituted a *per se* violation IDEIA. Therefore, counsel was obligated to prove that Petitioner's being the only girl in the class somehow impaired her ability to derive academic benefit. The preponderance of the evidence suggests that Petitioner's status as the only girl in the class had minimal effect on her ability to achieve. Both Mr. Abah and Ms. Mahler testified that Petitioner progressed academically and emotionally during the 2007-2008 and the 2008-2009 school years. Mr. Abah testified that Petitioner's behavior was "under control" and was not a concern by the end of the 2007-2008 school year, despite the fact that the dedicated aide had left. Petitioner was "confident in what she was doing," not walking out of the classroom, and not crying in class by the end of the school year. Ms. Mahler testified that Petitioner "held her own" with the boys in her class, and really only had a consistent problem with one of the eleven boys. In response to a question from the Hearing Officer, Ms. Mahler testified that although Petitioner was occasionally embarrassed to speak in front of the class and would do so in a low tone of voice, Petitioner was not intimidated by her status as the only girl in the class.

Academically, Petitioner's annual test scores suggest that she is deriving educational benefit at Robinson. In January 2008, while in the third grade, she was performing roughly just below the second grade level: 2:0 in Math Calculation, 1:9 in Math Reasoning, 1:5 in Reading Comprehension, and 1:9 in Reading Basic. By January of this year, she had progressed by more than a grade level in every area: 3:3 in Broad Math, 3:4 in Math Calculation, 3:3 in Applied Problems, 4:0 in Math Fluency, 4:2 in Broad Written Language, 4:0 in Spelling, 3:5 in Writing Samples, and 4:9 in Writing Fluency. While Petitioner would certainly benefit from having more interaction with female peers, Petitioner's representatives have simply failed to prove that the absence of

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<sup>42</sup> Rowley, *supra*, at 200-01.

such interaction has caused emotional distress or impaired Petitioner's ability to learn. On the contrary, the evidence suggests that she has increased both in personal confidence and educational achievement. The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS has failed to provide an environment in which Petitioner can derive educational benefit.

### **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 28<sup>th</sup> day of June 2009, it is hereby

**ORDERED**, that the *Complaint* is **DISMISSED WITH PREJUDICE**.

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

#### **Notice of Right to Appeal Hearing Officer's Decision and Order**

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) days of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

\_\_\_\_\_/s/\_\_\_\_\_  
Terry Michael Banks  
Hearing Officer

Date: June 28, 2009