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

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STUDENT HEARING OFFICE

STUDENT, through the legal guardian[1]	)	Complaint Filed: April 23, 2009
	)	
Petitioner,	)	Hearing Date: June 9, 2009
	)	
v.	)	Docket No.
	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	
	)	
Respondent.	)	
	)	
Student Attending:	)	
School	)	

HEARING OFFICER'S DECISION

Counsel for Petitioner: Douglas Tyrka, Esquire
2807 – 27th Street, N.W.
Washington, D.C. 20008
(202) 332-0038; Fax: (202) 332-0039

Counsel for DCPS: Daniel McCall, 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 Appendix A.

Jurisdiction

This proceeding was conducted 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 23, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) comply with the terms of a Hearing Officer's Decision ("HOD"), (2) develop an appropriate Individualized Education Program ("IEP"), (3) provide an appropriate placement, and (4) provide the parent an opportunity to participate in the placement determination. The due process hearing was convened on June 9, 2009.

DCPS was not represented at the hearing. This Hearing Officer was asked by the Student Hearing Office to adjudicate the proceeding due to the unavailability of the Hearing Officer assigned to the case at the time scheduled for the hearing, 9:00 a.m. The Hearing Officer reached counsel for DCPS at 1:00 p.m. and advised counsel that the hearing would proceed if Petitioner's counsel declined to agree to a continuance. Counsel for DCPS stated that he would be unable to attend the hearing. The Hearing Officer proceeded with the hearing when Petitioner's counsel declined to agree to a continuance.

Petitioner's Five-Day Disclosure Notice was admitted into evidence at the inception of the hearing. DCPS failed to submit a Five-Day Disclosure Notice, thereby waiving its right to introduce any evidence at the hearing.[2] Petitioner's counsel moved for a default judgment in light of DCPS' failure to file a response to the *Complaint* and its failure to file a Disclosure Notice.[3] The Hearing Officer granted the motion. However, under local rules of civil procedure, "No judgment by default shall be entered against the United States or the District of Columbia, or an officer or agency of either, unless the claimant establishes a claim or right to relief by evidence satisfactory to the Court."[4] Therefore, the Hearing Officer took evidence to establish Petitioner's right to relief

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[2] 34 C.F.R. §300.512(a)(3).

[3] Under IDEIA, a local education agency is required to file a response to the *Complaint* within ten days of receipt thereof, providing a detailed explanation of the agency's proposal or refusal to take the action raised in the *Complaint*, unless the agency has sent a prior written notice to the parent regarding the subject matter contained in the *Complaint*. 20 U.S.C. §1415(c)(2)(B)(i)(I). The statute imposes specific requirements as to the contents of the agency's response. DCPS disclosed no prior notice. Therefore, it was obligated to file a response satisfying the requirements of 20 U.S.C Section 1415(c)(2)(B)(i)(I) within ten days of receipt of the *Complaint*.

[4] D.C. SCR-Civil Rule 55(e). Federal Rule 55(d) has similar language permitting default judgments against the federal government "only if the claimant establishes a claim or right to relief by evidence that satisfies the court."

Record

Due Process Complaint Notice dated April 23, 2009
DCPS' Resolution Session Waiver dated April 23, 2009
Attendance Sheet dated June 9, 2009
CD-Rom of Hearing conducted on June 9, 2009

Witnesses for Petitioner

Admissions Director,

Witnesses for DCPS

None

Findings of Fact

1. Petitioner is a year-old student attending

2. On June 23, 2008, an HOD was issued by Hearing Officer Wanda I. Resto Torres in which she concluded that DCPS had violated a February 23, 2008 HOD. The HOD ordered DCPS to fund three independent evaluations and to convene a Multidisciplinary Team ("MDT") meeting within fifteen school days of receipt of the independent evaluations to review the evaluations, update the IEP, develop an intervention behavior plan, and determine a new placement.[6]

3. On November 25, 2008, Petitioner's counsel forwarded the three independent evaluations to the Special Education Coordinator at at and proposed three times on two dates for an MDT meeting.[7]

4. DCPS convened an MDT meeting for Petitioner on March 12, 2009. The MDT classified Petitioner with mental retardation ("MR") and prescribed 26.05 hours of specialized instruction per week and one hour per week of psychological counseling. The MDT placed Petitioner at

5. On March 23, 2009, the Special Education Coordinator at convened a meeting with Petitioner's counsel. At that meeting, the Coordinator conceded as follows:

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[5] *Complaint* at 1.
[6] Petitioner's Exhibit ("P.Exh.") No. 2 at 9-10.
[7] P.Exh. No. 10. According to Hearing Officer Resto Torres' HOD, Petitioner attended when that proceeding was initiated.
[8] P.Exh. No. 5 at 2; P. Exh. No. 4.

> Based upon the review of the records and history of severe behavioral and conduct problems self contained MR program is not an appropriate setting. We don't have the staff nor the behavioral and discipline supports to address the needs of the student. The Recommendation is for a self contained program that can address behavioral concerns, as well, cognitive deficits. has accepted the student. The team (MDT) has acknowledged and agreed with the placement at

6. Petitioner has been accepted at is a private school offering full-time special education services. If Petitioner were to attend he would be in a class of seven students. The teacher is certified in special education. employs five clinical social workers who provide psychological counseling as well as licensed occupational therapists.[10]

Conclusions of Law

As discussed above, the Hearing Officer granted a default judgment subject to a showing of entitlement to relief. Petitioner alleged that DCPS failed to comply with the June 23, 2008 HOD that required an MDT meeting to be convened within fifteen days of DCPS' receipt of independent evaluations. Although the meeting was not held until three months after the evaluations were forwarded to DCPS, the Hearing Officer is unaware of the circumstances that resulted in the agreement to convene the meeting on March 12, 2009. Moreover, Petitioner offered no testimony concerning the meeting on that date. Therefore, the only record of the meeting is a brief set of meeting notes. No IEP was disclosed, but Petitioner offered no testimony that no IEP was developed. For all of these reasons, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS failed to comply with the June 23, 2008 HOD and failed to develop an appropriate IEP.

As for the allegation that DCPS failed to provide an appropriate placement, the Special Education Coordinator at conceded that was not an appropriate placement for Petitioner. Therefore, the Hearing Officer concludes that Petitioner has met his burden of proving that DCPS has failed to provide an appropriate placement.

would be an appropriate placement for Petitioner. It provides a small class environment with a low student-to-teacher ratio, and it employs the necessary professional service providers to meet Petitioner's related services needs. Under *Florence County School District Four v. Carter*,[11] 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

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[9] P.Exh. No. 3.
[10] Testimony of Mr. Clarke.
[11] 510 U.S. 7 (1993).

receive educational benefits."[12] "[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."[13]

ORDER

Upon consideration of Petitioner's request for a due process hearing, Petitioner's Five-Day Disclosure Notice, the testimony presented at the hearing, and the representations of Petitioner's counsel at the hearing, this 11th day of June 2009, it is hereby

ORDERED, that DCPS shall immediately issue a Prior Notice placing Petitioner at for the 2009-2010 school year including transportation and all other appropriate related services.

IT IS FURTHER ORDERED, that on or before October 16, 2009, DCPS shall convene an MDT meeting to discuss Petitioner's progress at review all current evaluations, revisit Petitioner's disability classification, and update Petitioner's IEP. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel, Douglas Tyrka, Esquire.

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 appropriate DCPS Placement Specialist, 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. [14]

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

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[12] *Id.*, 510 U.S. at 11.
[13] *Id.*, 510 U.S. at 15-16.
[14] 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.

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 11, 2009