

**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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STUDENT HEARING OFFICE  
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**Confidential**

<b>STUDENT, through the legal guardian<sup>1</sup></b>	)	Complaint Filed: June 29, 2009
	)	
<b>Petitioner,</b>	)	Prehearing Order: August 30, 2009
	)	
<b>v.</b>	)	Hearing Date: September 11, 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:** Olekanma Ekekwe, Esquire  
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**Counsel for DCPS:** Candace Sandifer, Esquire  
Office of the General Counsel, DCPS  
825 North Capitol Street, N.E.; 9<sup>th</sup> Floor  
Washington, D.C. 20002

<sup>1</sup> Personal identification information is provided in Appendix 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 an \_\_\_\_\_ year-old student attending \_\_\_\_\_

On June 29, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) conduct manifestation determinations, (2) provide prescribed services, and (3) provide an appropriate placement. In a Prehearing Order issued on August 30, 2009, the Hearing Officer determined the issues to be adjudicated to be as follows:

- DCPS' alleged failure to conduct manifestation determinations

Petitioner alleges that he was suspended ten times during the 2008-2009 school year for a total of 30 school days, but DCPS conducted no manifestation determinations. The Hearing Officer directed Petitioner's counsel to provide a list of the dates Petitioner was suspended.

DCPS does not deny that manifestation determination meetings were not held.

- DCPS' alleged failure to provide prescribed services

Petitioner alleges that DCPS did not provide all of the specialized instruction, occupational therapy, and psychological counseling that Petitioner was entitled to receive during the 2008-2009 school year.

DCPS asserts that Petitioner received 90 minutes per day of inclusion services, 90 minutes per day of resource room services, and all of his prescribed related services.

- DCPS' alleged failure to provide an appropriate placement

Petitioner alleges that \_\_\_\_\_ is incapable of meeting Petitioner's educational needs. DCPS admits that \_\_\_\_\_ cannot implement Petitioner's Individualized Education Program ("IEP"), but asserts that Petitioner's parent requested that Petitioner remain at \_\_\_\_\_

The due process hearing was convened and completed on September 11, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

## **Record**

*Due Process Complaint Notice* dated June 29, 2009  
*DCPS Resolution Session Waiver* dated July 6, 2009  
*District of Columbia Public School's Response to Petitioner's Due Process Complaint* dated August 7, 2009  
*Petitioner's Response to DCPS' Response to Petitioner's Due Process Hearing Complaint* dated August 17, 2009  
*Prehearing Order* dated August 30, 2009  
*Interim Order* dated September 1, 2009  
*DCPS' Five-Day Disclosure* dated August 31, 2009 (Exhibit Nos. 1-4)  
*Petitioner's Five-Day Disclosure* dated September 1, 2009 (Exhibit Nos. 1-16 and 13)  
*Attendance Sheet* for hearing conducted on September 11, 2009

## **Witnesses for Petitioner**

██████████ Case Manager, Scrupples Corp.  
Petitioner's Mother  
Counselor, ██████████ of Virginia

## **Witnesses for DCPS**

Special Education Coordinator,

## **Findings of Fact**

1. Petitioner is an ██████████ year-old student who attended the ██████████ grade at ██████████ during the 2008-2009 school year.<sup>2</sup> Petitioner has not attended school during the 2009-2010 school year.<sup>3</sup>

2. On September 5, 2008, Petitioner was suspended for three (3) days for "causing disruption or being otherwise disorderly on school properties" and for "documented repeated failure to comply with the orders or directions of a principal, teacher, or other authorized DCPS employee."<sup>4</sup>

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<sup>2</sup> *Complaint* at 1.

<sup>3</sup> Testimony of Petitioner's mother.

<sup>4</sup> Petitioner's Exhibit ("P.Exh.") No. 8.

3. On December 1, 2008, DCPS convened a Multidisciplinary Team (“MDT”) meeting at [REDACTED]. The MDT developed an IEP in which Petitioner was classified with multiple disabilities (“MD”): emotional disturbance (“ED”) and other health impaired (“OHI”). The MDT prescribed 20 hours per week of specialized instruction outside general education, one hour per week of occupational therapy (“OT”), and one hour per week of behavioral support services. The MDT recommended that Petitioner “be placed in a more structured setting with a very small class setting and small student to staff ratio.”<sup>5</sup>

4. Petitioner received fifteen hours per week of specialized instruction per week throughout the 2008-2009 school year. The parties have agreed to a compensatory education plan to compensate Petitioner for the deprivation of services: three hours per week of independent tutoring services for one year, and one hour per week of art therapy or expressive therapy for six months.<sup>6</sup>

5. [REDACTED] cannot provide a small-class setting.<sup>7</sup>

6. On January 6 2009, Petitioner was suspended for three (3) days for “causing disruption or being otherwise disorderly on school properties” and for “documented repeated failure to comply with the orders or directions of a principal, teacher, or other authorized DCPS employee.”<sup>8</sup>

7. On March 6, 2009, Petitioner’s counsel requested that DCPS convene a placement meeting for Petitioner.<sup>9</sup>

8. On May 29 2009, Petitioner was placed on “Emergency Removal” for the remainder of the school year: “On May 28, 2009 [Petitioner] was seen by video surveillance going into room 118 after school. On May 29, 2009, the instructor came to the main office reporting that someone had defecated on her floor. [Petitioner] refuses to adhere to the rules at [REDACTED] this type of behavior poses a serious health and safety concern for all students and staff at [REDACTED].”

9. Petitioner has been accepted at [REDACTED] is a private school offering full-time special education services. The maximum class size is ten (10). Each class is taught by a teacher certified in special education who is has a teacher’s assistant. [REDACTED] offers individual and group psychological counseling. It is in the process of hiring an occupational therapist. If Petitioner were to attend [REDACTED] he would be in a class that currently has three students.<sup>11</sup>

<sup>5</sup> DCPS No. 1 at 1 and 5; testimony of Ms. Sarovic.

<sup>6</sup> Stipulation by DCPS.

<sup>7</sup> Testimony of Ms. Lobban.

<sup>8</sup> P.Exh. No. 7.

<sup>9</sup> P.Exh. No. 16.

<sup>10</sup> P.Exh. No. 6.

<sup>11</sup> Testimony of Ms. Sarovic.

## Conclusions of Law

### *Failure to Provide an Appropriate Placement*

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“Rowley”),<sup>12</sup> 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... 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>13</sup>

Thus, Petitioner’s burden is to show that DCPS has failed to provide an environment in which Petitioner can derive educational benefit. Ms. [REDACTED] testified that [REDACTED] cannot provide the small-class environment prescribed in Petitioner’s IEP. DCPS has not issued a Prior Notice placing Petitioner in a small class environment since his IEP was developed on December 1, 2008. Therefore, the Hearing Officer concludes that Petitioner has met his burden of proving that DCPS has failed to provide an appropriate placement.

### *Failure to Conduct Manifestation Determinations*

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local education agency (“LEA”), the parent, and relevant members of the child’s IEP Team (as determined by the parent and the LEA) must review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability, or (2) if the conduct in question was the direct result of the LEA’s failure to implement the IEP.<sup>14</sup>

If the MDT determines that the conduct was a manifestation of the child’s disability, the MDT must either (1) conduct a functional behavioral assessment, unless

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<sup>12</sup> 458 U.S. 176 (1982).

<sup>13</sup> *Rowley, supra*, at 200-01.

<sup>14</sup> 34 C.F.R. §300.530(e)(1).

the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (2) review the existing behavioral intervention plan, and modify it, as necessary, to address the behavior. The LEA must also return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.<sup>15</sup>

In this case, DCPS suspended Petitioner and changed his placement without benefit of a manifestation determination at the end of the 2008-2009 school year. The Hearing Officer concludes that Petitioner has met his burden of proving that DCPS failed to conduct a manifestation determination.

### *School of Virginia*

would be an appropriate placement for Petitioner. It offers the small class environment prescribed in Petitioner's IEP. Leary can provide the counseling services that Petitioner's requires. It did not employ an occupational therapist to provide the OT services Petitioner requires, but it is in the process of hiring a therapist and has committed to making up any missed services if one was not hired by the time of Petitioner's enrollment.

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."<sup>16</sup> "[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."<sup>17</sup>

### **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 21<sup>st</sup> day of September 2009, it is hereby

**ORDERED**, that DCPS shall immediately issue a Prior Notice placing and funding Petitioner at the [REDACTED] including transportation and all other appropriate related services.

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<sup>15</sup> 34 C.F.R. §300.530(f).

<sup>16</sup> *Florence County School District Four v. Carter*, 510 U.S. 7, 11 (1993).

<sup>17</sup> *Id.*, 510 U.S. at 15-16.

**IT IS FURTHER ORDERED**, that Petitioner is authorized to obtain an independent functional behavior assessment. Petitioner's counsel shall provide copies of the completed assessment to the appropriate DCPS Placement Specialist and the DCPS Office of Special Education ("OSE") Resolution Team by facsimile transmission<sup>18</sup> and first-class mail along with a written request to schedule the MDT meeting described below.

**IT IS FURTHER ORDERED**, that on or before November 20, 2009, DCPS shall convene an MDT meeting at \_\_\_\_\_ to review Petitioner's progress at \_\_\_\_\_ review all current evaluations, and update Petitioner's IEP, including an updated intervention behavior plan. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel.

**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 and the DCPS Office of Special Education Resolution Team<sup>19</sup> to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.<sup>20</sup>

**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: September 21, 2009

<sup>18</sup> Fax: (202) 645-8828.

<sup>19</sup> *Id.*

<sup>20</sup> If DCPS fails to coordinate scheduling the MDT meeting by dates 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.