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

STUDENT, through the legal guardian[1]	)	Complaint Filed: October 29, 2009
	)	
Petitioner,	)	Prehearing Order: November 24, 2009
	)	
v.	)	Hearing Date: January 13, 2010
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Docket No.
	)	
Respondent.	)	
	)	
Student Attending: Non-attending	)	

HEARING OFFICER'S DECISION

Counsel for Petitioner:	Petitioner's Mother, *Pro se*
Counsel for DCPS:	Blair Matsumoto, Esquire Office of the General Counsel, DCPS 825 North Capitol Street, N.E.; 9th Floor Washington, D.C. 20002 (202) 442-5000; Fax: (202) 442-5098

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

Jurisdiction

This hearing 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"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Introduction

Petitioner is an year-old non-attending student. On January 26, 2009, Petitioner filed a Due Process Complaint Notice against the District of Columbia Public Schools ("DCPS") alleging that DCPS had failed to (1) develop annual Individualized Education Programs ("IEPs") since the 2004-2005 school year, (2) conduct triennial evaluations, (3) authorize independent evaluations, (4) compensate Petitioner's service provider, and (5) provide transportation services.[2] Petitioner was and continues to be represented by his mother, an attorney licensed to practice in this jurisdiction.

On February 25, 2009, Petitioner filed a *Motion for Clarification of [Petitioner's] Stay Put Placement.* The motion set forth Petitioner's position that he is entitled to remain in his "current private instruction school" during the pendency of these proceedings.

Petitioner's mother also filed a *Motion for Recusal of Hearing Officer on Grounds of Bias* ("*Recusal Motion*") on February 25, 2009. The Hearing Officer was unaware of both motions until March 16, 2009, because the Student Hearing Office filed both motions in Docket No. 2009-0334, a separate proceeding filed on behalf of Petitioner that was withdrawn on February 27, 2009. The Hearing Officer received an email message from Petitioner's mother on March 16th that alerted him to the existence of the motions. The *Recusal Motion* alleged, *inter alia*, that after she filed the *Complaint*,

> The District of Columbia Public Schools immediately began emailing Mr. Banks alleging that the time frame for its answer was somehow stalled until Petitioner showed proof that he had served the DCPS office of the General Counsel (DCPSOGC"). I explained to Mr. Banks that Student Hearing Complaint only referenced notice to the Student Hearing Office and not DCPSOGC. Mr. Banks immediately accepted the statements of DCPSOGC as factual without an opportunity to query the Student Hearing Office or review the complaint…
>
> Immediately after the settlement conference meeting DCPS felt comfortable emailing Mr. Banks stating that Petitioner refused to sign the [registration] form and attached its resolution settlement discussion

[2] Docket No.

meeting notes as proof of its allegations. Mr. Banks accepted DCPS's notes as factual without hearing from Petitioner. Mr. Banks sent an email to Petitioner stating he would not have jurisdiction to hear the dispute if Petitioner did not sign the form…

Pursuant to IDEA, the resolution meeting is between the parties and not the hearing officer. It is accepted law what happens in settlement discussions stay there and are not admissible or discoverable. Notwithstanding, Mr. Banks sent Petitioner an email indicating that he will accept DCPS resolution notes as factual without so much as a consideration of Petitioner's hearing notes…

Mr. Banks is bias because he has already determined that he will support any assertions made by DCPS, whether supported by the evidence or not. Mr. Banks could not possibly know what document was presented to Petitioner during the meeting or whether that document is the same as a document he may or may not be familiar with because he did not attend the meeting and did not ask Petitioner or DCPS for a copy of the document that was presented to him. Clearly, Mr. Banks adopted the statements of DCPS and its counsel without as much as a review of the documents in dispute.[3]

On March 17, 2009, the Hearing Officer issued an Interim Order denying the Recusal Motion and the Motion for Clarification. On March 18, 2009, Petitioner's mother filed a *Motion for Reconsideration of Hearing Officer's Interim Decision Regarding Bias and Stay Put* ("*Reconsideration Motion*"). On March 20, 2009, Petitioner's mother filed a *Line* withdrawing the Complaint. On March 23, 2009, the Hearing Officer issued a Hearing Officer's Decision ("HOD") dismissing the Compliant without prejudice. On April 13, 2009, the Hearing Officer issued an order denying the *Reconsideration Motion.*

On February 24, 2009, Petitioner filed a second Due Process Complaint Notice alleging that DCPS had failed to honor "stay-put" provisions of IDEIA. On February 27, 2009, Petitioner filed a *Line* withdrawing the February 24th Complaint.[4] On March 16, 2009, the Hearing Officer issued an HOD dismissing the February 24th Complaint without prejudice.

On March 23, 2009, Petitioner filed a Due Process Complaint Notice alleging that DCPS failed to (1) develop IEPs since the 2004-2005 school year, (2) conduct triennial evaluations for the last five years, (3) authorize independent evaluations, (4) compensate Petitioner's service provider, and (5) provide transportation services. On March 30, 2009, DCPS filed *District of Columbia Public School's Motion to Dismiss Parent's Administrative Due Process Complaint Notice* ("*Motion to Dismiss*"). The gravamen of the *Motion to Dismiss* was that an order issued by United States District Judge Urbina on January 22, 2009 effectively resolved the issues in the Complaint. Petitioner filed

[3] Grammatical and other errors appear as typed in the *Recusal Motion.*
[4] Docket No.

Petitioner's Opposition to Respondent's Answer and Motion to Dismiss Petitioner's Due Process Complaint Notice ("*Opposition*") on April 1, 2009. The *Opposition* argued that Judge Urbina's order did not relieve DCPS of its continuing obligation to provide a free appropriate public education ("FAPE") to Petitioner. On May 18, 2009 the Hearing Officer issued a Hearing Officer's Decision ("HOD") granting the *Motion to Dismiss* primarily on the grounds that Judge Urbina's order prevailed over the issues raised in the Complaint. However, in furtherance of Judge Urbina's order, the Hearing Officer ordered the parties to convene an MDT meeting before the end of the 2008-2009 school year to develop a Student Evaluation Plan for Petitioner. Once the plan was developed, Petitioner was authorized to obtain the evaluations independently. Thereafter, within fifteen (15) school days of its receipt of the independent evaluations, DCPS was ordered to convene an MDT meeting to review all current evaluations and assessments, update Petitioner's IEP, and discuss placement alternatives.[5]

On August 28, 2009, Petitioner filed a Due Process Complaint Notice alleging that DCPS had failed to develop an appropriate IEP or provide an appropriate placement. On September 9, 2009, Petitioner's mother filed a *Line Withdrawing the Due Process Complaint.* On October 17, 2009, the Hearing Officer issued an Order dismissing the Complaint without prejudice.

On October 29, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the DCPS had failed to (1) develop an appropriate Individualized Education Program ("IEP"), and (2) provide an appropriate placement. The *Complaint* alleged additional violations that predate the May 18, 2009 HOD. At the prehearing conference on November 19, 2009, the Hearing Officer advised the parties that *res judicata* bars relitigation of those allegations.[6] In a Prehearing Order issued on November 24, 2009, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure to develop an appropriate IEP

  Petitioner alleges that the IEP team in August 2009 did not include a special education teacher and, therefore, was not properly constituted. Petitioner alleges that the IEP that was developed is deficient because it fails to (1) address Petitioner's seizures, (2) include functional goals that the parent proposed, (3) provide a full-time nurse, (4) provide the assistance of a handwriting expert, (5) provide adequate speech and language therapy, (6) provide Applied Behavioral Analysis ("ABA") support, (7) provide visual reinforcements, and (8) provide an appropriate communication device.

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[5] DCPS Exh. No. 7 at 6.

[6] *Washington Medical Center, Inc. v. Holle*, 573 A.2d 1269, 1281 (D.C. 1990)(*citations omitted*). *See also Hemphill v. Kimberly-Clark Corp.*, 530 F.Supp.2d 108, 110-11 (D.D.C. 2008) citing *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004); *Avery v. HPCS, Inc.*, Civ. Action No. 00-1315, 2003 D.C. App. Lexis 138 at 6 (D.C. March 13, 2003); *Smith v. Jenkins*, 562 A.2d 610, 613 (D.C. 1989).

DCPS asserts that the IEP team was properly constituted and that the IEP provides for full-time specialized instruction, one hour per week of occupational therapy, three hours per week of speech and language therapy, and is reasonably designed to provide educational benefit.

- DCPS' alleged failure to provide an appropriate placement

  Petitioner alleges that DCPS' proposed placement, is inappropriate, because it fails to provide (1) a full-time nurse, (2) consistent availability of speech and language therapists, (3) assistive technology, (4) ABA, and (5) other recommendations provided in Petitioner's evaluations.

  DCPS asserts that provides a small-class environment of 8-10 students, will provide a full-time dedicated aide for Petitioner, is properly staffed, and can meet Petitioner's educational needs.

On November 25, 2009, the day after the Prehearing Order was issued, Petitioner's mother filed *Petitioner's Withdrawal of the Student Hearing Complaint Without Prejudice.* The Hearing Officer contacted Petitioner's mother by e-mail and reminded Petitioner's mother that this Hearing Officer follows Federal Rule 41 with respect to withdrawals. Since Petitioner's mother withdrew the August 28th Complaint on September 9th alleging the same facts as alleged in the instant *Complaint*, the Hearing Officer urged Petitioner's mother to request a continuance instead of proceeding with the withdrawal, because the second withdrawal would result in a dismissal with prejudice under Rule 41.[7] Petitioner's mother requested a continuance and the Hearing Officer granted it.

On January 11, 2010, Petitioner filed *Petitioner's Motion for Summary Decision.* The Hearing Officer notified the parties by e-mail that he would not consider the motion as it was untimely filed.[8] The due process hearing was convened and completed on January 13, 2009. The parties' Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing.[9]

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[7] The October 17th Order, included in the Record herein, advised Petitioner's mother that a second withdrawal on the same set of facts would justify a dismissal with prejudice.

[8] In a reply e-mail, Petitioner's mother objected to the Hearing Officer's refusal to consider her motion. The Prehearing Order required the parties to file dispositive motions no later than the deadline for filing the Five-Day Disclosures. Student Hearing Office Standard Operating Procedures ("SOP"), Section 401(c)(4).

[9] The Hearing Officer sustained DCPS' objections to the following of Petitioner's proposed exhibits: (1) Exhibit 7, testimony of a Dr. Megson before Congress on grounds of relevancy and Dr. Megson's unavailability to testify and be subjected to cross-examination; (2) Exhibit 8, an incomplete evaluation of Petitioner by Dr. Megson; (3) Exhibit 9, a letter from Dr. Megson, composed after the filing of the *Complaint* in anticipation of litigation, and Dr. Megson's unavailability to testify and be subjected to cross-examination; (4) Exhibit 10, notes of Dr. Trouth on a prescription sheet, composed after the filing of the *Complaint* in anticipation of litigation, and Dr. Trouth's unavailability to testify and be subjected to cross-examination; and (5) Exhibit 14, a filing in a proceeding before The Honorable Henry Kennedy on grounds of relevancy. The Hearing Officer sustained Petitioner's objections to the following (continued)

Witnesses for Petitioner

Petitioner's Grandfather
Care Provider
Paraprofessional,
Petitioner's Mother

Witnesses for DCPS

Leslie Charles, Speech and Language Pathologist, DCPS
Annie Glanville, Autism Specialist, DCPS
Natalia Houston, Program Manager, DCPS Office of Special Education
Deidre Williams, Program Manager, DCPS Office of Special Education

Findings of Fact

1. Petitioner is an year-old non-attending student.[10]

2. Petitioner suffered a head injury as an infant that caused swelling in the cranial cavity. He began suffering seizures the next year. Petitioner's seizures are "uncontrollable," but he receives medication to mitigate their impact. At age he was diagnosed with Pervasive Developmental Disorder ("PDD"). Petitioner is non-verbal.[11]

3. Judge Urbina described the background of the proceeding that he adjudicated as follows:

> In August 2004, Individualized Education Plan ("IEP")[1] for the 2004-2005 school year stated that he should attend the "inclusion nursery school program" at Compl. ¶ 27. however, no longer offers an inclusion program, and on August 10, 2005, DCPS issued a new IEP, placing in the citywide autism program at Compl. ¶ 30; Mem. Op. (Sept. 28, 2005) at 3. That IEP also changed classification from "developmentally delayed" to "autistic." Compl. ¶ 30. Because Jackson disputes the new IEP's change in classification and the

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of DCPS' proposed exhibits: Exhibits 1-4, 6, and 27-29, pleadings and orders already in the record. The Hearing Officer deferred ruling on DCPS Exhibit Nos. 17 and 23-26 until specifically offered into evidence by DCPS. DCPS did not subsequently offer these documents into evidence. The Hearing Officer overruled Petitioner's objections to the following DCPS exhibits: (1) Exhibit 5, e-mails between the parties; (2) Exhibit 8, a Letter of Invitation to an MDT meeting - Petitioner's educational records already in Petitioner's custody; and (3) Exhibits 10 and 14, Multidisciplinary ("MDT") Meeting Notes - Petitioner's educational records already in Petitioner's custody.

[10] Testimony of Petitioner's mother.

[11] *Id.*

placement, *id.* ¶ 32, she filed an administrative due process complaint on September 13, 2005, Mem. Op. (Sept. 28, 2005).

On September 28, 2005, the court granted the plaintiff's motion for a stay put injunction,[2] requiring DCPS to comply with "the mandates of the 2004-2005 school year IEPs." Order (Sept. 26, 2005) at 1-2. After a meeting between the parties and the court on September 29, 2005, the court issued an order requiring that DCPS:

> fund all related services and supplemental aids on the plaintiff A.J.P.'s April 9, 2004 Transition Plan and August 12, 2004 IEP, including speech therapy, occupational therapy, assistive technology, sign language instruction, behavioral management services and a full-time, one-on-one dedicated aide, *until the plaintiff's administrative due process complaint is decided and any appeal therefrom is concluded. . . .* [And DCPS] shall pay the identified aides and service providers, within 15 days of receipt from each aide of his or her weekly invoice.[12]

4. Since Judge Urbina's September 2005 Order, Petitioner has received all of his educational services at home or at non-DCPS facilities chosen by his mother.[13]

5. has served as a "care provider" for Petitioner since 2006. She takes Petitioner to his appointments, gives him his prescribed medications, and works with him on his penmanship. graduated from high school, but has no professional training or licenses.[14]

6. Petitioner's mother retained to provide educational services to Petitioner. taught Petitioner Math, Reading, Science, and Social Studies. worked with Petitioner for about 18 months until DCPS terminated funding for her services.[15] While she worked with Petitioner, Petitioner was essentially non-verbal. He communicated by pointing to pictures. Petitioner was able to match numbers up to 10.[16]

7. is a paraprofessional for the a Prince George's County School System. provided Petitioner services in the evening, after her services to the county were completed. has no training in education and is not a licensed teacher.[17]

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[12] *Laster v. District of Columbia*, Civil Action No. 05-18175 (D.D.C. Jan. 22, 2009) at 2; DCPS Exh. No. 7 at 4-5.
[13] Testimony of Petitioner's mother.
[14] Testimony of Ms. Davis.
[15] Judge Urbina's January 22, 2009 order effectively terminated DCPS' obligation to fund related services and supplemental aides. DCPS Exh. No. 7 at 5.
[16] Testimony of
[17] *Id.*

8. On May 18, 2009, Children National Medical Center ("CNMC") completed an Augmentative and Alternative Communication Evaluation of Petitioner. The findings and recommendations *inter alia*, include the following:

> It is our impression that for communication, [Petitioner] needs a full AAC system that includes symbols, gestures, and durable speech generating device. At this time it appears the Sequencer and the Go Talk 20 best meet these needs. Implementation of the speech generating devices will also require coordinated planning for maximizing preprogrammed messages. To accomplish this it is recommended [Petitioner's] scheduled activities be analyzed for communicative opportunities. After this is accomplished, the goal will be to expand [Petitioner's] expressive communication within a variety of his daily activities. To implement these goals we offer the following recommendations...
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> [I]n addition to the symbol system it is recommended that through collaboration of family, and home school staff an overall "[Petitioner] Communication Dictionary" be developed. This would include a description of current personal gestures and vocalizations and AAC/AT system communications. Next develop an outline of [Petitioner's] current activities and projected expansions of his participation in additional activities of new ways to communicate in his present activities. Analyze these activities for communication opportunities and needs and determine how he will use communication messages...
>
> It is recommended that [Petitioner] receive intensive speech therapy services to address his overall learning and assist in the manifestation of an AAC system into his daily activities, and expand his receptive and expressive language development.[18]

9. July 1, 2009, Ms. Kathy Chumas of Dynamic Development completed an Occupational Therapy ("OT") evaluation of Petitioner. Ms. Chumas' findings and recommendations, *inter alia*, include the following:

> [Petitioner's] occupational therapy evaluation revealed depressed processing within the vestibular/proprioceptive system. Consequently, [Petitioner] presents with low muscle tone, some difficulty with bilateral tasks, and he displays many sensory seeking behaviors. Low muscle tone can impact a child's ability to develop adequate fine motor skills. His overall inability to regulate himself is causing [Petitioner] to seek out extra sensory input from his environment. [Petitioner] also presents with a motor planning disorder which is being caused by inconsistent registration of sensory information. [Petitioner's] motor planning weaknesses require

[18] Petitioner's Exhibit ("P.Exh.") No. 3 at 3-4.

him to cognitively think his way through higher order based tasks rather than perform these tasks more automatically.

Recommendations:

... [Petitioner] should receive preferential seating in all academic settings to prevent sensory overload and obtain the best auditory and visual advantage.

Competing auditory information should be minimized whenever possible. Frequent checks should be made to assure what is heard...

[Petitioner] should have a sensory diet incorporated throughout the day. The goal of a sensory diet would be to give [Petitioner] the proper stimulation that would lead to increased regulation and overall attention.

[Petitioner] should receive an assistive technology device that assists with language output.

[Petitioner]should receive individualized speech and occupational therapy sessions twice a week utilizing a sensory model.

[Petitioner] should receive individualized occupational therapy sessions within the school setting weekly using a sensory model.[19]

10. On July 9, 2009, Interdynamics Inc. completed a Psychoeducational Evaluation of Petitioner. The findings and recommendations, *inter alia*, include the following:

Developmental Milestones were reportedly achieved within normal limits until approximately 18 months of age when his mother noted a regression of his skills. He was diagnosed early on as a child with a Pervasive Developmental Disorder (PDD). He had a significant medical history beginning at approximately 20 months of age and currently takes Depakote for a seizure disorder. Developmentally, speech and language, social interactive skills, fine motor skills, along with toilet training are significantly delayed. He has allergies to medication and foods. [Petitioner] began to receive services (speech & language, occupational therapy, and technical assistance) at approximately . His mother's opinion is that interventions and supports have been ineffective and that she has only begun to see progress in [Petitioner] since he began receiving private educational instruction, during 2006...

Because of his significant attention and concentration difficulties, as well as language limitations, [Petitioner's] cognitive abilities, verbal reasoning

[19] P.Exh. No. 2 at 3-4.

abilities, nonverbal reasoning abilities, working memory skills, and processing speed could not be adequately assessed by standardized norm-referenced instruments. However, over the course of the evaluation, [Petitioner] was able to scribble, and with frequent verbal prompts by his mother, was able to identify (by pointing) some common objects, suggesting that he has learned and can learn over time. [Petitioner] needs a multisensory instructional approach using both verbal and nonverbal instructional methods, through a full time educational program, to assist him throughout his school day…

According to the Psychological Evaluation (07/06/2004), [Petitioner's] overall functioning was assessed using the Baley scales, which indicated Low skills in Communication, Daily Living Skills, and Socialization. [Petitioner] is exhibiting significant delays in self-help skills, social skills, and expressive language, and is not toilet trained. In the classroom and school setting, these deficits would be prominent and requires intervention. During the evaluation, [Petitioner] displayed a significantly short attention span along with hyperactivity. This factor decreases his focus on academic work, resulting in less opportunity for learning and retaining information. In addition, his language delays affect [Petitioner's] ability to retain, interpret, and recall information. [Petitioner] requires lots of patience, as well as frequent and consistent verbal prompts. [Petitioner] will require a one-to-one aide who will work with him during his school day.

This Psychoeducational Evaluation strongly suspects a diagnosis of Autism that is co-morbid with ADHD. However, the clinical component of a Clinical Evaluation was not administered which could render a more definitive diagnosis…

Recommendations

1. … [Petitioner] is a student with significant deficits that affect all areas of his functioning. He needs to be considered for full time special education placement as a student with Other Health Impairment (Autism, Seizure). Due to the lack of progress during his first years of instruction, it is evident that he needs a more comprehensive educational placement and more intensive and specialized interventions. He needs special education supports that should include a full time educational program, speech and language, occupational therapy, medication provision, educational assistance, behavior management (ABA, toileting), one-to-one, and transportation throughout his school day.

2. [Petitioner] needs an Individualized Educational Program to address all areas of deficit. His IEP should focus on improving all areas of his functioning, such as inattention and responding to verbal cues, necessary

in order to assist [Petitioner] in manipulating the school day successfully…

10. [Petitioner] is nonverbal… He demonstrated some picture identification and receptive language. The Picture Exchange Communication (PECS System) should be revisited with intensive instruction, supplemented with computer use to explore more intensive Speech and Language Therapy… Another option may be an assistive technology device.[20]

11. On July 21, 2009, Interdynamics Inc. completed a Speech and Language Evaluation of Petitioner. The findings and recommendations, *inter alia*, include the following:

[Petitioner] is non-verbal and was diagnosed with PDD-NOS at 24 months of age. He primarily communicates through gestures. Limited vocalizations were produced throughout the evaluation and [Petitioner's mother] reported that this was typical of [Petitioner]… [Petitioner] vocalized intermittent vocalizations throughout the evaluation which had no relevance to a specific task. Throughout the evaluation, [Petitioner] exhibited significant attention and sensory difficulties. Per parent report, and exhibited in today's testing, [Petitioner] lacks ability to point to wants and needs. [Petitioner] was able to exhibit eye contact, shared some enjoyment during physical activity, responded to his name when called intermittently, gave items to others as part of a routine, and partially participated in joint attention. More difficulty was evident in social routines such as social eye contact, smiling, and interactions. When [Petitioner] did not want to engage in a task, he would simply turn away and lay down on the over-sized stuffed animal, go to his mother, or simply throw down what was given to him.

Recommendations

[Petitioner's] results indicate communication deficits in the severe range. These weaknesses impact his ability to access the general education curriculum. It is recommended that [Petitioner] receive speech and language therapy for 3 hours per week. Sessions should be completed in individual sessions, group, and service implementation into the classroom. The speech and language pathologist should collaborate with the classroom teacher and parent to maximize success…[21]

12. In early August 2009, DCPS requested the opportunity to observe Petitioner in his normal educational environment, his home. Petitioner's mother denied

[20] P.Exh. No. 5 at 6, 7 and 9. The exhibit provided to the Hearing Officer did not include page 8 (Recommendations 3-9).
[21] P.Exh. No. 4 at 5-6.

the request, but consented to have Petitioner observed at
and observed Petitioner at

13. DCPS convened an MDT meeting on August 26, 2009 to update Petitioner's IEP and to discuss and determine a placement.[24] The participants in the meeting included Petitioner's mother, – School Psychologist, Alicia Nti – Occupational Therapist, Gayle Hall – DCPS Program Manager, and Shenaz Hussain – Physical Therapist.[25] are licensed special education teachers.[26] Petitioner's mother did not invite or any other of Petitioner's service providers to the MDT meeting.[27]

14. The MDT prescribed 23.5 hours per week of specialized instruction in an out-of-general education environment, one hour per week of occupational therapy, and three hours per week of speech and language therapy.[28]

15. Prior to the meeting on August 26, 2009, drafted IEP goals and objectives to be considered by the MDT based upon her review of Petitioner's evaluations.[29] The draft IEP included annual goals and objectives in School Related Skills, Pre-Academic Reading, Pre-Academic Math, Pre-Academic Written Expression, Self-Help, Communication, and Fine Motor/Visual – Motor Integration.[30] Petitioner's mother disagreed with the draft goals and objectives developed by and submitted her own proposed goals and objectives.[31] The team determined that in light of DCPS' lack of prior experience with Petitioner and the pervasive delays evident from the findings in the evaluations, Petitioner's mother's proposed goals were too ambitious for Petitioner:

> [Petitioner's mother] feels that the goals are too low for [Petitioner]. DCPS states that the IEP is a working document and if [Petitioner] masters the goals, new goals can be developed. [Petitioner's mother] was not able to provide documentation of goals previously mastered.[32]

The MDT adopted some of Petitioner's mother's recommendations, but Petitioner's mother disagreed with the final goals and objectives approved by the MDT.[33]

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[22] Testimony of
[23] Testimony of Petitioner's mother.
[24] DCPS Exh. No. 14 at 1; DCPS Exh. No. 7 at 6.
[25] P.Exh. No. 17 at 1.
[26] Testimony of
[27] Testimony of Petitioner's mother and
[28] DCPS Exh. No. 15 at 1 and 13, ¶ XIII.
[29] Testimony of
[30] DCPS Exh. No. 15 at 3-12.
[31] Testimony of Petitioner's mother; P.Exh. No. 16.
[32] DCPS Exh. No. 14 at 6.
[33] Testimony of Petitioner's mother, testified that the handwritten insertions and deletions on the IEP reflected changes proposed by Petitioner's mother. DCPS Exh. 15 at 3-8; DCPS Exh. No. 14 at 6-7.

16. The MDT authorized Petitioner's mother to obtain the following independent evaluations: OT, audiological, physical therapy, and neuropsychological.[34]

17. The MDT committed to purchase the assistive technology devices recommended for Petitioner in the CNMC evaluation upon his enrollment.[35]

18. The MDT prescribed a dedicated aide for Petitioner for the morning bus ride to school, throughout the school day, and for the afternoon bus ride back to his home.[36]

19. Petitioner's mother disagreed with the IEP because she did not believe it provided sufficient accommodations for his disabilities. According to Petitioner's mother, the IEP should have included (1) the use of specific assistive technologies, and (2) a plan in the event of Petitioner's inevitable seizures.[37]

20. Petitioner's mother has never provided DCPS a medical report documenting the severity of or necessary treatment for Petitioner's seizures.[38]

21. The MDT issued a Prior Notice placing Petitioner at The MDT selected because of the following program characteristics: Petitioner would be in the Intermediate Program in which the students range in age from 8-10. The classes have very low student to teacher ratios. Petitioner's teacher would be certified in special education, trained in Applied Behavior Analysis ("ABA") for children with autism, and have a Masters degree. employs the PECS methodology recommended in Interdynamics' Psychoeducational Evaluation. Petitioner's teacher would be assisted by two board certified behavioral assistants ("BCBAs") who would visit weekly and offer suggestions as to modification of techniques and curriculum. Both BCBAs are also certified in the use of PECS.[40]

22. In addition to the dedicated aide, there would be a teacher's assistant assigned to Petitioner's classroom. has a full-time nurse, an occupational therapist, and a speech and language therapist.[41]

23. Petitioner's mother objected to the placement at because she believed that could not adequately address Petitioner's needs. According to Petitioner's mother, had an inadequate OT room, did not have a full-time nurse,

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[34] DCPS Exh. No. 14 at 5.
[35] Testimony of DCPS Exh. No. 14 at 8.
[36] Testimony of DCPS Exh. No. 14 at 8-9.
[37] Testimony of Petitioner's mother; *Petitioner's Closing Brief* at 18. Petitioner's mother argued that the IEP should have prescribed nursing services for Petitioner.
[38] Testimony of testified that in June 2009, she requested Petitioner's mother to provide any medical documentation she had of Petitioner's seizures. Petitioner's mother also failed to disclose any medical records relating to Petitioner's seizures for the hearing.
[39] DCPS Exh. No. 16.
[40] Testimony of
[41] Testimony of

and did not have adequate assistive technology services. Petitioner's mother requested placement at two private schools, DCPS declined to effectuate a placement at a private school on the grounds that could meet Petitioner's needs and was the least restrictive environment.[42]

24. Petitioner's mother elected not to send Petitioner to Petitioner has not been accepted at or any other private school.[43]

Conclusions of Law

Failure to Develop an Appropriate IEP

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[44] 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
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> "(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 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).[45]

Petitioner's mother argued that the IEP team convened on August 26, 2009 was invalid, because it did not contain any of Petitioner's teachers. 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

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[42] Testimony of Petitioner's mother and DCPS Exh. No. 14 at 9-10.
[4343] Testimony of Petitioner's mother.
[44] 458 U.S. 176 (1982).
[45] *Id.* at 181-82.

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.[46]

An LEA should not take lightly its obligation to ensure the availability of the required team members. The Ninth Circuit has held that the failure to convene an appropriate team constitutes a substantive violation of IDEA, and is a denial of FAPE.

> The failure to include at least one regular education teacher on the IEP team deprived the team of "important expertise regarding the general curriculum and the general educational environment." The IEP team did not include individuals Congress concluded were most knowledgeable about a disabled student's special educational needs. As a result, we have no way of determining whether the IEP team would have developed a different program after considering the views of a regular education teacher. The failure to include at least one regular education teacher on the IEP team was a structural defect in the constitution of the IEP team.[47]

Petitioner's mother's contention fails in several respects. First, for at least the past five years, Petitioner's mother has elected not to have Petitioner educated in a public or private school. Nor has Petitioner's mother retained the services of anyone trained or licensed in education to instruct Petitioner at home. testified that she was a "care provider" with no teaching credentials and no more than a high school education. testified that she was a "paraprofessional" with the P.G. County School System, and had no training or credentials in education. Therefore, as of the date of the MDT meeting, there was no teacher "of the child" who would be required to attend the meeting.[48] Second, Petitioner's mother had the right to invite anyone she elected to the MDT meeting.[49] She could have invited or any other service provider in her employ that she chose, but she failed to do so. DCPS provided three individuals at the MDT who were certified special education teachers: The Hearing Officer concludes that DCPS assembled an IEP team that achieved substantial compliance with 34 C.F.R. Section 321(a).

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[46] 34 C.F.R. §300.321(a).

[47] *M.L. v. Federal Way School District*, 394 F.3d 634, 646 (9th Cir. 2004), citation omitted. *See also, Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1076-77 (9th Cir. 2003)(the failure to include a representative from the private school that the child was currently attending on the IEP team violated the procedural requirements of the IDEA). *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1484-5 (9th Cir. 1992)(the school district violated the procedures mandated by Congress in the IDEA by failing to secure the participation of the disabled student's regular education teacher, or any representative of the private school he attended after the school district refused to identify him as disabled.)

[48] 34 C.F.R. §300.321(a)(2) and (3).

[49] "At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate" may be included on the IEP team. 34 C.F.R. §300.321 (6).

Petitioner's mother argued that the IEP was inappropriate because the goals and objectives were inadequate. Petitioner's mother submitted a copy of her own proposed goals and objectives to the MDT and to the Hearing Officer in her Exhibit 16. However, Petitioner's mother offered no testimony to explain why her proposed goals were more appropriate than those adopted by the MDT. It is undisputed that Petitioner is non-verbal and has not received instruction from a licensed teacher for the last five years.
his care-provider, testified that he communicates only by pointing to pictures. His only math success is the ability to identify the first ten numbers. The MDT meeting notes reflect that "[Petitioner's mother] was not able to provide documentation of goals previously mastered." The MDT determined that in light of Petitioner's lack of previous schooling, it would be preferable to start with modest goals that could be enhanced once Petitioner demonstrated proficiency. The Hearing Officer concludes that Petitioner's mother has failed to meet her burden of proving that the IEP goals adopted by the IEP team were not calculated to confer educational benefit to Petitioner.

Petitioner's mother cites *Scorah v. District of Columbia*,[50] as precedent for rejection of an IEP when the school district has no direct knowledge of a child's needs.[51] Counsel's reliance on *Scorah* is misplaced for several reasons. First, Scorah was decided prior to the Supreme Court's decision in *Schaffer v. Weast*,[52] and prior to the change in local regulations that now impose the burden of proof on the party initiating due process proceedings, rather than on DCPS in all cases.[53] Second, DCPS failed to produce an accurate transcript to the District Court on appeal. Therefore, the Court ruled, "when considering Plaintiffs' Motion for Summary Judgment, this Court will consider all evidence in the light most favorable to the Plaintiffs, and [will] make all reasonable inferences in their favor."[54] Third, despite having the burden of proof, DCPS offered virtually no evidence to meet its burden:

> In reaching the following conclusions, the Court notes that, at the December 16, 2002 due process hearing, DCPS presented a total of seven documents. In addition, it presented only one witness, via telephone, for fifteen minutes, who specifically testified that he was unable to speak personally to particular needs and that he did not know whether the goals and objectives provided for in IEP were appropriate. In contrast, the Scorahs presented thirty-six documents and five witnesses in support of their claim that individualized program is appropriate and that is an appropriate private school placement for The Scorahs also presented evidence that established that educational and emotional needs would be harmed if he were moved from

By contrast, in this case, Petitioner's mother had the burden of proof and offered no testimony to prove that the goals and objectives she proposed were more appropriate than

[50] 322 F. Supp.2d 12 (D.D.C. 2004).
[51] *Petitioner's Closing Brief* at 19.
[52] 126 S. Ct. 528 (2005).
[53] 5 D.C.M.R. §3030.3.
[54] 322 F.Supp.2d at 18.
[55] *Id.* At 18-19.

those adopted by the MDT. DCPS offered into evidence all of the evaluations reviewed by the MDT on August 26th, the MDT Meeting Notes, and the IEP. It also offered testimony from four individuals who participated in the MDT meeting, one of whom observed Petitioner at to prepare for the MDT meeting. Unlike the situation in *Scorah*, the MDT was well prepared for the meeting. Present at the meeting were three individuals licensed as special educators, an occupational therapist, a school psychologist, a speech therapist, an autism specialist, and a physical therapist. The MDT meeting notes reflect a thorough review of all of Petitioner's current evaluations. The Hearing Officer concludes that the Court's decision in *Scorah* is inapposite to the current proceeding.

Petitioner's mother next argued that the IEP was inadequate because it did not specifically identify which assistive technology devices would be used and did not provide goals and methodologies for the devices. This argument is also without merit. The MDT committed to purchase the devices recommended in the CNMC evaluation. testified that she had the authority to purchase the equipment and would do so upon Petitioner's enrollment. Once the devices were purchased, it would be used at the discretion of Petitioner's teachers to implement his IEP.

Finally, Petitioner's mother argued that the IEP was inappropriate because it did not contain accommodations for Petitioner's seizures. First, while the MDT did not dispute that Petitioner may suffer from seizures, Petitioner's mother offered no medical documentation of the cause or extent of Petitioner's seizures, and no medical directive as to how the seizures should be handled. Petitioner's mother and grandfather also testified that they visited the day after the MDT meeting and no nurse was present. On the other hand, testified emphatically that DCPS recommended Petitioner's placement at because of the autism programs at and because a full-time nurse was available at also testified that upon Petitioner's enrollment at the nurse would meet with Petitioner's mother and develop a plan to address Petitioner's seizures and medications.

There is no dispute that the level of services prescribed in the IEP is appropriate: full-time specialized instruction, and four hours per week of related services. As recommended in the Interdynamics Psychoeducational Evaluation, the MDT prescribed a dedicated aide on the bus rides to and from school and throughout the school day. The aide would be available to assist with instruction, assist with Petitioner's toileting needs, and to alert the nurse in the event of a seizure. Petitioner would be in a small-class environment with a teacher certified in special education and trained in ABA. Petitioner's mother offered no credible proof that the IEP goals and objectives were not reasonably calculated to confer educational benefit. Nor did she prove that the IEP's failure to address Petitioner's seizures and medications was necessary for an appropriate IEP. The Hearing Officer concludes that Petitioner's mother has failed to meet her burden of proving that DCPS failed to develop an appropriate IEP.

Failure to Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[56] 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.[57]

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

Petitioner's mother sincerely believes that Petitioner's needs and safety can best be met in a "private instruction program" at home.[58] The strength of her convictions is evinced by her refusal to allow Petitioner to be trained by licensed educational professionals for the last five years. However DCPS has the legal obligation to place Petitioner in the least restrictive environment in which his needs can be met:

> The Act requires that the schools ensure that: To the *maximum extent appropriate*, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .[59]

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[56] 458 U.S. 176 (1982).
[57] *Rowley, supra,* at 200-01.
[58] *Petitioner's Closing Brief* at 23-26.
[59] *Gillette v. Fairland Board of Education*, 932 F.2d 551, 553 (6th Cir. 1991).

DCPS is bound by the following statutory placement priority:

> Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:
>
> (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
>
> (2) Private or residential District of Columbia facilities; and
>
> (3) Facilities outside of the District of Columbia.[60]

Thus, if there is a public facility that can meet a student's needs, DCPS must place the child in such facility rather than a private facility or in the child's home.

If Petitioner were to attend he would be in a self-contained class with a very low student to teacher ratio.[61] His teacher would Petitioner's teacher would be certified in special education, trained in Applied Behavior Analysis ("ABA") for children with autism, and have a Masters degree. Petitioner would have a dedicated aide from the time he leaves home until his return home. He would receive full-time specialized instruction and the four hours per week of related services recommended in his evaluations. Moreover, testimony persuades the Hearing Officer that has a full-time nurse who is at least as capable as Petitioner's current "care-provider" to address Petitioner's seizures and to administer medications as necessary. While it is understandable that Petitioner's mother would feel more comfortable having her vulnerable child educated at home, she has failed to offer proof by a preponderance of the evidence that Petitioner requires such a unique arrangement to meet his needs.

> Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent's desires... ("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."). "Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act."[62]

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[60] D.C. Code §38-2561.02(c).

[61] On August 27th, when Petitioner's mother and grandfather visited they visited one of the three autism classes. That class had but two students. The Hearing Officer made no specific finding as to the student – teacher ratio, because no testimony was elicited as to the size of the class to which Petitioner would be assigned.

[62] *Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 140 (D.D.C. 2002), *citing Rowley*, 458 U.S. at 207, and *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C. Cir. 1988).

For all of the reasons discussed above, the Hearing Officer concludes that Petitioner's mother has failed to meet her burden of proving that DCPS failed to provide an appropriate placement.

Petitioner's mother cites the recent Supreme Court decision in *Forest Grove School District v. T.A.*[63] for the proposition that Petitioner is entitled to a private placement, reimbursement and funding of his "private instruction program"

> "regardless of whether he tried the DCPS proposed program or not. The Supreme Court held that IDEA allows reimbursement for private special education services, even when the child did not previously receive special education services from the school district. Thus, a student doesn't have to "try" the program before the school district is obligated to reimbursement for private special education services. The Supreme Court held that IDEA allows reimbursement for private special education services, even when the child did not previously receive special education services from the school district. Thus, a student doesn't have to "try" the program before the school district is obligated to reimbursement for private special education services. "[64]

While counsel's characterization of the Court's ruling in *Forest Grove* is reasonably accurate, it is incomplete. Counsel's reliance on the case is misplaced because she failed to meet the precondition to eligibility for reimbursement. A parent is entitled to reimbursement only upon a showing that the school system denied the student a free appropriate education ("FAPE") and an appropriate placement.[65] In this case, Petitioner failed to establish either a denial of FAPE or that was an in appropriate placement.

Counsel also inaccurately cites and misapplies *Florence County School District Four v. Carter.*[66] Consistent with *Forest Grove*, the *Carter* Court held that "[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."[67] Again, Petitioner's counsel failed to establish the necessary predicate, that DCPS violated IDEA.

Finally, counsel cites *Weixel v. Board of Education of City of New York,*[68] for the proposition that the school district was obligated to accommodate the student's fibromyalgia and chronic fatigue syndrome by providing her with home instruction as an placement.[69] In fact, the court held that the District Court erred by dismissing the Complaint for insufficiency:

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[63] 129 S. Ct. 2484 (2009).
[64] *Petitioner's Closing Brief* at 16.
[65] 129 S.Ct. at 2292-95.
[66] 510 U.S. 7 (1993); *Petitioner's Closing Brief* at 16-17.
[67] 510 U.S. at 15-16.
[68] 287 F.3d 138 (2nd Cir. 2002)
[69] *Petitioner's Closing Brief* at 21.

> With regard to education from January through July 1994, a liberal reading of the allegations in the amended complaint supports the argument that defendants failed to provide any meaningful educational placement to during the second half of her -grade year. The amended complaint alleges that Rose was unable to attend classes because of her CFS. Further, the complaint alleges that she was only able to complete her seventh-grade education through home schooling, and that the defendants refused to provide such instruction to her. As such, plaintiffs did allege that Rose was denied an appropriate educational placement during this time period.[70]

Weixel is distinguishable, because the plaintiff there alleged that she was *unable* to attend public school due to her disability. Petitioner's mother has made no claim that Petitioner's seizures prevent him from attending a school with adequate nursing support. Rather, Petitioner's mother has elected not to send Petitioner to insisting that is inappropriate and inadequate because it does have a full-time nurse who can address Petitioner's needs in the event of a seizure. However, Petitioner's mother failed to document the extent to which Petitioner's seizures are disabling, failed to establish Petitioner's need for a full-time nurse, failed to prove that did not have a full-time nurse, and failed to prove that could not adequately accommodate Petitioner in the event of a seizure.

[70] *Id.* at 150.

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 23rd day of January 2010, 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: January 23, 2009