District of Columbia
Office of the State Superintendent of Education

Student Hearing Office
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Confidential

STUDENT, through the legal guardian[1]	)	Complaint Filed: April 9, 2010
	)	
Petitioner,	)	Prehearing Order: June 4, 2010
	)	
v.	)	Hearing Date: June 15-16, 2010
	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	
	)	
Respondent.	)	
	)	
Student Attending:	)	
	)	

HEARING OFFICER'S DECISION

[1] 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 a year-old student attending On April 9, 2010, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") had failed to provide an appropriate placement. In a Prehearing Order issued on June 4, 2010, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure to an appropriate placement

  Petitioner alleges that DCPS' proposed placement, School, is an inappropriate placement, because the setting at Payne (four students in a self-contained special education classroom) is too restrictive, Petitioner requires a full-time speech and language program, and the teacher at is not trained in handling children with cochlear implants. DCPS asserts that it offered Petitioner a full-time special education setting, and appropriate related services, designed to provide educational benefit.

The due process hearing was convened on June 15, 2010 and completed on June 16, 2010. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Witnesses for Petitioner

Petitioner's Mother
Special Education Consultant
Director of Clinical Services,

Witnesses for DCPS

Speech & Language Pathologist, DCPS
Educational Audiologist, DCPS
Evaluations Coordinator, DCPS
Acting Director, IEP Instructional Support, DCPS
Special Education Teacher,

Findings of Fact

1. Petitioner is a year old student who has attended since he was months old.[2]

2. Petitioner received bilateral cochlear implants in February and May of 2008.[3]

3. DCPS developed an Individualized Family Service Plan ("IFSP") for Petitioner on August 18, 2009. The IFSP indicated that Petitioner had been diagnosed with profound bilateral sensorineural hearing loss.[4] The IFSP prescribed 60 minutes per week of speech and language services at 30 minutes of occupational therapy ("OT") services at 75 minutes per week of services from an aural habilitation specialist, 30 minutes per week of audiology services at and bi-annual audiology services at Johns Hopkins.[5] In the IFSP Transition Plan, Petitioner's program needs were: Inclusive Setting, Small Teacher/Student, Oral Program, Toilet Training, and Adjustment Help.[6]

4. River completed an Occupational Therapy Evaluation on September 7, 2009. The findings and recommendations, *inter alia*, include the following:

> [Petitioner] presents with gross motor skills (stationary, locomotion) below age-expected levels with diminished quality of movement. Furthermore, classroom and clinical observation along with The Toddler/Infant Sensory Profile completed by [Petitioner's] parents suggest that [Petitioner] has some vulnerability in regards to vestibular and proprioceptive processing, directly impacting muscle tone, strength, postural control, coordination and the ability to grade muscle movement. In addition, [Petitioner's] low neurological threshold and sensory sensitivities to environmental stimuli, affect his ability to maintain an appropriate arousal level during classroom activities. These areas of vulnerability impact his overall performance in the classroom, and if not addressed, may hamper attainment of higher-level skill, as more challenging demands are placed on [Petitioner]. Occupational Therapy services recommended at this time in order to foster the development of age appropriate skills in all of the aforementioned areas for increased independence in both the school and home environment.[7]

5. completed a Speech and Language Evaluation of Petitioner on October 29, 2009. The findings and recommendations in the evaluation, *inter alia*, include the following:

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[2] Testimony of Petitioner's mother.
[3] Petitioner's Exhibit ("P.Exh.") No. 2 at 3.
[4] *Id.*
[5] *Id.* at 9.
[6] *Id.* at 10.
[7] P.Exh. No. 7 at 8.

[Petitioner] is a good user of his cochlear implants. He participates in the Ling 6 sound test each morning with some encouragement. He usually imitates all of the sounds with both his left and right implant separately when presented at a soft vocal volume in a quiet environment at 3-4 feet. Occasionally, [Petitioner] refuses to imitate the sounds and needs support from listening cards. This appears to be behavioral and not a matter of hearing ability. [Petitioner] responds consistently to his name in a quiet environment and has become more consistent at responding in the noisy classroom as well...[Petitioner] notices and discriminates between environmental sounds, such as knocking, the toilet flushing, and the classroom timer...

[Petitioner's] speech intelligibility varies greatly and depends a lot on context and familiarity of the listener. His speech is comprised of mostly vowels, diphthongs, and some early consonants. He is capable of producing the vowels and diphthongs, as well as the m, h, w, b, p, t, d, and s consonants; however, his production of these sounds in isolation, syllables, and words is inconsistent. [Petitioner] has particular difficulty producing the voiceless p and t sounds. Given his frequency of consonant deletions and substitutions, [Petitioner's] speech is often difficult to understand...

Overall, [Petitioner] appears to benefit from the small class size, the full time push in support provided by a speech pathologist and teacher, and by the speech, language, and social models provided daily at the
Goals should continue to address improving [Petitioner's] receptive and expressive language, articulation, and social skills, as well as further developing his auditory skills.

Speech and Language Diagnosis

[Petitioner] has profound bilateral sensorineural hearing loss. According to the above mentioned tests, [Petitioner] presents with average receptive vocabulary skills at the word level, significantly delayed receptive language skills, moderately delayed expressive language skills, and moderate to severe dyspraxia of speech.

Recommendations

[Petitioner] needs an intensive, oral language based learning environment with an emphasis on auditory-linguistic skill building and interactive opportunities for learning.

A low student-to-teacher ratio is imperative for [Petitioner] to learn new information and have frequent opportunities to participate.

> Integration in an oral setting with a small group of developmentally-matched peers is needed to provide appropriate linguistic and social models for [Petitioner].
>
> [Petitioner's] auditory status must be closely monitored to ensure he is gaining maximum benefit from his cochlear implants. The equipment must be checked daily, batteries replaced as needed, and programs set to meet [Petitioner's] needs throughout the day...
>
> Full time classroom based speech and language therapy is necessary. Therapy goals should focus on improving listening, developing receptive and expressive language skills, promoting pragmatic language use and play skills, and strengthening his oral musculature to improve speech sound development and coarticulation. Support from a full time speech pathologist will assist [Petitioner's] auditory, speech, and language goals. In addition to daily push-in support, a minimum of one hour per week of pull out therapy is recommended...[8]

6. On January 13, 2010, Ms. Jaclyn Walker conducted a developmental evaluation for DCPS. Her findings and recommendations, *inter alia*, include the following:

> [Petitioner] is a 2 year, 10 months, and 26 days old Caucasian boy who is being evaluated to determine his eligibility for Special Education and related services. The range of average consists of Developmental Quotient (DQ) scores from 85-115, with 100 being the exact middle. [Petitioner] earned a DQ of 120 in the Adaptive Domain, which is in the advanced developmental range. [Petitioner's] DQ in the Personal-Social Domain was 145, which is in the accelerated developmental range. [Petitioner's] DQ in the Cognitive Domain was 107, which is in the average developmental range....[9]

7. DCPS convened a Multidisciplinary Team ("MDT") meeting on February 16, 2010 to determine Petitioner's eligibility for special education services. The MDT determined that Petitioner was eligible as a Hearing Impaired child.[10] The MDT developed an Individualized Education Program ("IEP") that included goals in Adaptive/Daily Living Skills, Hearing, and Communication/Language.[11] The MDT prescribed 24.25 hours per week of specialized instruction outside general education, 90 minutes per week of speech-language pathology, 30 minutes per week of audiology services, and 60 minutes per week of OT services.[12] Petitioner's mother agreed with the goals and objectives in the IEP, many of which had been proposed by her consultant, Dr. Solomon. However, Petitioner's mother disagreed with the proposed setting, outside

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[8] P.Exh. No. 4 at 9-11.
[9] P.Exh. No. 7 at 4.
[10] DCPS Exh. No. 4. at 26.
[11] *Id.* at 28-34.
[12] *Id.* at 35.

general education, and with the need for 90 minutes per week of speech and language services outside the classroom.[13] DCPS also expressed its intention to place Petitioner at [14] Petitioner's mother expressed her disagreement with the proposed placement at Payne.[15]

8. On Petitioner's latest Narrative Summary Report from he was making progress in Language and Literacy, Mathematical Thinking, Scientific Thinking, Social Studies, and Physical Development. He appeared to struggle in The Arts.[16]

9. is a private school that was established to provide an inclusion model for hearing impaired students.[17] has 240 students, 37 of which have some degree of hearing loss. Approximately 30 of the hearing impaired students have cochlear implants, the remainder has hearing aids. The class sizes at range from eight to fourteen. employs a full-time audiologist, two psychologists, and two occupational therapists. It has 22 teachers, 8 of which are certified in special education. Petitioner is one of three hearing impaired students in a class of 13. His teacher is certified in special education. There is a speech and language pathologist in the classroom on a full-time basis. The pathologist facilitates communication between the hearing impaired students, the teacher, and the students' peers. The pathologist accompanies the hearing impaired students to activities outside the classroom, including lunch.[18]

10. If Petitioner were to attend he would be in a class of about 4-5 students.[19] The class is primarily self-contained and includes only disabled students with varying degrees of hearing disability. The teacher, Ms. Wollenzien, is certified in special education and has specialized in teaching hearing impaired students.[20] Petitioner would be with non-disabled peers at lunch, recess, Art, Music, and Physical Education, a total of about seven hours per week out of the 32.5 hours of the school week.[21]

11. is within walking distance of Petitioner's home in the Palisades area of northwest Washington, D.C.

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[13] Testimony of Petitioner's mother.
[14] DCPS issued a Prior Notice on February 25, 2010. P.Exh. No. 17.
[15] Testimony of Petitioner's mother.
[16] P.Exh. No. 18.
[17] "Inclusion" describes a classroom setting in which disabled and non-disabled students are integrated.
[18] Testimony of Ms. Ouellette; Petitioner's mother provided the classroom demographics.
[19] Testimony of Petitioner's mother.
[20] Testimony of Ms. Wollenzien; DCPS Exh. No. 11.
[21] Testimony of Ms. Wollenzien.
[22] Testimony of Petitioner's mother; DCPS School Directory on DCPS website.

Conclusions of Law

Failure Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[23] 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.[24]

Thus, Petitioner's burden is to show that DCPS has not, and is incapable of providing an environment in which Petitioner can derive educational benefit.

The parties concede that the only issue in dispute in this case is the least restrictive environment ("LRE") in which Petitioner's needs can be met. Petitioner does not assert that Ms. Wollenzien is not fully qualified to provide services to Petitioner. In fact, Petitioner's counsel offered no objection to Ms. Wollenzien as an expert witness in hearing impaired education. DCPS offered no challenge to competency of the program or staff at Rather, it argued that environment at would be too restrictive for Petitioner's needs, specifically the full-time accompaniment by a speech-language pathologist. DCPS also argues that a private school is more restrictive than a public school. Therefore, DCPS submits that Petitioner's severe hearing deficiencies requires that intensive services be provided primarily in a self-contained public school classroom with a very low number of hearing impaired students. Petitioner counters that he is making progress in an inclusion setting, immersed with non-disabled peers, but taught by a certified special education teacher and assisted on a full-time basis by a speech and language pathologist.

> 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

[23] 458 U.S. 176 (1982).
[24] *Rowley, supra,* at 200-01.

> 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. . . .[25]

Federal regulations governing LRE require that:

> To the maximum extent appropriate, children with disabilities, including children in public or private in public or private institutions or other care facilities, are educated with children who are nondisabled; and
>
> Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if 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...[26]
>
> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that... The child's placement... Is as close as possible to the child's home.[27]

There is *dicta* suggesting that private school placements are more restrictive than public school placements:

> The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense where this is not possible.[28]

However, neither the statute nor the regulations cited above express a preference for public school placements where LRE is concerned. The primary objective when LRE is at issue is for the student to be educated, to the maximum extent appropriate, with children who are nondisabled. What makes this case unique is that the private school, not the public school, offers the inclusion setting. All of the witnesses who were asked testified that they knew of no other private school model where hearing impaired students are immersed in relatively small classes with general education peers, and taught by a certified special education teacher with assistance from a full-time speech pathologist.

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[25] *Gillette v. Fairland Board of Education*, 932 F.2d 551, 553 (6th Cir. 1991).
[26] 34 C.F.R. §300.114(a)(2).
[27] 34 C.F.R. §300.116(b)(3).
[28] *Gillette, supra*, 932 F.2d at 553-54, citing *School Committee v. Department of Education*, 471 U.S. 359, 369 (1985).

Faced with this unusual dilemma, DCPS argued that a certain degree of mainstreaming was "implicit" in the IEP, because the IEP only prescribed 24.25 hours of specialized instruction. All other time was implicitly in general education. DCPS also offered testimony that Petitioner would be with non-disabled peers in non-core subjects such as Art, Music, and Physical Education.[29] Therefore, the alternative proposals are for 24.25 hours out of general education and about two hours per week in an inclusion setting in non-core subject from DCPS, and a full-time inclusion setting from Petitioner.

The Hearing Officer concludes that Petitioner has met his burden of proving, by a preponderance of the evidence, that DCPS has failed to provide an appropriate placement, due to its failure to provide the LRE. The Transition Plan in Petitioner's IFSP required an inclusion setting. The evidence revealed that Petitioner is making academic and social progress at which utilizes an inclusion model. Not only did his Narrative Summary Report indicate progress in all areas but The Arts, three DCPS witnesses, Ms. Johnson, Ms. Tebinka, and Ms. Pope, conceded that Petitioner was benefiting from the program at Unlike is within walking distance from Petitioner's home, thereby making River the preferable placement under 34 C.F.R. Section 116(b)(3). In the absence of evidence that Petitioner is not benefiting from the less restrictive environment at there is no legal justification for imposing a more restrictive environment, as DCPS proposes at Payne.

Under *Florence County School District Four v. Carter*,[30] 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."[31] "[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."[32]

It is settled law that parents who doubt the appropriateness of an IEP or a placement may remove their child to a private school and, if due process proceedings result in a determination that they were correct, the parents would be entitled to reimbursement for the costs of the private education.[33] In this case, Petitioner seeks reimbursement for expenses incurred as a result of his unilateral placement at For the reasons discussed above, the Hearing Officer concludes that has and is likely to continue to confer educational benefit to Petitioner.

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[29] Testimony of Ms. Johnson.
[30] 510 U.S. 7 (1993).
[31] *Id.*, 510 U.S. at 11.
[32] *Id.*, 510 U.S. at 15-16.
[33] *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 369 (1985).

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 26th day of June 2010, it is hereby

ORDERED, that DCPS shall immediately issue a Prior Notice placing Petitioner at for the 2010-2011 school year.

IT IS FURTHER ORDERED, that upon the submission to DCPS of receipts, invoices, cancelled checks, or other documentation of payment, DCPS shall reimburse Petitioner's parents or for tuition expenses related to Petitioner's enrollment at during the 2009-2010 school year retroactive to February 21, 2010.

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 to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.

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 26, 2010