

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
1150 - 5th Street, S.E.; Room 3
Washington, D.C. 20003
(202) 698-3819
Facsimile: (202) 698-3825
Tmbanks1303@earthlink.net

OSSE
STUDENT HEARING OFFICE
2009 AUG 31 AM 10:14

Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: July 21, 2009
)	
Petitioner,)	Prehearing Order: August 13, 2009
)	
v.)	Hearing Date: August 21, 2009
)	
THE DISTRICT OF COLUMBIA)	Docket No.
PUBLIC SCHOOLS)	
)	
Respondent.)	
)	
Student Attending:)	
)	

HEARING OFFICER'S DECISION

Counsel for the Petitioner: Donovan Anderson, Esquire
2041 Martin Luther King Avenue, S.E.
Washington, D.C. 20020
(202) 610-1400; Fax: (202) 610-1881

Counsel for DCPS: Harsharen Bhuller, Esquire
Office of the General Counsel, DCPS
825 North Capitol Street, N.E.; 9th Floor
Washington, D.C. 20002

¹ Personal identification information is provided in Appendix A.

Jurisdiction

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

Background

Petitioner is a _____ year-old student attending _____ of Prince George’s County, Maryland. On July 21, 2009, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) had failed to (1) evaluate Petitioner in all areas of suspected disability, and (2) provide an appropriate placement. In a Prehearing Order issued on August 13, 2009, the Hearing Officer determined the issues to be adjudicated to be as follows:

- DCPS’ alleged failure to conduct triennial evaluations

Petitioner alleges that despite a disability classification of emotional disturbance (“ED”), he has not received a psychological evaluation since 2002. Counsel for DCPS did not dispute the assertion and stated that Petitioner would receive prompt authorization for an independent evaluation.

- DCPS’ alleged failure to provide an appropriate placement

Petitioner alleges that DCPS convened a Multidisciplinary Team (“MDT”) meeting on June 1, 2009 and changed Petitioner’s placement to _____ School because of Petitioner’s poor attendance record. _____ is inappropriate because it cannot meet the requirements of Petitioner’s IEP: (1) a separate school, and (2) a 100% out of general education setting. DCPS asserts that _____ can provide the “basic floor” of opportunity required by *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“*Rowley*”).²

The due process hearing was convened and completed on August 21, 2009. The parties’ Five-Day Disclosures were admitted into evidence at the inception of the hearing.

² 458 U.S. 176, 200-01 (1982).

Record

Due Process Complaint Notice dated July 21, 2009
District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice dated July 30, 2009
Prehearing Order dated August 13, 2009
Petitioner's Five-Day Disclosure dated August 13, 2009 (Exhibit Nos. 1-7)
DCPS' Five-Day Disclosure dated August 14, 2009 (Exhibit Nos. 1-6)
Attendance Sheet for hearing conducted on August 21, 2009

Witnesses for Petitioner

Petitioner's Mother
Senior Director,

Witnesses for DCPS

Angel Hunter, Placement Specialist, DCPS

Findings of Fact

1. Petitioner is a year-old student attending in Prince George's County, Maryland.³

2. The most recent evaluation introduced into evidence is a Comprehensive Mental Health Report completed on May 14, 2002. In that report, Dr. Thomas Green diagnosed Petitioner with Attention Deficit Hyperactivity Disorder ("ADHD"), Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, and Parent-Child Relational Problem.⁴

3. On February 25, 2009, DCPS convened a Multidisciplinary Team ("MDT") meeting. The MDT developed an Individualized Education Program ("IEP") in which Petitioner was classified with an Emotional Disturbance ("ED").⁵ The MDT prescribed 28.5 hours per week of specialized instruction outside general education, one hour per week of counseling, and 30 minutes per week of occupational therapy.⁶ Ms. Hunter represented DCPS at the meeting.⁷ Petitioner's attendance was very poor; he attended school only five days in January 2009 and three days in February 2009.⁸ The MDT

³ *Complaint* at 1.

⁴ Petitioner's Exhibit ("P.Exh.") No. 2 at 4.

⁵ DCPS Exh. No. 6 at 1.

⁶ P.Exh. No. 6-12.

⁷ P.Exh. No. 6-25.

⁸ DCPS Exh. No. 5 at 2.

prescribed extended year services (“ESY”) and concluded that appropriate placement...”⁹ “continues to be an

4. DCPS reconvened an MDT to discuss Petitioner’s attendance on June 1, 2009. Although Petitioner had been absent for 66 days, his attendance had improved since a meeting on May 4, 2009. Nevertheless, he was in danger of failing the 8th grade due to excessive absences, sleeping in class, and failing to complete assignments. DCPS issued a Prior Notice changing Petitioner’s placement to located at
¹⁰

5. On August 11, 2009, DCPS authorized Petitioner to obtain independent comprehensive psychological and occupational evaluations at DCPS expense.¹¹

6. located at can provide up to 21 hours per week of specialized instruction.¹²

Conclusions of Law

Failure to Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“*Rowley*”),¹³ 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.¹⁴

⁹ *Id.* at 3.

¹⁰ DCPS No. 3; testimony of Mr. White.

¹¹ DCPS Exh. No. 1.

¹² Testimony of Petitioner’s mother.

¹³ 458 U.S. 176 (1982).

¹⁴ *Rowley, supra*, at 200-01.

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

Failure to Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),¹⁵ 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.¹⁶

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

Ms. Hunter testified that she removed Petitioner from _____ and sent him to a DCPS school because of his attendance problems. However, there is no indication from Ms. Hunter's testimony or from the meeting notes of the MDT meeting on June 1st that DCPS gave any consideration to the capability of the proposed new placement to meet Petitioner's educational needs. In fact, it is not altogether clear to the Hearing Officer which school DCPS intends Petitioner to attend. DCPS' Prior Notice places Petitioner at _____ on 26th Street, N.E. No such school exists. _____ is located at that address, while _____ School is another school in northeast Washington, D.C that serves students in Petitioner's age range.¹⁷ When Petitioner's mother visited the school on 26th Street, she was informed that it could provide no more than 21 hours of specialized instruction. This level of service falls short of the 28.5 hours prescribed in Petitioner's IEP. Clearly, the unilateral decision by DCPS to place Petitioner at the school on 26th Street was not made on the basis of the school's capability to meet the educational needs identified in Petitioner's IEP.

¹⁵ 458 U.S. 176 (1982).

¹⁶ *Rowley, supra*, at 200-01.

¹⁷ School Directory on DCPS website. _____ the Directory, is located at

School, the only other _____ school in

The placement determination must be made “by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and ... is based on the child’s IEP.”¹⁸ This group must include the parents of the child, at least one regular education teacher of the child, at least one special education teacher of the child, a representative of the public agency who is qualified to provide or supervise special education services, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the public agency, and an individual who can interpret the instructional implications of evaluation results.¹⁹ Thus, a placement determination made by a group that fails to meet the requirements of an appropriate IEP team, is potentially invalid.

In *W.G. v. Board of Trustees of Target Range School District No. 23*,²⁰ the school system gave no serious consideration to any proposal but the one it proposed. The Ninth Circuit agreed with the district court that the school district had independently developed a proposed IEP that would place the student in a predetermined program.²¹ The court held that in order to fulfill the goal of parental participation in the IEP process, the school district was required to conduct, not just an IEP meeting, but a “meaningful” IEP meeting.²²

In *Deal v. Hamilton County Board of Education*,²³ the Sixth Circuit reversed a district court decision in which the lower court denied reimbursement for a unilateral private placement by the parents. The parents had alleged that they had been denied a meaningful opportunity to participate in a placement determination in that the school system refused to consider funding a program for their autistic child that seemed to be effective.

The facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program... The clear implication is that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services. This is predetermination.

The School System seemed to suggest, at oral argument, that it is entitled to invest in a program such as TEACCH and then capitalize on that investment by using the TEACCH program exclusively. But this is precisely what it is not permitted to do, at least without fully considering the individual needs of each child. A school district unquestionably may

¹⁸ 34 C.F.R. §300.116(a)(1).

¹⁹ 34 C.F.R. §300.321(a).

²⁰ 960 F.2d 1479 (9th Cir. 1992).

²¹ *Id.* at 1484.

²² *Id.* at 1485.

²³ 392 F.3d 840 (6th Cir. 2004).

consider cost in determining appropriate services for a child. The school district is required, however, to base its placement decision on the child's IEP, 34 C.F.R. § 300.552, rather than on the mere fact of a pre-existing investment. In other words, the school district may not, as it appears happened here, decide that because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability, *regardless of any evidence to the contrary of the individualized needs of a particular child*. A placement decision may only be considered to have been based on the child's IEP when the child's individual characteristics, including demonstrated response to particular types of educational programs, are taken into account.²⁴

In this case, Ms. Hunter was the only DCPS representative at the MDT meeting June 1st purporting to have knowledge of the program at [redacted]. However, at the hearing, when she was confronted by Petitioner's mother's assertion that [redacted] could only provide 21 hours of specialized education, Ms. Hunter relied on hearsay reassurances of a "Ms. Thompson" that [redacted] could implement Petitioner's IEP. However, Ms. Hunter offered no personal assurance that [redacted] could provide Petitioner full-time specialized instruction. Therefore, the June 1, 2009 IEP team lacked the presence of a representative of the local education agency ("LEA") that was knowledgeable about the resources at [redacted] available to a child with Petitioner's needs. Moreover, the "group" at the placement meeting on June 1st determined a placement without regard to Petitioner's IEP. Since DCPS made the placement determination, and since its only representative at the meeting was unaware of critical aspects of the program at the proposed placement, the placement determination was obviously made without regard to the school's ability to meet Petitioner's needs. The unilateral placement determination also deprived Petitioner's foster mother of the opportunity to have a meaningful role in the placement determination.

The Hearing Officer concludes that Petitioner has met his burden of proving that DCPS has failed to provide an appropriate placement. Petitioner is entitled to remain at [redacted] not only during the pendency of this proceeding,²⁵ but until such time as DCPS provides a placement that can satisfy the requirements set forth in Petitioner's IEP.

Failure to Evaluate Petitioner in all Areas of Suspected Disability

The LEA must evaluate a child suspected of a disability in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and

²⁴ *Id.*, 392 F.3d at 858-59, citations omitted. *See also, Spielberg ex rel. Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258-59 (4th Cir. 1988)(placement must be based on the IEP, and parents' after the fact involvement in the decision does not satisfy the obligation to provide a meaningful opportunity to participate in the decision).

²⁵ 34 C.F.R. §300.518(a).

motor abilities.²⁶ No single procedure should be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.²⁷ Obviously, the results of the evaluations must be given considerable weight in determining the child's eligibility for services and in the development of the child's IEP.²⁸ Once a child has been determined to be eligible for services, he or she must be reevaluated at least every three years.²⁹

The record in this case includes no evaluations of Petitioner within the last seven years. Thus, Petitioner is clearly overdue for clinical and occupational therapy ("OT") reevaluations; he is classified ED and he receives OT related services. However, DCPS authorized Petitioner to obtain independent evaluations on August 11, 2009. Petitioner had access to full-time specialized instruction and OT services throughout the 2008-2009 school year. In the absence of any allegation or showing that Petitioner suffered any actual educational harm as a result of DCPS' failure to conduct timely re-evaluations,³⁰ the Hearing Officer concludes that DCPS' August 11th authorization for independent evaluations moots this claim.

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 31st day of August 2009, it is hereby

ORDERED, that DCPS shall immediately issue a Prior Notice placing and funding Petitioner at _____ in Laurel, Maryland, including transportation and all other appropriate related services.

IT IS FURTHER ORDERED, that on or before October 30, 2009, DCPS shall convene an MDT meeting at _____ to review Petitioner's progress at _____ review all current evaluations, update Petitioner's IEP as necessary, and discuss placement alternatives. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel, Donovan Anderson, Esquire. In the event that Petitioner has not maintained at least a 90% attendance record for the 2009-2010 school year when the MDT meeting is convened, DCPS is authorized to rescind the placement at _____

IT IS FURTHER ORDERED, that DCPS shall afford Petitioner's parent an opportunity to participate in any meeting in which Petitioner's placement is discussed or determined. The DCPS placement representative shall advise Petitioner's parent of the

²⁶ 34 C.F.R. §300.304(c)(4).

²⁷ 34 C.F.R. §300.304(b)(2).

²⁸ 34 C.F.R. §300.305(a).

²⁹ 34 C.F.R. §300.303(b)(2).

³⁰ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006); *Catalan v. District of Columbia*, 478 F.Supp. 2d 73, 75-6 (D.D.C. 2007).

advantages and disadvantages for Petitioner with respect to each school that is discussed, including any schools proposed by the parent. DCPS shall provide Petitioner's parent an explanation for the placement DCPS proposes, and the reasons for the proposal shall be provided in the Meeting Notes. DCPS shall issue a Prior Notice within seven days if Petitioner is placed in a public facility or within 30 days if Petitioner is placed in a private facility.

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 Ms. Hunter and the DCPS Office of Special Education Resolution Team³¹ to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.³²

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: August 31, 2009

³¹ Fax: (202) 645-8828.

³² 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.