

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.
Washington, D.C. 20003
(202) 698-3819
Facsimile: (202) 698-3825
Tmbanks1303@earthlink.net

OSSE
STUDENT HEARING OFFICE
2009 AUG 27 PM 2: 25

Confidential

STUDENT, through the legal guardian ¹)	Complaint Filed: May 11, 2009
)	
Petitioner,)	Prehearing Order: May 29, 2009
)	
v.)	Hearing Date: June 12, 2009
)	July 8, 2009
THE DISTRICT OF COLUMBIA)	August 20, 2009
PUBLIC SCHOOLS)	
)	Docket No.
Respondent.)	
)	
Student Attending:)	
(P.G. County, Md.))	

HEARING OFFICER'S DECISION

Counsel for Petitioner: Iris Barnett, Esquire
15 – 14th Street, S.E.
Washington, D.C. 20020
(202) 543-2201; Fax: (202) 546-7811

Counsel for DCPS: Laura George, 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 hearing was invoked 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 in Prince George's County, Maryland. On May 11, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to provide an appropriate placement. In a Prehearing Order issued on May 29, 2009, the Hearing Officer determined the issues to be adjudicated to be as follows:

- DCPS' alleged failure to develop an placement

Petitioner alleges that on April 1, 2009 a Multidisciplinary Team ("MDT") at CGES determined that Petitioner required a full-time special education placement, but DCPS declined to effectuate a placement. DCPS denies that the MDT determined that Petitioner requires a full-time placement. DCPS also asserts that in light of Petitioner's current residence, Prince George's County is responsible for providing Petitioner special education services.

The first of three due process hearings was convened on June 12, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing. Petitioner is a ward of the District who resides with his foster mother in Prince George's County, Maryland ("County"). Petitioner's counsel relied on 5 D.C.M.R. Section 3002 to support her contention that DCPS was obligated to provide Petitioner a free appropriate public education ("FAPE"). That provision provides that DCPS owes a FAPE to "each child with a disability... who resides in, or is a ward of, the District." Based on Petitioner's counsel's opening statement, the Hearing Officer noted that Petitioner's foster mother had enrolled Petitioner in a County school, thereby precluding DCPS from providing services. The Hearing Officer suggested that Petitioner participate in a County placement meeting scheduled for June 30th. Mr. Timothy Fitzgerald, DCPS Placement Specialist, stated that if the County were to place Petitioner at Petitioner's proposed placement, Phillips School (Laurel, Md.), DCPS would not oppose the placement. The Hearing Officer continued the hearing until after the County's placement meeting.

On July 6, 2009, Petitioner's counsel faxed a letter to Mr. Fitzgerald notifying Mr. Fitzgerald that Petitioner rejected the placement proposed by the County at the meeting on June 30th. The letter also requested that DCPS place Petitioner at or "we ask

that DCPS propose an alternative DCPS placement for [Petitioner's foster mother] to consider."²

The second due process hearing was convened on July 8, 2009. Petitioner's letter of July 6th was admitted into evidence as DCPS Exhibit No. 1. In light of Petitioner's rejection of the County's proposed placement and the request for a DCPS placement on July 6th, the Hearing Officer suggested that DCPS convene a placement meeting as soon as possible, and the Hearing Officer would adjudicate the placement issue in the event the parties failed to agree on an appropriate placement. Petitioner's counsel agreed to this proposal, but counsel for DCPS objected on the grounds that, at the time the *Complaint* was filed, DCPS had not denied Petitioner a FAPE. The Hearing Officer agreed with DCPS' counsel, but determined that it would be in the student's best interest to resolve the matter as close as possible to the beginning of the 2009-2010 school year, and overruled DCPS' objection.

The parties agreed to convene a Multidisciplinary Team ("MDT") meeting on July 29th to determine a placement. The Hearing Officer set the following parameters for the meeting, based on DCPS Exhibit No. 1: Petitioner would be offered (1) full-time specialized instruction (at least 27 hours per week), (2) a small-class environment, (3) psychological counseling, (4) consideration of crisis intervention support, and (5) transportation. Since the meeting would be held in the District and during the summer vacation period, Petitioner waived the requirement that his teachers be present for the meeting.³ The final due process hearing was convened on August 20, 2009. DCPS' Supplemental Five-Day Disclosure was admitted into evidence.

Record

Due Process Complaint Notice dated May 11, 2009
DCPS Resolution Session Waiver dated May 11, 2009
District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice dated May 22, 2009
Prehearing Order dated May 29, 2009
DCPS' Five-Day Disclosure dated June 4, 2009 (No exhibits)
Petitioner's Five-Day Disclosure dated June 5, 2009 (Exhibit Nos. 1-12)
Memorandum of Points and Authorities in Support of Petitioner's Claim for Relief dated June 8, 2009
Interim Order dated June 12, 2009
DCPS Exhibit Nos. 1 and 2 admitted July 8, 2009
Petitioner's Exhibit No. 13 admitted July 8, 2009
Interim Order dated July 20, 2009
DCPS' [Supplemental] Five-Day Disclosure dated August 13, 2009 (Exhibit Nos. 3-6)
Attendance Sheet for hearings conducted on June 12, July 8, and August 20, 2009

² DCPS Exh. No. 1.

³ 34 C.F.R. §300.321(a).

Witnesses for Petitioner

Petitioner's Foster Mother
Program Director, (Laurel, Md.)

Witnesses for DCPS

Timothy Fitzgerald, Placement Specialist, DCPS

Findings of Fact

1. Petitioner is a _____ year-old student attending _____ in Prince George's County, Maryland.⁴

2. The County developed an IEP for Petitioner on April 1, 2009. It classified Petitioner with an "Emotional Disturbance" ("ED") and prescribed fifteen hours per week of specialized instruction in-general education and two hours per week out-of-general education.⁵

3. On July 6, 2009, Petitioner requested that DCPS provide a full-time special education placement.⁶

4. At the due process hearing on July 8, 2009, the parties agreed to convene an MDT meeting on July 29, 2009 to determine a placement. The Hearing Officer set the following parameters for the meeting, based on DCPS Exhibit No. 1: Petitioner would be offered (1) full-time specialized instruction (at least 27 hours per week), (2) a small-class environment, (3) psychological counseling, (4) consideration of crisis intervention support, and (5) transportation. Since the meeting would be held in the District and during the summer vacation period, Petitioner waived the requirement that his teachers be present for the meeting.

5. DCPS convened a placement meeting on July 29, 2009. The only DCPS representative at the meeting was Mr. Fitzgerald. Mr. Fitzgerald invited _____ to attend the meeting, but she did not appear. DCPS proposed placing Petitioner at _____ Mr. Fitzgerald was unable to provide any information about the program at _____ DCPS issued a Prior Notice to _____ on July 29, 2009.⁸

⁴ *Complaint* at 1.

⁵ Petitioner's Exhibit ("P.Exh.") No. 7-1 and 7-20.

⁶ DCPS Exh. No. 1.

⁷ Testimony of Petitioner's foster mother and Mr. Fitzgerald.

⁸ DCPS Exh. No. 4.

6. Petitioner has been accepted at _____ in Laurel, Maryland is a private school that offers full-time special education services. Each class is led by a certified special education teacher who is assisted by a teacher's assistant. The maximum class size is nine students. All students at _____ are on a behavior modification plan that rewards students for positive behavior throughout the day.⁹

Conclusions of Law

Failure to Provide an Appropriate Placement

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."¹⁰ 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.¹¹ 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*,¹² 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.¹³ 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.¹⁴

In *Deal v. Hamilton County Board of Education*,¹⁵ 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

⁹ Testimony of Ms. Williams.

¹⁰ 34 C.F.R. §300.116(a)(1).

¹¹ 34 C.F.R. §300.321(a).

¹² 960 F.2d 1479 (9th Cir. 1992).

¹³ *Id.* at 1484.

¹⁴ *Id.* at 1485.

¹⁵ 392 F.3d 840 (6th Cir. 2004).

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 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.¹⁶

In this case, Petitioner's representatives waived the requirement that Petitioner's teachers be present for the placement meeting. However, they did not waive the requirement for the participation of "other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options," they did not waive the presence of a DCPS representative "knowledgeable about the availability of resources of the public agency," and they did not waive the requirement for the placement decision to be based on the child's IEP. Mr. Fitzgerald was the only representative of DCPS at the placement meeting and he admitted that he knew nothing about the program at Therefore, the IEP team lacked the presence of a representative of the local education agency ("LEA") that was knowledgeable about the resources available to a child with Petitioner's needs. Moreover, the "group" at the placement meeting on July 29th 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 any 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.

¹⁶ *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).

The regulations require DCPS to provide a written explanation in a Prior Notice if it proposes taking action or refuses to take action in contravention to the parents' desires.¹⁷ In this case, DCPS declined to place Petitioner at _____ as requested by Petitioner's foster mother. The Prior Notice offered no explanation for declining the parent's placement proposal, and no information other than the new placement at _____

The Hearing Officer concludes that Petitioner has met his burden of proving that DCPS has failed to provide an appropriate placement.

(Laurel, Md.)

_____ would be an appropriate placement for Petitioner. It offers full-time special education services in a small-class environment. _____ teachers are certified in special education and are all assisted by teachers' assistants. Petitioner, like all students at _____ would be governed by a behavior modification plan. Finally, _____ employs the service providers that can provide the related services that Petitioner may require.

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."¹⁸ "[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."¹⁹

¹⁷ The regulation prescribing the contents of a Prior Notice, 34 CFR §300.503(b), provides;

(b) Content of notice. The notice required under paragraph (a) of this section must include--

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected;

(7) A description of any other factors that are relevant to the agency's proposal or refusal.

¹⁸ *Florence County School District Four v. Carter*, 510 U.S. 7, 11 (1993).

¹⁹ *Id.*, 510 U.S. at 15-16.

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 August 2009, it is hereby

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

IT IS FURTHER ORDERED, that at least thirty days after Petitioner's enrollment at , but no later than 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, Iris Barnett, Esquire.

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 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 Mr. Fitzgerald and the DCPS Office of Special Education Resolution Team²⁰ to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.²¹

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

²⁰ Fax: (202) 645-8828.

²¹ 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.

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 26, 2009