

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance

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Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: August 28, 2009
)	
Petitioner,)	Prehearing Order: October 14, 2009
)	
v.)	Hearing Date: October 26, 2009
)	
THE DISTRICT OF COLUMBIA)	Docket No.
PUBLIC SCHOOLS)	
)	
Respondent.)	
)	
Student Attending:)	
)	

2009 OCT 30 PM 4:05
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

HEARING OFFICER'S DECISION

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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 _____ On August 28, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to provide an appropriate placement and an appropriate Individualized Education Program ("IEP") for the 2009-2010 school year. On August 31, 2009, Petitioner filed *Petitioner's Motion for Stay-Put Protection* ("*Motion*"). The *Motion* alleged that Petitioner attended _____ during the 2008-2009 school year, but DCPS made no placement determination for the 2009-2010 school year. When the parent attempted to enroll Petitioner at _____ for the current school year, she was denied enrollment and was informed that Petitioner should be enrolled at _____. Petitioner's parents elected to enroll Petitioner at _____ in Maryland rather than to enroll at _____. DCPS filed no response to the *Motion*. On October 9, 2009, the Hearing Officer issued an Interim Order granting the *Motion* and ordering DCPS to permit Petitioner to reenroll in the _____ for the 2009-2010 school year.

In Prehearing Order issued on October 14, 2009, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure to provide an appropriate placement

Petitioner alleges that DCPS failed to provide a placement for Petitioner for the 2009-2010 school year and was denied admission when Petitioner attempted to reenroll at _____. Petitioner's parents elected to enroll him in a public school in Maryland rather than his neighborhood high school in the District, _____. DCPS asserts that Petitioner now resides in Maryland and is not entitled to services from DCPS.

- DCPS' alleged failure to develop an appropriate IEP

This issue will not be adjudicated. During the prehearing conference, Petitioner's counsel conceded that the only deficiency in the IEP was the Multidisciplinary Team's ("MDT") alleged failure to specify a placement for 2009-2010.

The due process hearing was convened on October 26, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing. DCPS' reiterated its motion to dismiss on the grounds that Petitioner was a resident of Maryland, was attending a Maryland school, which relieved DCPS of its obligation to provide services to Petitioner.² The Hearing Officer denied the motion, because (1) Petitioner filed a timely *Motion for Stay-Put Protection* after being denied enrollment at during the first week of the school year, and (2) after the issuance of the Interim Order on October 14th, Petitioner reenrolled at and has been attending At the conclusion of the parties' opening statements, Petitioner's counsel moved for a summary judgment. The Hearing Officer denied the motion, because issues of fact relating to Petitioner's placement remained in dispute.

Record

Due Process Complaint Notice dated August 28, 2009
Petitioner's Motion for Stay-Put Protection dated August 31, 2009
District of Columbia Public School's Response to Parent's Administrative Due Process Complaint dated September 9, 2009
Interim Order dated October 9, 2009
District of Columbia Public School's Motion to Dismiss Parent's Administrative Due Process Complaint dated October 14, 2009
Prehearing Order dated October 14, 2009
Petitioner's Opposition to DCPS' Motion to Dismiss dated October 19, 2009
Petitioner's Five-Day Disclosure dated October 19, 2009 (Exhibit Nos. 1-10)
DCPS' Five-Day Disclosure dated October 19, 2009 (Exhibit Nos. 1-3)
Attendance Sheet for hearing conducted on October 26, 2009

Witnesses for Petitioner

Petitioner's Mother

Witnesses for DCPS

Special Education Coordinator,

Findings of Fact

1. Petitioner is a _____ year-old student who attended _____ during the 2008-2009 school year.³

² IDEIA requires local education agencies to provide special education services to those "residing in the State between the ages of 3 and 21." 20 U.S.C. §1412(a)(1)(A).

³ Testimony of Petitioner's mother.

2. On January 7, 2009, DCPS convened an MDT meeting and developed an IEP. The MDT prescribed 20 hours per week of specialized instruction and one hour per week of behavior support services.⁴ The MDT did not discuss placement for the 2009-2010 school year and DCPS did not issue a Prior Notice.⁵

3. Shortly before the beginning of the 2009-2010 school year, Petitioner's mother received an unexpected letter welcoming Petitioner to _____ When she attempted to reenroll Petitioner at _____ she was told that Petitioner's neighborhood school was _____ and that he would have to enroll at _____ Petitioner's mother declined to enroll Petitioner at _____ because she believes it to be in a "bad neighborhood." Instead, she facilitated his enrollment at _____ in Maryland, where Petitioner's father lives. Petitioner's mother reenrolled Petitioner at _____ October 13, 2009 after the issuance of the Interim Order on October 9, 2009.⁶

4. _____ can provide Petitioner twenty hours per week of specialized instruction out of general education, and it can provide one hour per week of behavioral support services.⁷

Conclusions of Law

Failure to Determine and Provide an Annual Placement

Placements must be reviewed annually, must be based on the child's unique needs identified in the IEP,⁸ and must be made by a properly constituted IEP team.⁹ In *Deal v. Hamilton County Board of Education*,¹⁰ the court held that "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."¹¹ All other factors being equal, the student should be placed in a school as close as possible to his or her home and, preferably, at the child's neighborhood school.¹²

District regulations sets forth the following criteria for determining an appropriate placement; the decision must be

⁴ DCPS Exh. No. 1 at 4.

⁵ Testimony of Petitioner's mother.

⁶ *Id.*

⁷ Testimony of _____

⁸ 34 C.F.R. §300.116(b) and §300.324(b).

⁹ 34 C.F.R. §300.321(a) and §300.308(b).

¹⁰ 392 F.3d 840 (6th Cir. 2004).

¹¹ *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).

¹² 34 C.F.R. §300.116(b)(3) and (c).

- (a) 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;
- (b) Made in conformity with the Least Restrictive Environment (LRE) provision of the Act and § 3011 of this Chapter;
- (c) Made within timelines consistent with applicable local and Federal law;
- (d) Determined at least annually after his or her initial placement;
- (e) Based on the child's IEP; and
- (f) Is as close as possible to the child's home.¹³

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.”¹⁴ Thus, a placement determination made by a DCPS official or a DCPS entity that does not include the parents, that is reached without consideration of the capability of the proposed placement to meet the needs identified in the IEP, and that is made by a group that otherwise fails to meet the requirements of an appropriate IEP team, is invalid.

In *W.G. v. Board of Trustees of Target Range School District No. 23*,¹⁵ 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.¹⁶ 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.¹⁷

In *Deal*, 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.

¹³ 5 D.C.M.R. §3013.1. *See also* 34 C.F.R. §300.116.

¹⁴ 34 C.F.R. §300.116(a)(1), *emphasis added*. Each public agency must ensure that a parent of a child with a disability is a member of any group that makes decisions on the educational placement of the parent’s child. 34 C.F.R. §300.501(c)(1).

¹⁵ 960 F.2d 1479 (9th Cir. 1992).

¹⁶ *Id.* at 1484.

¹⁷ *Id.* at 1485.

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.¹⁸

In this case, there is no evidence that DCPS ever discussed placement with Petitioner's mother. Nor is there any evidence that DCPS ever issued a notice of placement. Assuming DCPS issued a notice of placement, there is no evidence that the placement determination was based on Petitioner's educational needs as established in his IEP.

Counsel for DCPS argued that DCPS fulfilled its annual placement obligation when it determined the appropriate educational setting for Petitioner in his January 2009 IEP. Thereafter, it had the sole authority to determine the location where that program would be implemented. Under DCPS' theory, there is no distinction between "educational setting" and "placement."

However, this theory is inconsistent with the plain wording of the applicable regulations. Federal and local regulations mandate the placement "as close as possible to the child's home."¹⁹ Thus, under prevailing regulations, placement includes a consideration of the school's location. 5 D.C.M.R. Section 3013.1(e) and 34 C.F.R. Section 116(b)(2) compel the MDT to consider the capability of the school at a particular location to meet the child's needs as those needs are described in the IEP. Thus, the coincidental requirements of parental participation in the placement decision, and the consideration of the capabilities of a proposed school to meet the child's needs, imposes an obligation on the local education agency ("LEA") representative at the MDT meeting to reveal to the parent the proposed location and to afford the parent the opportunity to discuss the capability of that particular school to meet the child's needs. Once the parent

¹⁸ 392 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).

¹⁹ 5 D.C.M.R. §3013.1. *See also* 34 C.F.R. §300.116.

has had the opportunity to participate meaningfully in that discussion, the LEA has the unilateral right to make the placement determination, subject to the parent's right to challenge that determination through a due process proceeding.

Here, DCPS never provided the parent the opportunity to participate in the placement determination. Moreover, DCPS never made a documented placement determination. Therefore, the Hearing Officer concludes that Petitioner has met his burden of proving that DCPS failed to provide an appropriate placement. The Hearing Officer will order DCPS to convene a placement meeting for Petitioner for the 2009-2010 school year. Petitioner offered no persuasive evidence that _____ is not an appropriate placement.²⁰ Therefore, _____ may still be considered as one of the placement options.

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 30th day of October 2009, it is hereby

ORDERED, that on or before November 25, 2008, DCPS shall convene an MDT meeting. DCPS shall coordinate scheduling an MDT meeting with Petitioner's counsel, Zachary Nahass, Esquire. The MDT shall review all current evaluations and assessments and discuss placement alternatives for the remainder of the 2009-2010 school year.

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 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 ("OSE") Resolution Team to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.²¹

²⁰ Petitioner's mother testified that Petitioner requires a small-class environment, but neither the IEP nor any evaluations supported her assertion. She also complained that _____ was in a "bad" neighborhood, but this assertion was unsupported by any evidence relating to the neighborhood's potential effect on Petitioner's ability to derive educational benefit at _____.

²¹ If DCPS fails to coordinate scheduling the MDT meeting by a date 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.

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 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: October 30, 2009