

**District of Columbia  
Office of the State Superintendent of Education**

**Student Hearing Office  
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STUDENT HEARING OFFICE  
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**Confidential**

<b>STUDENT, through the legal guardian<sup>1</sup></b>	)	Complaint Filed: August 18, 2010
	)	
<b>Petitioner,</b>	)	Hearing Date: September 22, 2010
	)	Room 1, Van Ness
<b>v.</b>	)	
	)	
<b>THE DISTRICT OF COLUMBIA</b>	)	Docket No.
<b>PUBLIC SCHOOLS</b>	)	
	)	
<b>Respondent.</b>	)	
	)	
<b>Student Attending:</b>	)	
<b>Non-Attending</b>	)	

**HEARING OFFICER'S DECISION**

**Counsel for Petitioner:** Lauren Onkeles, Esquire  
The Children's Law Center  
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**Counsel for DCPS:** Blair Matsumoto, Esquire  
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<sup>1</sup> Personal identification information is provided in Attachment 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 non-attending student. On August 18, 2010, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools (“DCPS”) had failed to (1) develop an appropriate Individualized Education Program (“IEP”), and (2) provide an appropriate placement. Petitioner contemporaneously filed a motion for an expedited hearing. This motion was denied in an Interim Order on September 2, 2010, because the *Complaint* made no allegation of disciplinary action on the part of DCPS.<sup>2</sup>

On September 13, 2010, Petitioner filed *Petitioner’s Motion That All Issues Not Specifically Denied by the Respondent Be Deemed Admitted* (“*Motion*”). Petitioner argued that all issues in dispute should be resolved in her favor, because DCPS failed to address the allegations in the *Complaint* in its *Response to the Petitioner’s Due Process Complaint* filed on August 31, 2010. In *District of Columbia Public School’s Opposition Motion to Petitioner’s Motion for Deemed Admittance* filed on September 15, 2010, DCPS argued that the Hearing Officer lacked the authority to grant Petitioner’s *Motion*.

The due process hearing was convened and completed on September 22, 2010. The parties’ Five-Day Disclosures were admitted into evidence at the inception of the hearing. After the parties’ opening statements, the Hearing Officer granted Petitioner’s *Motion* as to the allegation that DCPS failed to provide an appropriate placement. DCPS not only failed to address the issue in its *Response*, it produced no documentation in its Five-Day Disclosure that it had offered a placement to Petitioner for the 2010-2011 by the time the *Complaint* was filed. The Hearing Officer denied Petitioner’s *Motion* as to the allegation that the IEP was inappropriate, because the allegation in the *Complaint* was vague. At the prehearing conference on September 3, 2010, Petitioner’s counsel, in response to the Hearing Officer’s request for further specificity, stated that the goals and objectives were not sufficiently specific and not measureable. Counsel for DCPS argued at the prehearing conference that Petitioner had never before alleged that the IEP goals and objectives were inadequate, and insisted that Petitioner’s IEP was appropriate. In light of Petitioner’s lack of specificity in the *Complaint*, DCPS’ general denial did not prejudice Petitioner’s counsel’s ability to prepare for the hearing.

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<sup>2</sup> 34 C.F.R. §532(c).

## Witnesses for Petitioner

Petitioner's Guardian  
Jenny Bernal, Investigator, Children's Law Center  
Chief Social Worker,  
Timothy Elliot, Licensed Social Worker, API Associates  
Educational Consultant  
Educational Consultant,

## Witnesses for DCPS

Deputy Director, Lower School, DCPS

## Findings of Fact

1. Petitioner is a \_\_\_\_\_ year-old student who is currently not attending any school. She last attended \_\_\_\_\_ during the 2009-2010 and graduated after completing the \_\_\_\_\_ grade. DCPS offered no placement for the 2010-2011 school year until the Resolution Session meeting in this proceeding on August 27, 2010, when it proposed to place Petitioner at \_\_\_\_\_. After visiting \_\_\_\_\_ Petitioner's guardian rejected this proposal and elected to keep Petitioner at home rather than to send her to \_\_\_\_\_

2. DCPS completed a Speech and Language Assessment on January 28, 2010. She "exhibited moderate difficulty in Expressive and Receptive Language Skills characterized by needs in expressive and receptive syntax, semantics, articulation, written syntax, vocabulary and spelling." The pathologist recommended that Petitioner receive at least one hour per week of group speech and language services.<sup>5</sup>

3. DCPS convened a Multidisciplinary Team ("MDT") meeting on February 25, 2010 and developed the annual IEP. The MDT classified Petitioner with Emotional Disturbance ("ED").<sup>6</sup> The MDT prescribed 25.5 hours per week of specialized instruction outside general education, one hour per week of speech and language services, and one hour per week of behavior support services. The IEP included goals and objectives in Mathematics, Reading, Adaptive/Daily Living Skills, Communication/Speech and Language, and Emotional, Social, and Behavioral Development. The Mathematics goal was, "[Petitioner] will demonstrate improved math skills, using adult support and or verbal cues." The Reading goal was, "[Petitioner] will demonstrate improved reading skills, using adult support and or verbal cues." The Adaptive/Daily Living Skills goal

<sup>3</sup> Petitioner's Exhibit ("P.Exh.") No. 23 at 69 (The page numbers of Petitioner's exhibits are number sequentially throughout the Disclosure).

<sup>4</sup> Testimony of Petitioner's guardian.

<sup>5</sup> P.Exh. No. 3 at 8.

<sup>6</sup> P.Exh. No. 9 at 41.

was, “[Petitioner] will improve all aspects of self-care at an age appropriate level.” The Speech and Language goal was, “[Petitioner] will improve he Expressive and Receptive Language Skills to a level commensurate with her cognitive scores.” The Social/Emotional goal was, “By February 2011, [Petitioner] will demonstrate improved ability for understanding and management of her emotions 80% of the time, when given adult support, verbal cues and positive reinforcement.”<sup>7</sup>

4. completed a Woodcock-Johnson Test of Achievement on May 4, 2010. Petitioner’s grade equivalent scores were as follows: Broad Reading – 2:7; Broad Math – 3:2; and Broad Written Language – 3:9.<sup>8</sup>

5. DCPS convened another MDT meeting on May 21, 2010 to review the Woodcock-Johnson results and to discuss placement. The DCPS representative suggested that Petitioner’s guardian “look at \_\_\_\_\_ but the MDT made no placement determination at the meeting.”<sup>9</sup>

6. At \_\_\_\_\_ Petitioner’s class size was four during individual instruction, and nine in team teaching groups. Two teachers were present during team teaching groups. Petitioner made marginal progress on her Mathematics, Reading, and Adaptive/Daily Living Skill goals, and no progress on her Communication/Speech - Language and Emotional, Social, and Behavioral Development goals. \_\_\_\_\_ provided more than the one hour per week of psychological services prescribed in the IEP, but Petitioner actually regressed in social/emotional development compared to the 2008-2009 school year.<sup>10</sup>

7. For Petitioner to make academic progress, she needs to be in a small class, in a structured and predictable environment with research-based reading programs.<sup>11</sup>

8. \_\_\_\_\_ is a private school that offers full-time special education services to students whose primary disability is ED. The school year begins in August and has 227 days of instruction. \_\_\_\_\_ is divided into two divisions: kindergarten through eighth grade and grades nine through twelve. The average student to teacher ration in the lower division is 6:1. All teachers at \_\_\_\_\_ are certified in special education. Each class in the lower division has a teacher’s assistant who is an intern from the George Washington University masters degree program in special education. The therapeutic staff for the lower division includes the clinical director, one neuropsychologist, four social workers, and four behavior specialists. \_\_\_\_\_ also has speech therapists on its staff. If Petitioner were to attend \_\_\_\_\_ she would be in a class of six students, three boys and three girls. All students at \_\_\_\_\_ participate in a behavior modification program in which students are rewarded for positive behaviors.<sup>12</sup>

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<sup>7</sup> *Id.* at 42-44.

<sup>8</sup> P.Exh. No. 1 at 2.

<sup>9</sup> P.Exh. No. 7.

<sup>10</sup> Testimony of \_\_\_\_\_

<sup>11</sup> Testimony of \_\_\_\_\_

<sup>12</sup> Testimony of \_\_\_\_\_

9. is a DCPS facility that provides full-time special education services to approximately 67 students whose primary disability is ED in grades three through eight. The maximum class size is eight. Each class has a teacher certified in special education and a teacher's assistant. If Petitioner were to attend she would be the fourth girl in a class of eight students. contracts with Positive Nature to provide psychological services. Six therapists from Positive Nature are on-site. The maximum caseload for each therapist is fifteen. The Positive Nature staff provides individual and group therapy and is present during lunch and recess. All students at participate in a behavior modification program in which students are evaluated daily.<sup>13</sup>

## Conclusions of Law

### *Failure to Develop an Appropriate IEP*

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),<sup>14</sup> 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

"(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).<sup>15</sup>

Petitioner offered persuasive testimony through as to the inadequacy of the goals in Petitioner's IEP. As noted in paragraph three of the Findings of Fact, Petitioner's goals simply provided that she would improve her skills in each of the subject-matter areas. The goals offered no direction to the service providers as to

<sup>13</sup> Testimony of Dr. Mosley.

<sup>14</sup> 458 U.S. 176 (1982).

<sup>15</sup> *Id.* at 181-82.

specific areas of concern that required attention. For example, in Mathematics, the goal should have been more specific, such as mastering the ability to multiply three-digit numbers by three-digit numbers and other specific math skills, since she had made progress with two-digit multiplication. In reading, there was no mention of her specific weakness, phonemic awareness, and no specific goal, such as being able to read two-syllable words. In writing, there were no goals to address her specific weaknesses: mechanics, punctuation, and word usage. In Daily Living Skills, no specific skills were targeted for attention and the 50% - 60% achievement goal was not very aggressive. Similarly in Speech-Language, no specific deficits were targeted for attention, such as verbal and writing skills or articulation, and social skills.<sup>16</sup>

The Hearing Officer concludes that Petitioner has met her burden of proving that DCPS failed to develop an appropriate IEP by failing to develop specific, measurable goals and objectives to address Petitioner's unique needs, rather than the generic goals reflected in the IEP. Petitioner's counsel also argued that Petitioner's IEP should reflect the amount of time actually provided related services to Petitioner in addition to the amount prescribed in the IEP. However, Petitioner offered no persuasive testimony that the prescribed services were inadequate to meet her needs. Although Petitioner regressed in social/emotional development, she did so while receiving additional services from

The Hearing Officer believes that the professionals at Petitioner's new placement should review her progress during her first month and develop a related services program that address her current emotional needs.

### ***Failure Provide an Appropriate Placement***

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),<sup>17</sup> 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.<sup>18</sup>

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<sup>16</sup> See P.Exh. No. 9 at 47, LRE Justification for Speech-Language Pathology.

<sup>17</sup> 458 U.S. 176 (1982).

<sup>18</sup> *Rowley, supra*, at 200-01.

In this case, DCPS had not proposed an appropriate placement at the time the *Complaint* was filed. It first proposed \_\_\_\_\_ at the Resolution Session meeting on August 27, 2010. Therefore, the Hearing Officer concludes that Petitioner has met her burden of proving that DCPS failed to provide an appropriate placement.

Under *Florence County School District Four v. Carter*,<sup>19</sup> 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.”<sup>20</sup> “[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.”<sup>21</sup>

Both \_\_\_\_\_ and \_\_\_\_\_ offer small class sizes and therapeutic support staffs. In both schools, Petitioner would be in an out of general education environment throughout the day. The Hearing Officer noted during the hearing that Petitioner made virtually no progress last year at \_\_\_\_\_ despite being in small, structured environment in which she received more psychological support services than was prescribed in her IEP. However, none of the witnesses from \_\_\_\_\_ supported placing Petitioner in a more restrictive environment. \_\_\_\_\_ visited both schools and found the classroom environment at \_\_\_\_\_ to be much calmer and more structured. He testified that the more charged atmosphere at \_\_\_\_\_ would be problematical for Petitioner. \_\_\_\_\_ also noted that \_\_\_\_\_ uses research-based teaching program – specifically the \_\_\_\_\_ model – and that a reading specialist was assigned to the class in which Petitioner would be placed. The one reading specialist at \_\_\_\_\_ serves all of the students in the Academy requiring her services. Based on Petitioner’s history, the Hearing Officer believes that \_\_\_\_\_ would be a more appropriate placement for Petitioner than \_\_\_\_\_

## 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 1<sup>st</sup> day of October 2010, it is hereby

**ORDERED**, that DCPS shall immediately issue a Prior Notice placing Petitioner at \_\_\_\_\_ for the 2010-2011 school year including transportation and all other appropriate related services. In the event DCPS fails to begin providing Petitioner transportation by October 8, 2010, upon the submission of receipts or invoices, DCPS shall reimburse Petitioner’s guardian or transportation service provider for expenses incurred providing Petitioner transportation between her home and \_\_\_\_\_ for the 2010-2011 school year.

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<sup>19</sup> 510 U.S. 7 (1993).

<sup>20</sup> *Id.*, 510 U.S. at 11.

<sup>21</sup> *Id.*, 510 U.S. at 15-16.

**IT IS FURTHER ORDERED**, that on or before November 19, 2010, DCPS shall convene an MDT to review Petitioner's progress at \_\_\_\_\_ and to revise the IEP consistent with this Decision. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel, Lauren Onkeles.

**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: October 1, 2010