

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

**Office of Review and Compliance
Student Hearing Office**

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Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: April 8, 2009
)	
Petitioner,)	Prehearing Order: May 13, 2009
)	
v.)	Hearing Dates: May 20, 2009
)	June 10, 2009
THE DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS)	Docket No.
)	
Respondent.)	
)	
Student Attending:)	
)	

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STUDENT HEARING OFFICE

HEARING OFFICER'S DECISION

Counsel for Petitioner: Roberta Gambale, Esquire
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¹ 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 student attending _____

On April 8, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) develop appropriate Individualized Education Programs ("IEP"), (2) implement the IEP, and (3) provide an appropriate placement. In a Prehearing Order issued on May 13, 2009, the Hearing Officer identified the issues to be adjudicated as follows:

- DCPS' alleged failure to provide an appropriate IEP

Petitioner alleges that Petitioner's April 22, 2008 and March 30, 2009 IEPs are inappropriate, because (1) the parent was not present during the development of the March 2009 IEP, (2) the IEPs include insufficient speech and language ("S/L") and occupational therapy ("OT") services, no intervention behavior plan ("IBP"), and no classroom accommodations, particularly a dedicated aide. DCPS asserts that both IEPs are appropriate and that the parent agreed to the implementation of the 2009 IEP.

- DCPS' alleged failure to implement the IEP

Petitioner alleges that DCPS has failed to provide related services on a consistent basis: no OT services from November 2008-February 2009 and numerous misses S/L sessions. DCPS asserts that Petitioner's services were increased to make up for missed services.

- DCPS' alleged failure to provide an appropriate placement

Petitioner alleges that _____ cannot implement Petitioner's IEP and/or provide the type of setting Petitioner requires: related service providers have not been available consistently; staff members are not certified in Applied Behavior Analysis ("ABA"); inadequate playground supervision; lack of a dedicated aide; Petitioner has regressed in "potty" training, writing, and behavior; Petitioner's classroom peers are causing her to become more aggressive; Petitioner is receiving reading _____

instruction below her level of proficiency;
sensory integration.

does not offer

The due process hearing was convened on May 20, 2009 and continued to and completed on June 10, 2009. The parties' Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated April 8, 2009
DCPS Resolution Session Waiver dated April 10, 2009
District of Columbia Public School's Notice of Insufficiency and Response to Petitioner's Due Process Complaint dated April 20, 2009
Petitioner's Response to Notice of Insufficiency dated April 28, 2009
Petitioner's Five-Day Disclosure dated May 12, 2009 (Exhibit Nos. 1-47)
DCPS' Five-Day Disclosure dated May 13, 2009 (Exhibit Nos. 1-2)
Prehearing Order dated May 13, 2009
Interim Order dated May 25, 2009
Attendance Sheets (2) of hearings conducted on May 20 and June 10, 2009
CD-Roms (2) of hearings conducted on May 20 and June 10, 2009

Witnesses for Petitioner

Petitioner's Mother
Petitioner's Grandmother
Lore Rodriguez, Educational Advocate, James E. Brown & Associates
Autism Program Director,

Witnesses for DCPS

Special Education Coordinator,
Special Education Teacher,

Findings of Fact

1. Petitioner is a year-old student attending
2. On April 22, 2008, DCPS convened a Multidisciplinary Team ("MDT") meeting to develop Petitioner's annual IEP. The MDT classified Petitioner with Autism and prescribed thirty (30) hours per week of specialized instruction, one hour per week

² *Complaint* at 1.

of speech-language (“S/L”) pathology, and one hour per week of occupational therapy (“OT”).³

3. On January 16, 2009, DCPS completed a Speech/Language Re-evaluation Report. The pathologist’s findings and recommendations, *inter alia*, include the following:

Formal and informal assessment of [Petitioner’s] speech and language skills reveals that she has severe deficits in receptive, expressive, and pragmatic language skills. Significant weaknesses were noted in her ability to understand and express relationships between words that are related by semantic class relationships, to interpret spoken sentences of increasing length and complexity, to interpret, recall, and execute oral commands of increasing length and complexity, and to label pictures of people, objects, and actions. Receptive vocabulary skills are severely delayed and indicate that [Petitioner’s] one-word hearing vocabulary learned in school and at home is inadequate for her chronological age. Expressive vocabulary skills are severely delayed indicating word-picture associations are not commensurate with that of her peers.

[Petitioner’s] receptive and expressive language skills are not commensurate with her age, linguistic environment and cognitive functioning and are impacting on academic achievement. Speech and/or language intervention services continue to be warranted. Her communication skills interfere with school performance in the areas of task completion, and social interaction. [Petitioner] does qualify for speech and language intervention services under DCPS’ guidelines and regulations for IDEIA 2004.

RECOMMENDATIONS

[Petitioner] receive Speech and Language Intervention services:

2x weekly: small group
1x weekly: Consult and/or collaboration with Classroom Teacher...⁴

4. On March 19, 2009, DCPS completed an Occupational Therapy evaluation of Petitioner. The pathologist’s findings and conclusions, *inter alia*, include the following:

Teacher Interview: [Petitioner’s] classroom teacher describes her as making progress with communicating with her peers and also working in

³ Petitioner’s Exhibit (“P.Exh.”) No. 6 at 1.

⁴ P.Exh. No. 15 at 6. An independent evaluation completed in February 2007 recommended two one-hour sessions per week. P.Exh. No. 21 at 4.

groups. She is able to follow directives and classroom guidelines. She is able to keep up with her classmates.

Learning and Participation Implications:

From provider's observation [Petitioner] has not demonstrated the ability to perform efficiently in the classroom. She often does not follow directives from her teacher and classroom para-professionals. She makes sounds such as laughing or vocalization not relevant to classroom activities or current task being done at that time...

Strengths:

Utilization of (pictures exchange communication system) PECS's book for communication during lunch time.

Independence with self care.

Ambulatory in school environment.

Areas Needing Support:

Attention in the classroom (easily distracted)

Following verbal directives or instructions

Sensory processing

Suggested Intervention: [Petitioner's] current classroom does not appear to be an appropriate environment that would address [Petitioner's] needs.

OT services: It is the professional opinion of the therapist, based on observation, assessment, and interview with instructional personnel that [Petitioner] does need direct therapy to improve her academic success.

The recommendations for this school year ending June 2010 are:

OT Time: 60 minutes Frequency: weekly Duration: 10 months...

Annual Goals Needing Support: [Petitioner] will improve her sensory processing, visual motor integration, and visual perceptual and fine motor skills to enhance her academic performance.⁵

5. On March 30, 2009, DCPS convened an MDT meeting to develop Petitioner's annual IEP. The MDT classified Petitioner with Autism and prescribed 27.7 hours per week of specialized instruction, one hour per week of S/L pathology, and one hour per week of OT.⁶ The MDT also prescribed extended year services ("ESY") from June 29 through July 24, 2009 as well as compensatory education services: 15 hours of OT and five hours of S/L.⁷ The IEP included seven goals to address Petitioner's S/L needs:

⁵ P.Exh. No. 16 at 4. An independent OT evaluation in 2007 also recommended 60 minutes of services per week. P.Exh. No. 20 at 4.

⁶ DCPS Exh. No. 2 at 1 and 6.

⁷ *Id.* at 8.

services to improve her social-pragmatic, expressive, and receptive language skills.⁸ The IEP included six goals to address Petitioner's OT needs: deficits in areas of sensory integration, poor attention and poor production of letters independently.⁹ Petitioner's mother did not attend the MDT meeting.¹⁰

6. DCPS reconvened an MDT meeting on June 3, 2009. Petitioner's mother attended the meeting. The MDT modified Petitioner's OT services by breaking the hour into three twenty-minute sessions per week. The MDT also agreed to split Petitioner's hour of S/L services into two 30 minutes sessions per week and to add thirty minutes per week of collaboration between Petitioner's teacher and speech therapist. Petitioner's mother approved both modifications. At Petitioner's advocate's request, the Special Education Coordinator agreed to submit a request for a dedicated aide for Petitioner.¹¹ The MDT also agreed to include sensory integration throughout the school day.¹²

7. Petitioner made academic progress during the second and third advisory periods of the 2008-2009 school year:

2nd Quarter Comments:

[Petitioner] is still having difficulty with transitions. We have given her an individual picture schedule, which aids with transition, but she still struggles at times. [Petitioner] is doing well learning addition through the use of ABA techniques. She has also increased her spontaneous requests since we have incorporated a verbal immersion program for her during breakfast and lunch.

3rd Quarter Comments:

[Petitioner] has done an excellent job in this advisory becoming acclimated to classroom routines and procedures. She is very assertive, and at times, needs to take a time out before she can continue following the classroom routine. She continues to increase her spontaneous vocalizations, and has started to use more eye contact when making her requests known.¹³

8. Petitioner is in a class of seven autistic students. Petitioner's teacher is certified in special education. There are four teacher's aides in the classroom, two of which are dedicated.¹⁴

⁸ *Id.* at 4-5.

⁹ *Id.* at 5-6.

¹⁰ DCPS No. 2 at 1.

¹¹ DCPS No. 2, Meeting Notes; testimony of

¹² Testimony of

¹³ P.Exh. No. 46.

testified that Petitioner is "behind in math but on grade level in reading."

¹⁴ Testimony of _____ and _____

Conclusions of Law

Failure to Develop appropriate IEPs

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

At the beginning of each school year, the LEA is required to have a current IEP in effect for each child with a disability within its jurisdiction. Each child's IEP is accessible to each regular education teacher, special education teacher, and every related service provider who provides services to the student. Each teacher and service should be informed of his or her specific responsibilities related to implementing the child's IEP, including the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.¹⁷ Each child's IEP must be reviewed annually.¹⁸

In this case, Petitioner's counsel argued that Petitioner's 2008 and 2009 IEPs were inappropriate because there were insufficient OT and S/L services, no intervention behavior plan, no dedicated aide, and the parent was not present at the March 2009 IEP meeting. Both of Petitioner's most recent OT and S/L evaluations recommend that

¹⁵ 458 U.S. 176 (1982).

¹⁶ *Id.* at 1

81-82.

¹⁷ 34 C.F.R. §300.323(d)(2).

¹⁸ 34 C.F.R. §300.324(b)(1)(i).

Petitioner receive one hour per week of these services. Petitioner's 2007 independent S/L evaluation recommended two one-hour sessions per week. The Hearing Officer concludes that Petitioner has failed to offer convincing evidence that the related services prescribed in Petitioner's IEPs are insufficient. Moreover, the meeting notes from the June 3, 2009 MDT reveal that Petitioner's mother approved the plan to split Petitioner's current level of related services in to twenty and thirty minutes sessions, totaling one hour each for OT and S/L.

Petitioner offered insufficient evidence of the need for an intervention behavior plan. Petitioner's mother testified that Petitioner was becoming more aggressive, was stemming, and was mimicking negative behaviors of her classmates. However, testimony and written report were inconsistent with the parent's testimony. is with Petitioner throughout the school day and testified that Petitioner's aggressive behaviors are sporadic. expressed no concerns about Petitioner's classroom behavior.

Petitioner offered no persuasive evidence that Petitioner requires a dedicated aide. The only testimony that might have been intended to relate to this allegation was testimony from the mother and grandmother that Petitioner's potty-training had regressed since she has been at There was no testimony as to how a dedicated aide would assist Petitioner academically. testified that Petitioner is, in fact, potty trained, but that she often sits without "going." And the OT evaluation on March 19, 2009 listed as one of Petitioner's strengths her "Independence with self care." The Hearing Officer concludes that Petitioner has failed to establish the need for a dedicated aide.¹⁹

Finally, The LEA has a heavy burden to ensure the presence of the child's parent at each IEP meeting.²⁰ If neither parent can attend, the LEA should facilitate parental participation by phone.²¹ In the case of a parent who is difficult to reach, or who persistently fails to attend meetings, LEA should maintain detailed records of its attempts to encourage a parent to attend a meeting. The regulations suggest that, in the event a school decides to proceed with an IEP meeting without a parent, it should have records of telephone calls made or attempted to the parent, copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits.²² In this case, the record includes numerous correspondences between and Petitioner's counsel's office attempting to schedule an MDT meeting to develop Petitioner's annual IEP.²³ decided to go forward in the parent's absence on March 30, 2009 because of the difficulty in getting an agreement as to a date for the meeting. immediately forwarded a

¹⁹ Notwithstanding the Hearing Officer's conclusion, the MDT on June 3, 2009 agreed to submit a request for a dedicated aide for Petitioner. The meeting notes were not instructive as to the MDT's reasons for determining the need for the aide.

²⁰ 34 C.F.R. §300.322(a).

²¹ 34 C.F.R. §300.322(c).

²² 34 C.F.R. §300.322(d).

²³ P.Exh. Nos. 29, 30, 31, 36, 37.

copy of the IEP that was developed to Petitioner's counsel.²⁴ The Hearing Officer concludes that DCPS made sufficient good faith efforts to secure Petitioner's parent's presence at the March 30th MDT meeting.

For the reasons discussed above, the Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS failed to provide an appropriate IEP.

Failure to Implement the IEP

As noted in the findings of fact above, DCPS concedes that Petitioner did not receive all of the OT and S/L services to which she was entitled. At the March 30, 2009 MDT meeting, DCPS prescribed 15 hours of OT and 5 hours of S/L services as compensatory education services for the services Petitioner missed. Petitioner made no showing that the compensatory services prescribed on March 30th were inadequate. Thus, Petitioner has already received relief for DCPS' failure to provide the related services to which Petitioner was entitled. Therefore, the Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS failed to implement Petitioner's IEP.

Inappropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),²⁵ 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.²⁶

Thus, Petitioner's burden is to show that _____ has failed to provide an environment in which Petitioner can derive educational benefit. The gravamen of Petitioner's counsel's argument is that Petitioner is not making academic progress and is not receiving instruction with Applied Behavioral Analysis ("ABA") techniques. Petitioner has made an inadequate showing to meet her burden of proving that

²⁴ P.Exh. No. 33.

²⁵ 458 U.S. 176 (1982).

²⁶ *Rowley, supra*, at 200-01.

has not provided educational benefit. First, Petitioner offered no showing of the need for ABA services. Although the Hearing Officer is aware that such services are often prescribed for autistic children, Petitioner offered no evaluations or any other testimony specifically addressing Petitioner's need for ABA. Although [redacted] testified that she uses ABA techniques, Petitioner's counsel argued that [redacted] is not certified in the use of ABA. However, Petitioner's counsel made no showing that certification in ABA techniques is necessary to provide educational benefit to an autistic student.

Second, the testimony of Petitioner's mother and grandmother that Petitioner was making no progress at [redacted] was contradicted by [redacted] conceded that Petitioner was "behind" in math, but at grade level in reading. [redacted] testimony and written report reflected her belief that Petitioner was making social and academic progress at [redacted]

Third, Petitioner is in a class of only seven students with a certified special education teacher who is assisted by four paraprofessionals. Petitioner also receives the level of related services prescribed in her IEP. At the June 3rd MDT, DCPS satisfied the parent's request to provide related services in several shorter sessions each week.

Fourth, Petitioner's counsel cited the opinion related in the DCPS OT evaluation that "[Petitioner's] current classroom does not appear to be an appropriate environment that would address [Petitioner's] needs." However, the Hearing Officer read the March 19, 2009 OT evaluation thoroughly and found no factual basis in the report to support the pathologist's conclusion. There was no description of the classroom or discussion of practices or circumstances in the classroom that would lead to the conclusion that the environment was not conducive to Petitioner's progress.

The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that Petitioner has not and cannot receive educational benefit at [redacted]

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented during the hearings, and the representations of the parties' counsel at the hearings, this 20th day of June 2009, it is hereby

ORDERED, that the Complaint is **DISMISSED WITH PREJUDICE**.

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 20, 2009