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 guardian[1]	)	Complaints Filed: July 17, 2009
	)	
Petitioner,	)	Interim Order: September 20, 2009
	)	
v.	)	Hearing Date: September 25, 2009
	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Docket Nos. 2009-1051
	)	
Respondent.	)	
	)	
Student Attending: [redacted]	)	

HEARING OFFICER'S DECISION

Counsel for Petitioner:	Roberta Gambale, Esquire James E. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005 (202) 742-2000; Fax: (202) 742-2098
Counsel for DCPS:	Nia Fripp, Esquire Nia Fripp, 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 an fourteen year-old student attending [redacted] On July 17, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools ("DCPS") had failed to identify Petitioner as a child with a disability. On June 4, 2009, Petitioner filed an Amended Complaint ("*Complaint*") alleging that DCPS failed to (1) provide access to Petitioner's educational records, (2) conduct reevaluations, (3) develop an appropriate Individualized Education Program ("IEP"), and (4) implement the IEP. The due process hearing was convened on September 25, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Record

Due Process Complaint Notice dated July 17, 2009
DCPS Resolution Session Waiver dated July 22, 2009
District of Columbia Public School's Response to and Partial Motion to Dismiss Administrative Due Process Complaint dated July 27, 2009
Petitioner's Five-Day Disclosure dated September 10, 2009 (Exhibit Nos. 1-13)
DCPS' Five-Day Disclosure dated September 18, 2009 (Exhibit Nos. 1-9)
DCPS' Supplemental Five-Day Disclosure dated September 18, 2009 (Exhibit No. 10)
Interim Order dated September 20, 2009
Attendance Sheet for Hearing Conducted on September 25, 2009

Witnesses for Petitioner

Petitioner's Mother

Witnesses for DCPS

[redacted] Special Education Coordinator, [redacted]

Findings of Fact

1. Petitioner is a fourteen year-old student attending Angelou.[2]

2. On October 10, 2006, [redacted] completed a Psychoeducational Evaluation of Petitioner. [redacted] diagnosed Petitioner with a Learning Disorder, NOS, Developmental Coordination Disorder, and Rule-out Mixed Receptive-Expressive Language Disorder (with deficits in auditory processing).[3] [redacted] findings and recommendations, *inter alia*, include the following:

> Based upon the results of the current assessment, [Petitioner] should be classified as a learning disabled student. Although his cognitive functioning and academic achievement levels are generally commensurate, it is not necessary to base the diagnosis solely on the discrepancy model. [Petitioner's] test scores suggest he may be experiencing some language processing/auditory processing difficulties which may be affecting his acquisition of language-based skills. This is consistent with his history of difficulty in reading. Additionally, [Petitioner] is experiencing visual-motor integration deficits that also impact his classroom performance. Much of the day is spent performing writing activities which may be frustrating and laborious for [Petitioner]. Finally, [Petitioner's mother] and Mr. Nicholes [Petitioner's fourth grade teacher at Roots] both expressed significant concern regarding [Petitioner's] behavior and the impact that it may have on his academic performance.
>
> RECOMMENDATIONS
>
> The MDT should consider providing [Petitioner] special education services as a student with a Specific Learning Disability to address his weakness in reading and written language.
>
> A speech-language evaluation is recommended to assist with determining if [Petitioner] is experiencing speech-language deficits that may be negatively impacting his ability to learn. It is especially important that measures of auditory processing be performed to determine if deficits in this area are the causal factor of [Petitioner's] academic difficulties.
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> An occupational therapy evaluation is recommended to determine the extent of [Petitioner's] visual-motor integration deficits and to determine if intervention is warranted at this time.
>
> A clinical evaluation is recommended to examine [Petitioner's] social-emotional functioning and to determine the need for counseling services.

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[2] *Complaint* at 1.
[3] P.Exh. No. 23 at 7.

> [Petitioner] would benefit from specialized instruction in the areas of reading and written language. This may be performed individually or in a small group setting. He would learn most effectively with a phonetically based reading/writing program that utilizes a multi-sensory format.
>
> A behavior plan should be developed to assist with helping [Petitioner] with his behavior at school…[4]

3. Petitioner reenrolled at Brightwood for the 2008-2009 school year.[5]

4. On March 20, 2009, DCPS convened a Multidisciplinary Team meeting to determine Petitioner's eligibility for special education services. The team acknowledged the 2006 psychoeducational evaluation, but determined that a new evaluation should be conducted. Petitioner's advocate argued that Petitioner should be determined to be eligible on the basis of the 2006 evaluation. The MDT agreed that "If [Petitioner] is found eligible to receive Sp. Ed. Services, he will receive compensatory education services since this process began back in 2006. The MDT, including the parent, agreed that Petitioner did not require an occupational therapy ("OT") evaluation.[6] Petitioner's mother signed a Consent for Evaluation form, and the MDT developed a Student Evaluation Plan ("SEP") ordering comprehensive psychological and speech an language evaluations for Petitioner.[7]

5. On April 22, 2009, [redacted] DCPS Speech and Language Pathologist, completed a Speech and Language Therapy Services Speech and Language Evaluation Summary Report. [redacted] concluded that Petitioner did not require speech and language services:

> [Petitioner] is an [redacted]ear old African-American [redacted] presenting with receptive and expressive language skills within the average range. Articulation, social language, oral motor and voice skills were also found within the average range. Analysis of the assessment data in conjunction with DCPS Speech-Language Eligibility Criteria; results are not consistent with a diagnosis of speech language impairment.[8]

6. On May 12, 2009, [redacted] DCPS School Psychologist, completed a Comprehensive Psychological Evaluation. His findings and recommendations, *inter alia*, include the following:

> [Petitioner] is an [redacted]year-old child who completed the WIAT-II and the RIAS. Cognitively, [he] earned a *Composite Intelligence Index* or CIX of

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[4] *Id.* at 6-7.
[5] Testimony of Petitioner's mother.
[6] P.Exh. No. 12.
[7] P.Exh. No. 13. The SEP actually authorized psychological, social history, and educational evaluations, all of which are encompassed in a comprehensive psychological evaluation.
[8] DCPS Exh. No. 5.

80. On the RIAS, this level of performance falls within the range of scores designated as Below Average. [Petitioner's] VIX [Verbal Intelligence Index] of 82 and NIX [Nonverbal Intelligence Index] of 81 are consistent with his CIX noted above and indicate that [Petitioner's] verbal and nonverbal abilities are similarly developed...

His visual-perceptual abilities, as measured by the Beery Developmental Test of Visual-Motor Integration, were found to be in the Below Average range. The examiner feels that his performance was perhaps compromised by his waning motivation on the later geometric replications.

Academically, [Petitioner] appears to be achieving in approximately the upper-second to the upper-third grade range in reading, with his spelling skills falling in the upper-fourth grade range. In arithmetic, [Petitioner's] abilities range from the beginning fourth to the early parts of the fifth grade. Heretofore, [Petitioner] is functioning almost two to three grade levels below grade expectancy in reading, with the rest of his skill areas falling relatively higher. And, as mentioned in Dr. [redacted] October 26th 2006 report, while [Petitioner] [Petit ioner's] cognitive functioning and academic achievement levels are generally commensurate, it is not necessary to base eligibility solely on the "discrepancy model." Therefore, [Petitioner] appears to meet the DCPS criteria for special education intervention and merit remediation that would effectively/properly address his deficits.[9]

7. DCPS convened an MDT on May 18, 2009 to determine Petitioner's eligibility for special education services. The MDT determined that Petitioner was eligible and classified Petitioner with a Specific Learning Disability.[10] The MDT prescribed 15 hours per week of specialized education services in an out of general education environment, 30 minutes per week of behavioral support services, and one hour per month of speech and language consultation services.[11] The MDT determined that Petitioner was not entitled to compensatory education services and did not require extended year services ("ESY").[12] The MDT notes indicate that "This team will have to reconvene to discuss change of placement. School is unable to implement IEP."[13] The IEP included a Prior Notice that placed Petitioner at Brightwood.[14] Petitioner's mother requested "another placement because she doesn't feel that he is getting what he needs."[15]

8. The MDT had the following discussion regarding Petitioner's behavior:

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[9] DCPS Exh. No. 7 at 8-9. Mr. [redacted] offered five pages of detailed program recommendations (at 9-14), but he offered no specific recommendation as to an appropriate educational setting.
[10] P.Exh. No. 19 at 1.
[11] *Id.* at 6.
[12] P.Exh. No. 20 at 5.
[13] *Id.*
[14] P.Exh. No. 19.
[15] P.Exh. No. 20 at 1.

> Ms. [redacted] tated that [Petitioner] is capable and very bright. He works when he feels like it. His behavior spirals. He acts out and distracts others. He knows what he's doing. He's very mature. He has the ability to control his behavior… Mrs. Hudson feels that his behavior has declined since the DC CAS testing… Ms. Looper read the (2) statements from his teachers. [Petitioner] has been in several fights. The majority of the fights he's had are over girls. Mrs. Barnett stated that, initially, [Petitioner] did no work… [Petitioner] is busy and girl crazy… Ms. Williams states that she has seen improvement in his hallway behavior. Ms. Looper stated [Petitioner] has age appropriate manners. He has never been disrespectful to me."[16]

9. Petitioner's advocate and mother disagreed with the level of counseling prescribed in the IEP; they proposed one hour per week. Petitioner's advocate also proposed a compensatory education plan including (1) two hours per week of independently provided tutoring, (2) one hour per week of independently provided speech and language therapy, (3) summer camp to address social-emotional behaviors, and (4) a Lindamood Bell assessment. The MDT declined to accept the advocates plan. Petitioner's advocate made no request for a functional behavior assessment.[17]

10. Petitioner has been accepted at [redacted] 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. If Petitioner were to attend [redacted] he would be the fifth student in the class. All students at [redacted] re on a behavior modification plan at rewards students for positive behavior throughout the day. [redacted] employs clinical therapists, social workers, art therapists, and behavioral counselors. The annual tuition is approximately $40,000, not including related services. Counseling services are $120 per hour.[18]

Conclusions of Law

Childfind

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 motor abilities.[19] Once a child has been determined to be eligible for services, he or she must be reevaluated at least every three years.[20] Under local law, DCPS has 120 days to conduct initial evaluations and determine a child's eligibility for special education services ("childfind").[21]

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[16] *Id.* at 1-3.
[17] P.Exh. No. 21.
[18] Testimony of Dr. Warnke.
[19] 34 C.F.R. §300.304(c)(4).
[20] 34 C.F.R. §300.303(b)(2).
[21] D.C. Code §38-2561.01(a).

Petitioner's counsel argued that DCPS has been on notice since 2006, when Petitioner was evaluated by Dr. [redacted] that Petitioner required special education services. However, the evidence is uncontroverted that Petitioner was enrolled in Roots, a public charter school from 2004 until the beginning of the 2008-2009 school year. Petitioner offered no evidence that DCPS was put on notice of Dr. Mack's evaluation prior to the MDT meeting on March 20, 2009. At that meeting, the MDT developed a SEP, ordering the completion of a new comprehensive psychological evaluation and a speech and language evaluation. These evaluations were completed and the MDT reconvened to determine Petitioner's eligibility on May 18, 2009, well within the 120-day deadline. The Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS failed timely to conclude childfind proceedings.

Failure to Evaluate Petitioner in All Areas of Suspected Disability

Petitioner alleges that DCPS failed to conduct occupational therapy ("OT), clinical, and speech and language evaluations, and a functional behavior assessment. The MDT on March 20, 2009 ordered comprehensive psychological and speech and language evaluations to be conducted. DCPS concedes that the comprehensive psychological evaluation it conducted did not include an analysis of Petitioner's social/emotional problems, and it authorized an independent evaluation.[22] A referral for independent comprehensive psychological and speech and language evaluations was issued the same day as the amended *Complaint* was filed. Therefore, these evaluations were not reviewed by the Hearing Officer since they were not available to the May 18th MDT when its eligibility and placement determinations were made.

Petitioner argues that Dr. [redacted] 2006 evaluation recommended an OT evaluation and an FBA. In fact, Dr. [redacted] recommended a behavior intervention plan, which would require the completion of an FBA. DCPS asserts that Petitioner's parent agreed at the MDT meeting that Petitioner did not require an OT evaluation. Petitioner's parent was represented at the March 20, 2009 MDT by Ms. Rodriguez, and the MDT developed a SEP that did not include an OT evaluation or an FBA. Ms. Rodriguez did not request an FBA at either the March 20th or the May 18th MDT meeting. During the hearing, Petitioner offered no testimony in support of Petitioner's need for an OT evaluation. Nor was testimony offered to show that Petitioner's behavior during the 2008-2009 school year had an adverse impact on his academic performance. As noted in the Findings of Fact above, the MDT on May 18th had a thorough discussion of Petitioner's behavior. The MDT's decision not to recommend an FBA does not constitute an omission that constitutes a violation of IDEIA. The Hearing Officer also concludes that Petitioner has failed to meet his burden of proving, by a preponderance of the evidence, that his current level of motor functioning is such as would suggest the need for an OT evaluation.

Failure to Develop an Appropriate IEP

[22] P.Exh. No. 7.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("*Rowley*"),[23] 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
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> "(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).[24]

Petitioner alleges that the IEP developed on May 18, 2009 is inappropriate, because (1) there are no social/emotional goals and objectives, and (2) there is an insufficient amount of specialized instruction. During the hearing, over Petitioner's objection, DCPS offered into evidence page 5 of the May 18, 2009 IEP, missing from Petitioner's Exhibit 19, that included social/emotional goals. The Hearing Officer overruled Petitioner's objection. Petitioner's advocate's notes of the meeting also confirm that social emotional goals were discussed at the MDT meeting and were included in the IEP.[25]

As for the alleged insufficiency of specialized instruction in the IEP, Petitioner offered nothing more than the parent's and the educational advocate's opinions that fifteen hours per week is insufficient to meet Petitioner's needs. However, neither Dr. [redacted] recommended full-time specialized instruction in their evaluations. Petitioner's advocate asserted that Dr. [redacted] evaluation was sufficient to determine Petitioner's eligibility at the March 20, 2009 MDT. Dr. [redacted] concluded that Petitioner required specialized instruction only in reading and written language. This falls well short of a recommendation of full-time specialized instruction. Moreover, both Dr. [redacted] and Mr. [redacted] noted that there was no discrepancy between Petitioner's cognitive and

[23] 458 U.S. 176 (1982).
[24] *Id.* at 181-82.
[25] P.Exh. No. 21, top of last page.

achievement scores. Thus, while Petitioner may have a learning disability, it has not been shown to be severe enough to require a full-time, restrictive setting. The Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS failed to develop an appropriate IEP.

Failure to Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley ("Rowley")*,[26] 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.[27]

Thus, Petitioner's burden is to show that DCPS has failed to provide an environment in which Petitioner can derive educational benefit. The Hearing Officer has already concluded that the record does not support Petitioner's contention that he requires a full-time special education program. Petitioner's counsel's *only* evidence that Brightwood cannot meet Petitioner's needs is the following entry in the May 18th MDT meeting notes: "This team will have to reconvene to discuss change in placement. School is unable to implement IEP." Ms. [redacted] testified at the hearing that she was the author of the meeting notes. However, she testified emphatically that Brightwood *can* implement Petitioner's IEP and that she could not explain why she wrote that the school could not implement the IEP.

Ms. [redacted] also testified that it would be up to Petitioner's special education teacher's discretion to determine how much of Petitioner's special education services would be provided in a resource room and how much would be provided in the general education environment. On this point, Ms. [redacted] is clearly mistaken. Petitioner's IEP calls for fifteen hours per week of specialized instruction out of general education. Thus, Petitioner must be "pulled-out" of his general education class for 15 hours of specialized instruction by a special education teacher each week. Since Ms. [redacted] categorically refuted the statement in the meeting notes that Brightwood could not implement

[26] 458 U.S. 176 (1982).
[27] *Rowley, supra,* at 200-01.

Petitioner's IEP, Petitioner has not shown, by a preponderance of the evidence, that Brightwood cannot provide fifteen hours of specialized instruction per week in an out of general education environment. Therefore, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS has failed to provide an appropriate placement.

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 28th day of September 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: September 28, 2009

APPENDIX A

[redacted]

Docket No. 2009-1051

Student Attending: [redacted]

Student	[redacted]
Date Of Birth	
Student ID No.	
Student's Parent(s)	
Student's/Parent's Representative	