

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

Office of Review and Compliance

Student Hearing Office

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STUDENT HEARING OFFICE
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Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: August 26, 2009
)	
Petitioner,)	Prehearing Order: October 14, 2009
)	
v.)	Hearing Dates: October 27-28, 2009
)	
THE DISTRICT OF COLUMBIA)	Docket No. 2009-1216
PUBLIC SCHOOLS)	
)	
Respondent.)	
)	
Student Attending:)	
)	

HEARING OFFICER'S DECISION

Counsel for Petitioner: Sarah Cheever-Tompkins, Esquire
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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 a six year-old student attending [REDACTED]. On August 26, 2009, Petitioner filed a Due Process Complaint Notice ("*Complain*") alleging that the District of Columbia Public Schools ("DCPS") had failed to (1) complete childfind procedures timely, (2) develop an appropriate Individualized Education Programs ("IEP"), and (3) provide an appropriate placement. In a Prehearing Order issued on October 14, 2009, the Hearing Officer determined the issues to be adjudicated as follows:

- DCPS' alleged failure timely to complete childfind procedures

Petitioner alleges that DCPS failed comply with childfind procedures after Petitioner was referred for initial evaluations on February 20, 2009.

DCPS asserts that Petitioner's foster parent granted consent to evaluate on March 11, 2009, then withdrew consent on May 20, 2009. Petitioner was found eligible for special education services on June 12, 2009, and an IEP was developed on August 26, 2009.

- DCPS' alleged failure to develop an appropriate IEP

Petitioner alleges that the goals and objectives in the IEP are inadequate. DCPS asserts that the IEP is appropriate and was designed to confer educational benefit.

- DCPS' alleged failure to provide an appropriate placement

DCPS placed Petitioner at [REDACTED] after the Multidisciplinary Team (MDT) meeting on August 26, 2009. Petitioner contends that [REDACTED] is an inappropriate placement because (1) no information about [REDACTED] was provided at the MDT meeting, (2) despite Petitioner's classification as other health impaired ("OHI"), Petitioner was assigned to a program for emotionally disturbed ("ED")

students at [REDACTED] DCPS asserts that Petitioner is also classified ED and that [REDACTED] can meet Petitioner's educational needs.

The due process hearing was convened on October 27 and completed on October 28, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.²

Record

Due Process Complaint Notice dated August 26, 2009
District of Columbia Public School's Amended Response to Parent's Administrative Due Process Complaint dated October 1, 2009
Prehearing Order dated October 14, 2009
Interim Order dated September 20, 2009
Petitioner's Five-Day Disclosure dated October 20, 2009 (Exhibit Nos. 1-15, 17-20, 22-25)
DCPS' Five-Day Disclosure dated September 3, 2009 (Exhibit Nos. 1-20)
Attendance Sheets for hearing conducted on October 27-28, 2009

Witnesses for Petitioner

Monica Myles, Esquire, Guardian *ad litem*
Petitioner's Foster Father

[REDACTED] Medical Director, ECC
[REDACTED] Clinical Psychologist
[REDACTED]
[REDACTED]

Witnesses for DCPS

[REDACTED] Special Education Coordinator, [REDACTED] E.S.
[REDACTED] Special Education Coordinator, [REDACTED]
E.S.

² DCPS objected to the admissibility of Petitioner's Exhibit ("P.Exh.") Nos. 16, 21, 22, and 24. The Hearing Officer deferred ruling on each exhibit until offered into evidence at the time of the testimony of the witness who prepared the document. Petitioner's counsel failed to renew her request for admission of these documents into evidence. P.Exh. No. 16 was developed by Dr. [REDACTED] a psychologist at [REDACTED] who did not testify. DCPS' objection to this document is sustained. P.Exh. No. 21 was developed by Ms. [REDACTED], a social worker at [REDACTED] who did not testify. DCPS' objection to this document is sustained. P.Exh. No. 22 was a Psychiatric Evaluation that was developed by Dr. Harold Plotsky, who testified. DCPS' objection to this document is overruled. P.Exh. No. 24, classroom observation notes, was developed by Ms. [REDACTED] who testified. DCPS' objection to this document is overruled. The Hearing Officer sustained Petitioner's objection to testimony from any witness from [REDACTED] DCPS failed to disclose its intention to call a witness from [REDACTED]. 34 C.F.R. §300.512(a)(3).

Findings of Fact

1. Petitioner is a [REDACTED] year-old student attending the [REDACTED]
2. Petitioner began the 2008-2009 school year at [REDACTED]. When Petitioner was terminated from the after-care program for behavioral issues, his former foster parent enrolled Petitioner at [REDACTED]
3. Upon his arrival at [REDACTED] Petitioner's teacher, [REDACTED] became concerned about Petitioner's disruptive and anti-social behavior and began documenting his misconduct.⁵
4. On December 12, 2008, [REDACTED] referred Petitioner to [REDACTED] Student Support Team ("SST") due to his disruptive behavior in the classroom:

[Petitioner] has displayed disruptive and aggressive behavior since his arrival at [REDACTED]. He has choked a child, hit a child on the head with a metal music stand and thrown a chair in the classroom. He often makes noise during instruction which disturbs the class activities and or starts an argument which takes attention away from the lesson. He's not cognitively delayed, seems bright, knows the letters of the alphabet and can produce the correct sounds for the letters... He responds best when I can give him one-on-one attention. I have observed him during his aggressive acts and I have great reasons for concern. As he hits the children he starts to smile when they begin to cry; after talking to him about his behavior he continues to smile and does not appear to be remorseful. During these episodes I have called for security and asked her to remove him from the area and take him to Mr. Noble the school social worker. If these situations continue to occur, [Petitioner's] behavior will have an impact on his academic success. I am also fearful that someone will be hurt as a result of his aggressive acts.⁶

5. On February 20, 2009, the SST determined that intervention strategies to correct Petitioner's behavior had been unsuccessful and referred him to a Multidisciplinary Team ("MDT") to prescribe evaluations to determine his eligibility for special education services:

The Student Support Team has worked extremely hard to assist [Petitioner] with his aggressive behavior, to no avail. It appears that [Petitioner's] aggression is escalating and he is a danger to others. In January and in February 2009, [Petitioner] kicked [REDACTED] Educational Aide to [REDACTED]. [REDACTED] was very upset and resigned as a result of these incidents.

³ Testimony of foster father.

⁴ *Id.*

⁵ Petitioner's Exhibit ("P.Exh.") No. 7.

⁶ DCPS Exh. No. 18

On February 20, 2009, a meeting was held in Dr. [REDACTED] office to discuss [Petitioner]... [Petitioner] was suspended from school at the time. This was his second suspension at [REDACTED]. Although there have been many infractions that [Petitioner] could have been sent home for, Mr. [REDACTED] principal, Ms. [REDACTED] Social Worker, and Dr. [REDACTED] Guidance Counselor, all felt that suspension was the last resort to be initiated. However, [Petitioner's] behavior was escalating and he was out of control...

Dr. [REDACTED] stated the SST has met several times on [Petitioner] and the intervention strategies implemented have not proven to be successful. [Petitioner] is doing well academically in school... His behavior is a very serious problem which could impact on his academic success if not corrected at an early age. [Petitioner] has been referred to the Multi-Disciplinary (MDT) for evaluation. The first evaluation completed either by DCPS or Child and Family Services Agency ["CFSA"] will be used to determine if [Petitioner] is eligible for Special Education Services.⁷

6. DCPS convened an MDT meeting on March 11, 2009. The MDT agreed that Petitioner should receive educational and clinical evaluations.⁸ Petitioner's foster father provided written consent to evaluate Petitioner.⁹

7. In light of an imminent psychoeducational evaluation by the D.C. Department of Mental Health, and upon the recommendation of the evaluator, Petitioner's foster father rescinded consent for DCPS to evaluate Petitioner on May 20, 2009.¹⁰

8. Dr. [REDACTED] of the D.C. Department of Mental Health completed Psychoeducational Evaluation on May 27, 2009. Dr. King diagnosed Petitioner with Attention Deficit Hyperactivity Disorder ("ADHD"), Adjustment Disorder with Disturbance of Emotions and Conduct, and Neglect of Child.¹¹ Petitioner's Full Scale IQ was 99, in the average range.¹² He scored in the average or high average range in all achievement categories.¹³ Dr. [REDACTED] other findings and recommendations, *inter alia*, include the following:

In regard to achievement (academic) testing, [Petitioner] earned Average and High Average scores on all of the exercises which assessed various reading, writing, and math skills. His achievement scores spanned from being on par to about one year above his same-age norm group and placed him within the Kindergarten grade equivalent level on the Calculation

⁷ DCPS Exh. No. 17.

⁸ DCPS Exh. No. 13-14.

⁹ DCPS Exh. No. 14. Petitioner's foster father testified that it was understood that either DCPS or CFSA would conduct the evaluation.

¹⁰ DCPS Exh. No. 10. The evaluation was ordered by a Superior Court order. Testimony of Ms. [REDACTED]

¹¹ P.Exh. Exh. No. 12-10.

¹² P.Exh. No. 12-6,7.

¹³ P.Exh. No. 12-8.

subtest and within the 1st grade level on the rest of the subtests. The respondent's achievement scores were generally consistent with or higher than his IQ and index scores of cognitive testing.

Based on these scores, [Petitioner] does not appear to present with any learning disorders. Despite his reported history of exposure to neglect, inconsistent attendance, and emotional stressors/distractions (i.e., removal from his mother), he has managed to develop relatively decent academic skills thus far. However, he exhibits significant attention problems, distractibility, poor regulation of his emotions and impulses, and hyperactivity that interferes with his educational progress. [Petitioner] qualifies for a diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD). A diagnosis of Adjustment Disorder with Disturbance of Emotions and Conduct also accounts for how his disrupted placement with his mother has exacerbated his emotional and behavioral control problems; he has reportedly been suspended from school on several occasions for various actions such as inappropriately touching peers and aggression. He requires constant redirection and monitoring. It is likely that symptoms of emotional distress have been minimized to some extent as the youth is reportedly comfortable in his current foster home. Additionally, the Diagnostic Impressions section reflects the child's reported exposure to neglect which seems to be manifested in his attention-seeking behaviors, jealousy regarding his brother and other children, and emotional neediness.

Recommendations:

Although [Petitioner] does not appear to present with any learning disabilities, special education services are warranted under a classification of Other Health Impaired (OHI). A Multidisciplinary Team Meeting (MDT) should take place at his school to review to develop an appropriate IEP. Classroom accommodations should be put in place (i.e., sitting near the teacher, given regular breaks, etc.). A behavioral modification program should be established that targets a few key behaviors. Such interventions could be initiated in the regular classroom but it is likely that he will require a small size classroom with a low student to teacher ratio...

[Petitioner] should be provided as soon as possible with individual psychotherapy on a weekly basis. Therapy should be delivered by a licensed clinician who has expertise with neglected children who present with symptoms of ADHD and conduct problems. Play therapy and other techniques could supplement talk therapy. The child should be regularly monitored for an intensification of symptoms of a mood disorder, aggression, and sexually acting out behaviors...

Due to the youth's high level of hyperactivity and impulsivity, it is recommended that a medication consultation take place with a child

psychiatrist in the community to determine if pharmacological intervention should supplement therapy...¹⁴

9. DCPS convened an MDT meeting on June 12, 2009 to determine Petitioner's eligibility for special education services:

DCPS was provided an outside evaluation for [Petitioner]. The findings of the evaluation were that [Petitioner] has ADHD along with a significant emotional disturbance. DCPS supports these findings. [Petitioner] demonstrated significant behavioral problems within the school. He is disobedient and requires constant supervision to redirect poor behavior. His severely impacted behavioral problems have caused an academic impact. [REDACTED] Elementary can not support the needs of [Petitioner] however a full time ED DCPS can adequately address his needs. DCPS is finding [Petitioner] eligible for Special Education as a student with OHI sighting Emotionally Disturbed and ADHD... The IEP will be drafted within 30 days and the placement being offered will be Bruce Monroe and an appropriate setting for [Petitioner] which can service his needs.¹⁵

Petitioner's Guardian *ad litem*, Ms. [REDACTED] objected to the proposed placement at [REDACTED] because Petitioner's mother was not present at the meeting, and because the IEP had not been developed.¹⁶ Petitioner's foster father also objected to the proposed placement because there was no representative of Monroe at the meeting and he "didn't want to sign on to something I didn't know anything about."¹⁷

10. DCPS issued a Prior Notice on June 12, 2009 placing Petitioner at [REDACTED]. The Prior Notice indicated that the "IEP will be developed within 30 days."¹⁸

11. Shortly after the MDT meeting on June 12th, Ms. [REDACTED] attempted to schedule a MDT meeting with Ms. [REDACTED] to develop an IEP, but the parties could not reach agreement on a mutually convenient date. Eventually, Ms. [REDACTED] informed Ms. [REDACTED] that Petitioner's counsel would coordinate arrangements for the meeting on Petitioner's behalf.¹⁹

12. When Petitioner's foster father inquired by telephone as to enrollment requirements for Petitioner at [REDACTED] he was told that Petitioner could not be enrolled without an Individualized Education Program ("IEP"). The foster father enrolled Petitioner at [REDACTED] where Petitioner receives no special education services.²⁰

¹⁴ P.Exh. No. 12-11,12. During his testimony, Dr. [REDACTED] stated that Petitioner should be placed in a class of no more than five students per teacher.

¹⁵ DCPS Exh. No. 8 at 2.

¹⁶ Testimony of Ms. [REDACTED]

¹⁷ Testimony of foster father.

¹⁸ P.Exh. No. 8-1.

¹⁹ Testimony of Ms. [REDACTED] Ms. [REDACTED] sent letters of invitation to MDT meetings to Ms. Myles on July 27, 2009 and August 17, 2009. DCPS Exh. Nos. 11 and 12.

²⁰ *Id.*

13. DCPS convened an MDT meeting on August 26, 2009 to develop an IEP.²¹ The IEP included goals and objectives in mathematics; reading; and emotional, social, and behavioral development.²² The MDT prescribed 25.5 hours of specialized instruction per week and one hour per week of behavioral support services.²³ The MDT determined that Petitioner did not require extended year services (“ESY”).²⁴

14. DCPS issued a second Prior Notice on September 4, 2009, following a Resolution Session meeting, placing Petitioner at [REDACTED].²⁵

15. [REDACTED] as a “Cluster Program” for emotionally disturbed students. The program for “primary” students consists of a self-contained class of students in grades one through three. There are currently six students in the class, aged 7 to 9. The teacher is certified in special education. There is a teacher’s assistant and a dedicated aide in the classroom. The maximum class size is 10. All of the students have intervention behavior plans. [REDACTED] offers the following related services: speech and language therapy, occupational therapy, and psychological counseling. [REDACTED] employs a psychiatrist (half-time) who performs evaluations and conducts interventions. [REDACTED] also employs a full-time psychologist.²⁶

16. Petitioner was accepted at the [REDACTED] on October 16, 2009.²⁷ [REDACTED] is a private school offering full-time special education services to students from kindergarten through the sixth grade who have emotional disturbances (“ED”). A majority of the [REDACTED]’s students have ADHD, some in combination with learning disabilities. The maximum class size is five. If Petitioner were to attend [REDACTED], he would be the fifth student in a class of four boys and one girl, ages 6-8. The other four students have mental health treatment programs. Three of the students’ primary disability is ED, and “one is primary LD by now.” One is ED/OHI, one is ED/LD, and one is ED.²⁸ Most students at ECC are prescribed medication by the Medical Director, Dr. [REDACTED].²⁹

17. Petitioner’s foster father is not inclined to allow Petitioner to be medicated in the near term.³⁰

²¹ Petitioner was represented at the MDT meeting by his mother and Petitioner’s counsel. Petitioner’s mother was not available to testify at the hearing due to a medical emergency. Thus, no testimony was offered on Petitioner’s behalf regarding the August 26th MDT meeting.

²² DCPS No. 7 at 2-5.

²³ *Id.* at 6-7.

²⁴ *Id.* at 9.

²⁵ DCPS Exh. No. 5

²⁶ Testimony of Ms. [REDACTED] was not certain if the teacher’s certification was provisional or full.

²⁷ P.Exh. No. 14-1.

²⁸ Testimony of Mr. [REDACTED]

²⁹ Testimony of Dr. [REDACTED]

³⁰ Testimony of Petitioner’s foster father.

Conclusions of Law

Failure to Complete Childfind Procedures Timely

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.³¹ No single procedure should be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.³² The results of the evaluations must be given considerable weight in determining the child's eligibility for services and in the development of the child's IEP.³³ Under local law, "DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment."³⁴

The first inquiry is whether DCPS was on notice that Petitioner might be a child with a disability and delayed initiating evaluations to determine his eligibility. Petitioner offered no evidence of Petitioner's educational background prior to his enrollment at [REDACTED] other than testimony that he had been removed from an after-care program at [REDACTED] for violent behavior. Once he enrolled at [REDACTED] his teacher, Ms. [REDACTED] soon became concerned about his behavior and began keeping a chronology of behavioral incidents. The first entry was on November 11, 2008.³⁵ On December 12, 2008, Ms. [REDACTED] requested the intervention of an SST. The written request revealed that several strategies had already been implemented to attempt to ameliorate Petitioner's behaviors. On February 20, 2009, the SST determined that its intervention strategies had been unsuccessful and recommended that Petitioner be evaluated.

One month after becoming concerned enough about Petitioner's behavior to begin documenting his misconduct, Ms. [REDACTED] recommended the referral to the SST. Two months later, the SST determined that its intervention strategies were unsuccessful and recommended that Petitioner be evaluated. The Hearing Officer concludes that the [REDACTED] staff acted reasonably when it first attempted to resolve Petitioner's behavioral issues through intervention strategies. The three month period from mid-November to mid-February was not an unreasonably long period of time for [REDACTED] to determine that intervention strategies would not work and that initial evaluations should be initiated.

The second inquiry is whether DCPS failed timely to complete childfind procedures after the referral for evaluations. Petitioner was referred for evaluations at the MDT meeting on March 11, 2009. Petitioner was found eligible for full-time special education services on June 12, 2009. Since this determination was made within the 120-

³¹ 34 C.F.R. §300.304(c)(4).

³² 34 C.F.R. §300.304(b)(2).

³³ 34 C.F.R. §300.305(a).

³⁴ D.C. Code §38-2561.02(a). 5 D.C.M.R. §3004 (a) and (b)(1) provides that a referral for evaluations may be initiated in writing by the parent.

³⁵ P.Exh. No. 7.

day deadline of D.C. Code Section 38-2561.02(a), the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS failed timely to comply with IDEIA's childfind provisions.

Failure to Develop an Appropriate IEP

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),³⁶ 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).³⁷

The MDT reviewed Dr. ██████'s May 27th psychoeducational evaluation when it found Petitioner eligible on June 12th. That evaluation portrayed a student with average cognitive potential and average to above average achievement scores. Dr. ██████ concluded that Petitioner had no learning disabilities, but that he required classroom accommodations such as "sitting near the teacher, given regular breaks, etc.," and the development of a behavioral modification program. Dr. ██████ also suggested that Petitioner could initially be placed in a general education classroom, "but it is likely that he will require a small size classroom with a low student to teacher ratio." The IEP developed by the MDT on August 26th prescribed full-time special education services and one hour per week of behavioral support services. The prescribed services exceeded the services recommended by Dr. ██████.

The IEP included goals and objectives in mathematics; reading; and emotional, social, and behavioral development.³⁸ The MDT prescribed 25.5 hours of specialized

³⁶ 458 U.S. 176 (1982).

³⁷ *Id.* at 181-82.

instruction per week and one hour per week of behavioral support services, and³⁹ The MDT determined that Petitioner did not require ESY. Petitioner offered no testimony critical of the IEP goals and objectives. Petitioner was represented at the MDT meeting by his mother and Petitioner's counsel. Petitioner's mother was not available to testify at the hearing due to a medical emergency. Thus, no testimony was offered on Petitioner's behalf regarding any objections raised at the August 26th MDT meeting concerning IEP goals and objectives.

In the absence of any evidence of deficiencies in the goals and objectives, and in light of the fact that the services prescribed exceeded those recommended by Dr. [REDACTED] 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"),⁴⁰ 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.⁴¹

Thus, Petitioner's burden is to show that DCPS has failed to provide an environment in which Petitioner can derive educational benefit.

Petitioner's foster father and guardian *ad litem* insist that Petitioner's needs can be met only at a private special education school in which the class size is limited to five students. Dr. [REDACTED]'s May 27th evaluation made no such recommendation. In fact, his evaluation stated that the interventions he recommended "could be initiated in the regular classroom." However, in the hearing, without benefit of a reevaluation, Dr. [REDACTED] testified that Petitioner should be placed in a class with a 5:1 student-to-teacher ratio. Dr. [REDACTED]

³⁸ DCPS No. 7 at 2-5.

³⁹ *Id.* at 6-7.

⁴⁰ 458 U.S. 176 (1982).

⁴¹ *Rowley, supra*, at 200-01.

also testified that Petitioner should be in a class with no more than five other children. However, Dr. [REDACTED], the [REDACTED], examined Petitioner to determine whether Petitioner should be admitted to [REDACTED]. The maximum class size at [REDACTED] is five. While the Hearing Officer does not question Dr. [REDACTED] expertise, his recommendation is influenced by [REDACTED] model of managing emotionally disturbed students in classes of no more than five students.

Petitioners' representatives' primary objection to Monroe is that Petitioner would be placed in an "ED Cluster Program" and all of the students in his class would be classified ED. Petitioners' representatives insist that Petitioner's primary disability is his ADHD, and placing him in a class of ED students will reinforce inappropriate behaviors exhibited by his classmates. The representatives are also concerned that the classmates at Monroe would not be at Petitioner's academic level.

Petitioner's eligibility is not based on a learning disability. And although he has been diagnosed with ADHD, the behavioral issues that led Ms. [REDACTED] to refer him to the SST, and for the SST to refer him for evaluation, were only marginally related to inattentiveness or distractibility. Petitioner was referred for evaluation for persistent antisocial behavior including aggressiveness towards peers and staff, disobedience and insubordination, inappropriate sexual behavior, and profanity.⁴² Petitioner's emotional instability was confirmed by Dr. [REDACTED].

A diagnosis of Adjustment Disorder with Disturbance of Emotions and Conduct also accounts for how his disrupted placement with his mother has exacerbated his emotional and behavioral control problems; he has reportedly been suspended from school on several occasions for various actions such as inappropriately touching peers and aggression.

Thus, DCPS' proposal to place Petitioner in a program for ED students is consistent with Petitioner's history of behavior and with Dr. [REDACTED] findings and diagnosis.

Petitioner's foster father testified that he was denied enrollment at [REDACTED] by telephone at the beginning of the school year due to the lack of an IEP. The IEP was developed immediately thereafter on August 26th, but Petitioner's foster father made no subsequent effort to enroll Petitioner at [REDACTED]. Petitioner's foster father testified that he visited [REDACTED] for the first time two weeks before the hearing, for a total of fifteen minutes. Thus, the foster father elected to have Petitioner remain at [REDACTED] where he receives no special education services, rather than to enroll Petitioner at [REDACTED], where he would receive full-time services.

If Petitioner were to attend [REDACTED], he would be in a self-contained class of students in grades one through three. There are currently six students in the class, aged 7 to 9. The teacher is certified in special education. There is a teacher's assistant and a dedicated aide in the classroom. The maximum class size is 10. All of the students have intervention behavior plans. Thus, with the presence of teacher's assistant and dedicated

⁴² P.Exh. No. 7.

aide, the classroom environment is conducive for Petitioner to receive considerable individual attention.

Petitioner's representatives' objection to [REDACTED] is undercut by their preference for ECC as a placement. Like the program at [REDACTED], the [REDACTED] is for students whose primary disability is ED. All of Petitioner's potential classmates at ECC have a primary disability of ED. The maximum class size at ECC is five; the current class size at [REDACTED] is six. The age range at ECC is 6-8; the current age range at Monroe is 7-9.

While comparison of the programs is instructive, the Hearing Officer's obligation is to determine whether Petitioner has established the inappropriateness of the program at [REDACTED]. DCPS has the obligation to place Petitioner in the least restrictive environment in which his needs can be met:

The Act requires that the schools ensure that: To the *maximum extent appropriate*, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .⁴³

Petitioner does not present as a student who is incapable of learning in a public school environment. He has no learning disability. His cognitive potential is average, and his academic functioning is average to above average. Thus, Petitioner's eligibility is based upon the premise that if his behavior can be managed more effectively, Petitioner could perform even better than his current average to above average level. The Hearing Officer is not persuaded that this behavior management cannot be effectuated in a self-contained class of seven students in a class with a certified teacher, a teacher's assistant, and a dedicated aide, at [REDACTED]. As discussed above, the differences between the environments at Monroe and ECC are marginal. The biggest difference is that [REDACTED] is a private school, while [REDACTED] is public. In light of IDEIA's requirement for placing students in the least restrictive environment, DCPS' proposed placement was consistent with Petitioner's educational needs.

Finally, Petitioner's counsel argued that DCPS' placement decision was fatally flawed because it was made before the development of the IEP. 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."⁴⁴ Thus, a placement determination made by a DCPS official or a DCPS entity that does not include the

⁴³ *Gillette v. Fairland Board of Education*, 932 F.2d 551, 553 (6th Cir. 1991).

⁴⁴ 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).

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 this case, however, it cannot fairly be argued that the placement was not based on Petitioner's educational needs. The MDT on June 12, 2009 reviewed Dr. [REDACTED] evaluation and concluded that Petitioner required a full-time special education program for ED students. As discussed above, this conclusion was consistent with Petitioner's history and Dr. [REDACTED] evaluation.

DCPS is bound by the following statutory placement priority:

Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.⁴⁵

Thus, if there is a public facility that can meet a student's needs, DCPS must place the child in such facility rather than a private facility.

At the time the eligibility determination was made, [REDACTED] was already aware that DCPS had a full-time ED program at [REDACTED] that could meet Petitioner's needs. While [REDACTED] was in a position to propose [REDACTED] at that time, Petitioner's guardians still had the right to participate in the placement determination. This would entail DCPS providing a description of the program at [REDACTED] and allowing a thorough discussion of any concerns the guardians might have about the proposed placement. DCPS failed to provide this opportunity either at the June or August MDT meetings. There was no representative from [REDACTED] at either meeting, and there was no DCPS representative at either meeting knowledgeable of the program at Monroe.

Although DCPS violated the guardians' procedural rights, the violation did not prejudice Petitioner's substantive rights. The evidence presented by the parties established that Petitioner required a full-time special education placement. DCPS placed Petitioner at [REDACTED] based upon the MDT's determination that a full-time ED program was appropriate for Petitioner. Petitioner failed to meet his burden of proving that the program at [REDACTED] cannot meet his needs. Moreover, the program advanced by Petitioner as an alternative differs only marginally from the program proposed by Petitioner. Even though DCPS committed a procedural violation, absent proof that its

⁴⁵ D.C. Code §38-2561.02(c).

proposed placement would not meet Petitioner's needs, the Hearing Officer could not justifiably award the guardians the placement they prefer:

Although the IDEA guarantees a free appropriate education, it does not, however, provide that this education will be designed according to the parent's desires... ("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."). "Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act."⁴⁶

For all of the reasons discussed above, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS 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 7th day of November 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: November 7, 2009

⁴⁶ *Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 140 (D.D.C. 2002), citing *Rowley*, 458 U.S. at 207, and *Kerkam v. McKenzie*, 862 F.2d 884, 886 (D.C. Cir. 1988).

APPENDIX A

Docket No. 2009-1216

Student Attending: [REDACTED]

Student	[REDACTED]
[REDACTED]	[REDACTED]
Student ID No.	[REDACTED]
[REDACTED]	[REDACTED], Mother
[REDACTED]	[REDACTED] Foster Father
Student's/Parent's Representative	[REDACTED]
School System's Representative	[REDACTED]
[REDACTED]	[REDACTED] Director, ECC
[REDACTED]	[REDACTED] Executive Director, ECC
Clinical Psychologist	Dr. [REDACTED]
[REDACTED]	[REDACTED] E.S.
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

[REDACTED]



[REDACTED]

OSSE
STUDENT LEARNING OFFICE
2009 NOV -9 AM 10: 13

[REDACTED] **
** This email was sent by Terry Banks <mailto: terry.banks2@dc.gov> **

The HOD is attached.

...
Terry Banks