

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

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Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: April 28, 2009
)	
Petitioner,)	Prehearing Order: May 27, 2009
)	
v.)	Interim Order: June 9, 2009
)	
THE DISTRICT OF COLUMBIA)	Hearing Date: June 11, 2009
PUBLIC SCHOOLS)	
)	Docket No.
Respondent.)	
)	
Student Attending:)	
School)	

STUDENT HEARING OFFICE
2009 JUN 22 PM 3:43

HEARING OFFICER'S DECISION

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¹ Personal identification information is provided in Attachment A.

Jurisdiction

This hearing was conducted in accordance with the rights established under the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia (“District” or “D.C.”) Municipal Regulations (“DCMR”); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Introduction

Petitioner is an _____ year-old student attending _____ School

On April 28, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools (“DCPS”) had failed to (1) evaluate Petitioner in all areas of suspected disability, and (2) implement Petitioner’s Individualized Education Program (“IEP”). The due process hearing was convened and completed on June 11, 2009. The parties’ Five-Day Disclosures were admitted into evidence at the inception of the hearing.²

Record

Due Process Complaint Notice dated April 28, 2009
DCPS Resolution Session Waiver dated April 29, 2009
District of Columbia Public School’s Response to Parent’s Administrative Due Process Complaint Notice dated May 12, 2009
Petitioner’s Opposition to DCPS’ Motion to Dismiss dated May 12, 2009
Prehearing Conference Memorandum dated May 27, 2009
DCPS’ Five-Day Disclosure dated May 28, 2009 (Exhibit Nos. 1-5)
Petitioner’s Five-Day Disclosure dated May 28, 2009 (Exhibit Nos. 1-11)
Letter Motion for Continuance dated June 3, 2009
Interim Order dated June 9, 2009
Attendance Sheet for hearing conducted on June 11, 2009
CD-Rom of Hearing conducted on June 11, 2009
Petitioner’s Post Hearing Memorandum of Law on the Issue of Timeliness of Evaluations dated June 12, 2009

Witnesses for Petitioner

Petitioner’s Mother

² DCPS objected to the admission of Petitioner’s Exhibit No. 12, a letter written after the filing of the *Complaint*. The Hearing Officer deferred ruling on its admissibility until specifically offered by Petitioner’s counsel. Petitioner’s counsel did not later offer the exhibit into evidence.

Witnesses for DCPS

None

Findings of Fact

1. Petitioner is an _____ year old student attending

2. On November 13, 2008, when Petitioner attended the _____ grade at _____ School in Fairfax County, Virginia, that school developed Petitioner's IEP. The Multidisciplinary Team ("MDT") classified Petitioner with multiple disabilities: other health impaired ("OHI"), emotional disturbance ("ED"), and learning disability ("LD").⁴ The MDT prescribed 15.5 hours per week of service in a special education setting, four hours per month of speech and language services, and two hours per month of counseling services.⁵

3. The November 13, 2008 IEP included goals and objectives only for "Social/Emotional: Appropriate school behaviors" and "Social Emotional: Interactions." The MDT determined that Petitioner did not require specialized instruction in any subject matter:

Based on QRI (Qualitative Reading Inventory) results in the Fall of 2008 he was instructional on grade level five for reading fluency, decoding and comprehension. The DRA (Developmental Reading Assessment) results indicate that he is instructional on grade level. Based on these results, the IEP team discussed and agreed that a reading goal is no longer needed. The IEP team further discussed his oral communication needs and agreed that he no longer needs a goal for answering WH questions because of the results of his reading assessments. He continues to require support for articulation because he continues to make errors on s/z/ and r sounds in spontaneous speech. His language needs can be addressed in the context of the reading and writing process. His language needs will be informally monitored...⁶

4. Petitioner enrolled at _____ on December 2, 2008.⁷

³ *Complaint* at 1.

⁴ Petitioner's Exhibit ("P.Exh.") No. 3-1.

⁵ P.Exh. No. 3-7.

⁶ P.Exh. No. 3-4. Petitioner's IEP permitted services to be provided "in general education on a regularly scheduled basis," "in special education setting on an intermittent basis," and "in special education setting on a regularly scheduled setting." P.Exh. No. 3-6. However, the IEP prescribed no specific amount of time for the "Areas of Need:" Appropriate School Behavior, Interactions, and Communication/Articulation. *Id.*

⁷ Testimony of Petitioner's mother.

5. DCPS convened an MDT meeting on February 26, 2009. The MDT developed an IEP that prescribed two hours per week of specialized instruction in reading, one hour per week of speech services, and 30 minutes per week of psychological counseling.⁸

6. The February 26th MDT developed a Student Evaluation Plan (“SEP”) that ordered the following evaluations for Petitioner: psychological, speech and language, social history, educational, and a behavioral rating.⁹ Petitioner’s general education teacher reported that Petitioner “is on grade level in reading, math, written expression. Behavior – does not present with severe behavior issues, a couple of minor issues.” The school social worker confirmed that Petitioner evinced no behavioral problems: “[a]t this time he has not had behavioral concerns with [Petitioner]. [Petitioner] is at times sad about his father. [Petitioner] stated he enjoys the school, involved with school projects.”¹⁰ The math teacher reported that [Petitioner] has never walked out of the classroom, does not see behavior issues that were exhibited from previous school. [Petitioner] participates well in school.”¹¹ The special education teacher reported that she “Has not seen behaviors that were exhibited in the Fairfax County Public Schools. He is friendly with the other children, all the children enjoy each other’s company, nonstructured environments behavior is fine and in the classroom.”¹² The MDT concluded that Petitioner’s needs could be met in the general education environment, and agreed to reconvene upon the completion of the evaluations.¹³

7. Petitioner’s mother expressed her disagreement with the IEP: “Waiting for evaluations/do not agree.”¹⁴ However, she conceded that he was performing on grade level when he left Fairfax, and she is more concerned with his behavioral progress than his academic progress.¹⁵

Conclusions of Law

Failure to Evaluate in All Areas of Suspected Disability

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.¹⁶ No single procedure should be used as the sole criterion for determining

⁸ P.Exh. No. 4-1. The Meeting Notes indicated that the specialized instruction would be for reading. P.Exh. No. 4-7

⁹ P.Exh. No. 4-4.

¹⁰ *Id.*

¹¹ P.Exh. No. 4-5.

¹² *Id.*

¹³ P.Exh. Nos. 4-7 and 4-8.

¹⁴ P.Exh. No. 4-1.

¹⁵ Testimony of Petitioner’s mother.

¹⁶ 34 C.F.R. §300.304(c)(4).

whether a child is a child with a disability and for determining an appropriate educational program for the child.¹⁷

Petitioner's counsel argued in a post-hearing memorandum of points and authorities that DCPS was obligated to complete its initial evaluations of Petitioner within sixty days of the February 26, 2009 MDT meeting pursuant to 20 U.S.C. Section 1414(a)(1)(A) and (C). However, that provision permits states to establish different timeframes for completing the evaluations. Counsel then argued that D.C. Code Section 38-2501, which provided a 120-day deadline for completion of initial evaluations, has been repealed. Counsel further argued that D.C. Code Section 38-2561.02, which now provides a 120-day deadline, applies only to placement of students with disabilities in nonpublic schools. The clear wording of the provision belies counsel's argument:

Assessment and placement of a student with a disability -- General

(a) 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.

(b) DCPS shall place a student with a disability in an appropriate special education school or program in accordance with this chapter, and the IDEA.

(c) 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.

The provision's heading indicates that it has "general" application to assessments and placement. Counsel's argument that a statutory provision that specifically prioritizes placement in DCPS schools and DCPS public charter schools, applies only to children in nonpublic schools, is specious at best. When the *Complaint* was filed on April 28, 2009, the 120-day period that began on February 26th had not expired. Therefore, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS failed timely to evaluate Petitioner in all areas of suspected disability.¹⁸

¹⁷ 34 C.F.R. §300.304(b)(2).

¹⁸ At the hearing, counsel for DCPS indicated that the evaluations ordered in the February 26th SEP had been completed. The parties agreed to meet on June 16th to review the evaluations.

Failure to Implement Petitioner's IEP

“If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency-- (1) Conducts an evaluation... and (2) Develops, adopts, and implements a new IEP, if appropriate...¹⁹

Petitioner's counsel argued that DCPS failed to implement Petitioner's Fairfax County IEP by failing to provide 15.5 hours of specialized instruction per week. However, Petitioner's Fairfax County IEP did not require 15.5 hours of specialized instruction. Rather, it required 15.5 hours in a special education environment to address his behavioral issues. The IEP included no academic goals and objectives, and the meeting notes of the November 13, 2008 MDT meeting clearly indicated the MDT's determination that Petitioner required no further specialized instruction. “His language needs will be informally monitored...”²⁰ The IEP included no specific amount of time for any particular specialized instruction and indicated, ambiguously, that Petitioner's social/emotional needs could be met either in a general education or special education environment. Thus, it is not clear to the Hearing Officer exactly what services Fairfax intended to provide to Petitioner other than the two hours per month of counseling services and four hours per month of speech services.

When DCPS convened a MDT meeting on February 26, 2009, it prescribed two hours per week of specialized instruction and the identical amount of related services prescribed in Petitioner's Fairfax IEP. The meeting notes indicated that the two hours of specialized instruction was to be in reading. Since the Fairfax IEP clearly terminated special education reading services, the two hours prescribed by _____ was an increase, not a decrease in prescribed services. Petitioner's only witness, Petitioner's mother, offered no persuasive testimony that DCPS has not provided the related services prescribed by Fairfax and DCPS. She conceded that DCPS has provided the prescribed speech services, and testified that did not know whether or not know whether DCPS has provided the two hours per month of counseling services prescribed in the two IEPs. The Hearing Officer concludes that Petitioner has failed to meet his burden of proving that DCPS has failed to implement his Fairfax IEP.

Even if Petitioner had met his burden, there is no showing that Petitioner has suffered any educational harm.²¹ According to the _____ staff, Petitioner is performing at grade level and his behavior is not interfering with his academic progress. The meeting notes of the February 26th MDT meeting reflect the staff's unanimous perception that

¹⁹ 34 C.F.R. §300.323(f).

²⁰ P.Exh. No. 3-4.

²¹ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006); *Catalan v. District of Columbia*, 478 F.Supp. 2d 73, 75-6 (D.D.C. 2007).

whatever negative behaviors Petitioner exhibited in Fairfax, he was is not experiencing behavioral problems at Petitioner's mother conceded that Petitioner was performing at grade level when he left Fairfax, and she stated that she was now more concerned about his behavior than his academics. According to the meeting notes, Petitioner's behavior is under control. Thus, even if DCPS failed to provide 15.5 hours of *access* to unspecified special education services in a special education environment, Petitioner has suffered no educational harm as a result of the deprivation.

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 21st 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 21, 2009