

**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: March 12, 2009
)	
Petitioner,)	Prehearing Order: April 2, 2009
)	
v.)	Hearing Dates: April 15, 2009
)	May 11, 2009
THE DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS)	Docket No.
)	
Respondent.)	
)	
Student Attending:)	
)	
Program)	
)	
Home School:)	
)	
School)	

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STUDENT HEARING OFFICE
2009 MAY 22 AM 9:12

HEARING OFFICER'S DECISION

Counsel for Petitioner: Christopher L. West, Esquire
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Counsel for DCPS: Daniel Kim, Esquire
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¹ Personal identification information is provided in Attachment A.

Jurisdiction

This proceeding was conducted 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 _____ year-old student attending whose current placement is _____ School. On February 10, 2009, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools (“DCPS”) had failed to (1) comply with the relevant regulatory procedures in a manifestation determination, (2) determine that Petitioner’s behavior, resulting in a suspension, was a manifestation of his disability, (3) provide an appropriate placement, and (4) conduct a functional behavior assessment (“FBA”). At the Prehearing Conference on March 30, 2009, Petitioner’s counsel advised the Hearing Officer that Petitioner has been unilaterally placed at _____ a private special education school. The Hearing Officer issued a Prehearing Order delineating the issues to be adjudicated as follows:

- DCPS’ alleged failure to comply with regulatory procedures

Petitioner alleges that DCPS failed to apply the provisions of 34 C.F.R. Section 300.530(e)(1) in a manifestation determination meeting on March 5, 2009. DCPS asserts that it applied the appropriate regulatory standard in determining that Petitioner’s behavior was not a manifestation of his disability.

- DCPS’ failure to determine that Petitioner’s behavior was a manifestation of his disability

Petitioner, who has been classified with a learning disability (“LD”), was suspended for an incident that took place on February 19, 2009. Petitioner alleges that his evaluations and the fact that his Individualized Education Program (“IEP”) includes social/emotional goals, support a conclusion that the behavior he exhibited on February 19th was a manifestation of his disability. DCPS asserts that Petitioner’s primary disability is LD, receives a relatively low level of specialized instruction, and that his behavior on February 19th was unrelated to his disability.

- DCPS' alleged failure to provide an appropriate placement

Petitioner was suspended for the remainder of the 2008-2009 school year on February 24, 2009 and placed at [redacted]. Petitioner alleges that if DCPS had correctly determined that Petitioner's behavior was a manifestation of his disability, it would have been required to maintain Petitioner's placement at [redacted]. In that event, [redacted] would have convened a placement meeting that would have resulted in a placement that adequately meets Petitioner's needs. DCPS asserts that the determination that Petitioner's behavior was not a manifestation of his disability was appropriate.

- DCPS' alleged failure to conduct an FBA

Petitioner alleges that despite Petitioner's having been suspended for more than 10 school days, DCPS has not conducted an FBA. DCPS asserts that it referred Petitioner for an FBA at a Multidisciplinary Team ("MDT") meeting on March 5, 2009. Since the *Complaint* was filed one week later, DCPS asserts that this allegation is premature.

The due process hearing was convened and completed on May 11, 2009. The parties' Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing.²

Record

Due Process Complaint Notice dated March 12, 2009
District of Columbia Public School's Response to Parent's Due Process Complaint Notice dated March 24, 2009
Prehearing Order dated April 3, 2009
Interim Order dated April 27, 2009
DCPS' Five-Day Disclosure dated April 8, 2009 (Exhibits 1-9)
Petitioner's Five-Day Disclosure dated April 8, 2009 (Exhibits 1-17)
Attendance Sheet dated May 11, 2009
CD-Rom of Hearing conducted on May 11, 2009

² The Hearing Officer denied Petitioner's *Motion for Default and Summary Judgment* dated April 23, 2009 and *Motion to Preclude DCPS Placement dated Evidence of May 8, 2009* at the conclusion of the parties' opening statements.

Witnesses for Petitioner

Petitioner's Aunt
Petitioner

Director of Admissions,
Carolyn Miskel, Educational Advocate, James E. Brown & Associates

Witnesses for DCPS

None

Findings of Fact

1. Petitioner is an _____ year-old student attending _____

2. On July 31, 2008, Dr. Dellena M. Cunningham of Interdynamics, Inc. completed a Comprehensive Psychological Evaluation of Petitioner. Dr. Cunningham diagnosed Petitioner with Dysthymic Disorder and a Learning Disorder, NOS.⁴ Dr. Cunningham's findings and recommendations, *inter alia*, include the following:

A review of his records indicates that [Petitioner] received several admonishments and suspensions for being out of his classes during the 2007-2008 school year. He failed all classes. [Petitioner] has been receiving specialized educational services since the 8th grade under the disability code Learning Disabled.

[Petitioner] was cooperative with the interview portion of the evaluation. However, his testing behavior was marked by his tendency to go to sleep when faced with difficult items, or to push items away from him and give up easily on tasks. His initial testing session had to be discontinued because he could not maintain wakefulness. Testing on a subsequent date elicited the same avoidance behaviors. At this time, [Petitioner] is performing within the Extremely Low range of intellectual functioning, as measured on the WAIS-III. [Petitioner] demonstrated significant difficulties in working memory and processing speed. His performance on some subtests, as well as VMI suggest that he has difficulty processing complex visual information or forming spatial images without making errors. These deficits imply longstanding problems in academic settings and will need to be addressed in any educational program developed for him. At this time, [Petitioner] is performing at 2nd grade (Math), 4th grade (Oral Language) and 5th grade (Reading) levels on Achievement measures.

³ *Complaint* at 1.

⁴ Petitioner's Exhibit ("P.Exh.") No. 11 at 11.

[Petitioner's] attitude toward school and his own capability are areas of concern for him. The more 'failures' he experiences, the more certain he becomes of his own inadequacy. He would rather not demonstrate his perceived incompetence and achieves this end by not finishing classroom assignments, leaving his classroom to meet with friends or avoiding being called on by his teachers by 'falling asleep...'

[Petitioner] rates himself as Clinically Significant for Depression and current affective testing supports that self-assessment. The data suggest that dysthymia is an integral part of this adolescent's current life. He exhibits a cluster of symptoms in which feelings of usefulness, dejection, pessimism and discouragement are intrinsic components. Preoccupation with concerns about his social adequacy and personal worthiness and pervasive self-doubts are all part of a constellation of features of [Petitioner's] psychological makeup. He has learned from past experience that good things do not last and that the positive feelings and attitudes of those from whom he seeks love will probably end abruptly and be followed by disappointment, anger and rejection. It is imperative that any intervention include a therapeutic component that will directly challenge this cognitive assumption. [Petitioner] would benefit more from support for his emotional functioning which, when lifted, would increase his academic performance. He will not be able to tolerate his academic challenges unless his emotional reality is also addressed...

Recommendations:

[A] psychiatric consultation is recommended to assess the efficacy of medications to address his current mood state. Because of [Petitioner's] psychiatric history, his mood should be monitored periodically to forestall suicidal ideation and intentions.

Individual therapy is recommended to assist [Petitioner] in addressing issues of his self-worth and competency. He should also use this opportunity to explore his desires for nurturing parental figures and his ambivalence about dependency relationships with the family giving him care and shelter.⁵

3. DCPS convened a Multidisciplinary Team ("MDT") meeting on October 9, 2008. The MDT updated Petitioner's Individualized Education Program ("IEP"): it classified Petitioner with a Specific Learning Disability ("SLD") and prescribed 15 hours per week of specialized instruction, one hour per week of behavioral support services, and 30 minutes per week of speech and language services. Petitioner had three representatives at the meeting including his aunt and an educational advocate from James E. Brown & Associates.⁶ There was no discussion in the MDT meeting regarding

⁵ *Id.* at 9-11.

⁶ P.Exh. No. 8 at 1, 4-5.

Dr. Cunningham's findings and recommendations concerning Petitioner's emotional fragility.⁷

4. On February 19, 2009, DCPS convened a meeting to discuss an incident in which Petitioner fought with another student. The staff threatened to send Petitioner to if he continued to get into fights.⁸

5. On February 23, 2009, Petitioner was suspended for 83 days and his placement was changed to The behavior that resulted in the suspension was described as follows:

[Petitioner] was involved in another altercation in the cafeteria on Thursday the 19th of February. A friend of [Petitioner's] was struck by another student on the head in retaliation for an incident off campus the previous week. [Petitioner] then entered the altercation on his own accord and jumped on top of a cafeteria table yelling about what had happened. The administrators in the cafeteria said that he was not listening to get down and stop, making the situation more heated. The other two boys involved stated the same when asked about [Petitioner's] participation. [Petitioner] said he had to get involved because it was his friend and he has to protect his friends. The student that instigated the altercation said that [Petitioner] was part of a group of students that had tried to jump him off campus earlier that week over [a] "hood beef." This [is] the last in a series of incidents that involve hood issues with [Petitioner].⁹

6. DCPS convened an MDT on March 5, 2009 to conduct a manifestation determination regarding Petitioner's February 23, 2009 suspension. The MDT noted that this was the second incident involving Petitioner in a relatively short time period. The MDT also noted that Petitioner "is a special education student with a learning disability. [Petitioner] receives 7 ½ hours of specialized instruction and 30 minutes of counseling. [Petitioner] has refused to attend his counseling, even though Mr. Walsh has made the attempts of going to look for [Petitioner] and escort him to his office. The team members determined that this infraction was not a manifestation of his disability. The infractions that [Petitioner] continues to be involve in is due to the neighborhood issues." The MDT determined that Petitioner's suspension would be for forty-five days and that he would be placed at The team also determined that Petitioner should receive a new functional behavior assessment ("FBA") and a new intervention behavior plan ("IBP"). Petitioner's stepfather objected to the manifestation determination and stated that he would not send Petitioner to

7. The MDT on March 5, 2009 relied on a DCPS form, "Manifestation Determination," that directed the MDT to find that the student's behavior was not a

⁷ P.Exh. No. 9.

⁸ Testimony of Petitioner' aunt and Petitioner.

⁹ P.Exh. No. 17.

¹⁰ DCPS Exh. No. 2.

manifestation of his disability if (1) The student understood the impact and consequences of the behavior subject to disciplinary action, and (2) The student had the ability to control the behavior subject to disciplinary action.¹¹

8. Petitioner enrolled at _____ upon his suspension from _____ is a private school offering special education and vocational services to students between the ages of 15 and 21. It has a certificate of approval from OSSE. _____ currently has 22 students. The average class has eleven students. Each class is led by a teacher certified in special education who is assisted by an aide. _____ employs two licensed clinical therapists who provide psychological counseling. Since enrolling at _____ Petitioner has attended classes much more regularly than he did at _____. He has willingly and regularly participated in psychological counseling sessions.¹²

Conclusions of Law

Inappropriate Disciplinary Procedures

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local education agency ("LEA"), the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or (2) if the conduct in question was the direct result of the LEA's failure to implement the IEP.¹³

If the MDT determines that the conduct was a manifestation of the child's disability, the MDT must either (1) conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (2) review the existing behavioral intervention plan, and modify it, as necessary, to address the behavior. The LEA must also return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.¹⁴

The MDT's determination on March 5, 2009 that Petitioner's behavior was not a manifestation of his disability was flawed. The team gave no reason for its determination. Since it mentioned that his disability was LD, one can infer that the MDT believes that the misbehavior of an LD student is never a manifestation of a learning disability. The analysis cannot be this peremptory. The appropriate inquiry is whether "the conduct in question was caused by, or had a direct and substantial relationship to, the child's

¹¹ P.Exh. No. 7 at 3.

¹² Testimony of Mr. Davis.

¹³ 34 C.F.R. §300.530(e)(1).

¹⁴ 34 C.F.R. §300.530(f).

disability, or (2) if the conduct in question was the direct result of the LEA's failure to implement the IEP." Consequently, it is incumbent on the MDT to review the Petitioner's behavior throughout the school year and his IEP.

When this student's IEP was developed in November 2008, the MDT, including Petitioner's aunt and educational advocate, ignored Dr. Cunningham's analysis of Petitioner's social and emotional problems. Dr. Cunningham specifically recommended that his emotional problems outweighed his learning disability: "[Petitioner] would benefit more from support for his emotional functioning which, when lifted, would increase his academic performance. He will not be able to tolerate his academic challenges unless his emotional reality is also addressed." Dr. Cunningham also diagnosed Petitioner with dysthymic disorder and warned of suicidal ideation. The MDT made no reference whatsoever to Petitioner's emotional problems despite his history of truancy and disruptive behavior. Instead, it classified Petitioner only with a learning disability.

The March 5th MDT also conducted no analysis as to whether Petitioner's behavior was similar to previous behavior, no analysis as to whether the conduct in question had a direct and substantial relationship to his disability, or whether the conduct was the result of the failure to implement the IEP. Its only mention of his IEP was a misstatement as to Petitioner's level of services; he receives 15 hours of specialized instruction, not 7.5 as stated in the March 5th Meeting Notes. The MDT also relied on a DCPS form, "Manifestation Determination," that directed the MDT to find that the student's behavior was not a manifestation of his disability if (1) The student understood the impact and consequences of the behavior subject to disciplinary action, and (2) The student had the ability to control the behavior subject to disciplinary action. This is the standard for determining criminal insanity. It has no probative value in determining whether a student's behavior is a manifestation of a disability.

The Hearing Officer concludes that Petitioner has met his burden of proving that DCPS failed to conduct a thorough and appropriate manifestation determination. The Hearing Officer also concludes that Petitioner's behavior in the cafeteria was, in fact, a manifestation of the emotional problems identified by Dr. Cunningham that were ignored when the November 2008 MDT developed Petitioner's IEP. Consequently, DCPS improperly changed Petitioner's placement.¹⁵

Inappropriate Placement

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

¹⁵ 34 C.F.R. §300.530(f).

¹⁶ 458 U.S. 176 (1982).

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.¹⁷

As a result of its flawed manifestation determination, DCPS placed Petitioner at [redacted]. It did so without any analysis whatsoever as to whether [redacted] could meet Petitioner's educational needs. Petitioner's stepfather immediately notified DCPS that the change in placement was unacceptable and enrolled Petitioner at [redacted]. Under *Florence County School District Four v. Carter*,¹⁸ when a public school system has defaulted on its obligations under the Act, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits."¹⁹ "[O]nce a court holds that the public placement violated IDEA, it is authorized to 'grant such relief as the court determines is appropriate.' '[E]quitable considerations are relevant in fashioning relief'... and the court enjoys 'broad discretion' in so doing."²⁰

It is settled law that parents who doubt the appropriateness of an IEP or a placement may remove their child to a private school and, if due process proceedings result in a determination that they were correct, the parents would be entitled to reimbursement for the costs of the private education.²¹ In this case, Petitioner seeks reimbursement for expenses incurred as a result of his unilateral placement at [redacted]. [redacted] has a certificate of approval from OSSE. Its average class has eleven students. Each class is led by a teacher certified in special education who is assisted by an aide. [redacted] employs two licensed clinical therapists who provide psychological counseling. Since enrolling at [redacted] Petitioner has attended classes much more regularly than he did at Roosevelt. He has willingly and regularly participated in psychological counseling sessions. The Hearing Officer concludes that [redacted] is likely to confer educational benefit to Petitioner.

¹⁷ *Rowley, supra*, at 200-01.

¹⁸ 510 U.S. 7 (1993).

¹⁹ *Id.*, 510 U.S. at 11.

²⁰ *Id.*, 510 U.S. at 15-16.

²¹ *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 369 (1985).

DCPS' Alleged Failure to Conduct an FBA

Petitioner alleges that despite Petitioner's having been suspended for more than 10 school days, DCPS was obligated to conduct an FBA. DCPS asserts that it referred Petitioner for an FBA at the meeting on March 5, 2009. Since the *Complaint* was filed one week later, DCPS asserts that this allegation is premature. If an MDT determines that the conduct was a manifestation of the child's disability, the MDT must either (1) conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (2) review the existing behavioral intervention plan, and modify it, as necessary, to address the behavior. The LEA must also return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.²² In this case, although the MDT Meeting Notes on March 5th reveal that the MDT determined that Petitioner requires a new FBA, DCPS offered no testimony as to the anticipated completion date for the FBA. Therefore, the Hearing Officer will authorize an independent FBA.

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 May 2009, it is hereby

ORDERED, that DCPS shall immediately issue a Prior Notice placing Petitioner at _____ Program including transportation and all other appropriate related services.

IT IS FURTHER ORDERED, that upon the submission to DCPS of receipts, invoices, cancelled checks, or other documentation of payment, DCPS shall reimburse Petitioner's parents or NBVP for tuition and transportation expenses related to Petitioner's enrollment at NBVP for the 2008-2009 school year.

IT IS FURTHER ORDERED, that Petitioner is authorized to obtain an independent functional behavior assessment *and is not constrained by 5 D.C.M.R. Section 3027.5*. Petitioner's counsel shall provide copies of the completed assessment to the appropriate DCPS Placement Specialist and the DCPS Office of Special Education ("OSE") Legal Unit by facsimile transmission and first-class mail along with a written request to schedule the MDT meeting described below.

²² 34 C.F.R. §300.530(f).

IT IS FURTHER ORDERED, that within fifteen (15) school days²³ of its receipt of the independent evaluations, DCPS shall convene an MDT meeting to review all current evaluations, revisit Petitioner's disability classification and update Petitioner's IEP. DCPS shall coordinate scheduling the MDT meeting with Petitioner's counsel, Christopher West, Esquire.

IT IS FURTHER ORDERED, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

IT IS FURTHER ORDERED, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's counsel will contact the appropriate DCPS Placement Specialist and the DCPS OSE Legal Unit to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.²⁴

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: May 21, 2009

²³ For purposes of this order, "school days" refers to days on which classes are held during the regular school year. It does not include summer school. Thus, in the event the independent assessment is completed near to or after the end of the 2008-2009 school year, the MDT meeting shall be convened early in the 2009-2010 school year when an appropriate IEP team is more likely to be available.

²⁴ If DCPS fails to contact Petitioner's counsel to coordinate scheduling the MDT meeting by a date that would make compliance with this Order feasible, Petitioner's counsel shall initiate telephone calls and electronic correspondence to attempt to effect compliance within the timelines set out herein.