

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
STUDENT HEARING OFFICE
2012 SEP 12 PM 12:39

Parents,
on behalf of Student,¹

Petitioners,

v.

Hearing Officer: Gary L. Lieber

Case No: 2012-0421

District of Columbia Public Schools,

Respondent.

HEARING OFFICER DETERMINATION

This case was brought as a due process complaint pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended 20 U.S.C. §1400 *et seq.* and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("DCMR"). Petitioners are the father and step-mother of Student, age 19. In their due process complaint, Petitioners allege that Student was denied a Free Appropriate Public Education ("FAPE") by failing to timely conduct an initial evaluation when requested by the parents and by failing to allow a particular independent expert on autism (hereinafter "Psychologist") to participate in evaluating Student. The Parents seek a remedy that Student is an individual with a disability eligible for services under IDEA;

¹ Personal identification information is provided in Appendix A and that Appendix must be removed prior to public distribution.

that Psychologist be permitted to conduct an independent evaluation of Student at either his current placement or at a school in the District of Columbia selected by DCPS; an order mandating that an IEP be formulated and that such an IEP include Psychologist as a team member.

The Due Process Complaint was filed on June 12, 2012. The Respondent District of Columbia Public Schools filed a Response to the Due Process Complaint on June 18, 2012 in which it denied that it failed to offer FAPE to the student. On July 9, 2012, the parties conducted a resolution session: no agreement was reached at that meeting. Thereafter, on July 12, 2012, the undersigned conducted a prehearing conference and on July 13, 2012, a Prehearing Order was issued which, *inter alia*, set the date for the due process hearing for August 7, 2012. The five-day disclosures were timely filed on July 31, 2012.

The due process hearing commenced on August 7, 2012, and continued on August 10, 13, and 17. The hearing was open to the public and electronically recorded.² An interpreter was present at all times testimony was taken to aid the Step-Mother whose primary language is Spanish. The interpreter also interpreted the Step-Mother's testimony. At the hearing, Petitioners were represented by Michelle Kotler, Esquire and Carolyn Houck,

² During the August 10 hearing, the electronic recording malfunctioned and was not recording during an approximate 45 minute period. The parties agreed at the Hearing Officer's request to repeat the lost testimony and the accompanying documentary evidence. The problem repeated itself on August 17 for a shorter period of time. Again, with the parties and the witness' cooperation, the testimony and any documentary evidence was repeated. The Hearing Officer is satisfied that the evidence that was originally lost was recaptured in the subsequent testimony and that no party was prejudiced. In that respect, no party has claimed that they were prejudiced by these unfortunate technological snafus.

Esquire and Respondent was represented by Tanya Chor, Esquire and Maya Washington, Esquire.

The Petitioner called the following witnesses: Special education teacher (hereinafter "SETI"); the before mentioned Psychologist, expert witness; Step-Mother; former educational advocate for Attorney Houck (rebuttal) and a second special education teacher (hereinafter "SETII"). Step-Mother also gave short rebuttal testimony.

DCPS called the following witnesses: DCPS Compliance Case Manager; Acting Program Manager, Resolution Team; DCPS Program Manager Residential; and DCPS Applied Behavior Analysis Coordinator-Autism Program.

The following exhibits were admitted into evidence: Petitioners' Exhibits 3 through 19, 22, 23, 24, 27, 28, 32, 33, 35, 37, 38, 39, 45, 46, 47, 48. Respondent's Exhibits 1, 2, 3, 4, 6, 8 through 21 (including 8A, 18A and 20A), 25A, 29, 34, 35, 37, 43, 44, 46, 47, 48, 49, 50, 56, 57, 58. There was also a Hearing Officer's Exhibit introduced in the record that contained five exhibits constituting those formal pages not appearing in either party's proposed exhibits.

JURISDICTION

This Hearing Officer has jurisdiction pursuant to IDEA, 20 U.S.C. §1415, the statute implementing regulations at 34 C.F.R. §§300.511 and 300.513 and the District of Columbia Code of Municipal Regulations at DCMR §§5-3029 and 5-3030. The Chief Hearing Officer granted a joint motion to extend the deadline

for the Hearing Officer's Determination from August 26, 2012 to September 14, 2012 due to the length of the case and the preference of the parties to file post-hearing briefs which were not feasible in the absence of the extension.

PRIOR HEARING OFFICER'S DETERMINATION

On November 28, 2011, Hearing Officer Peter B. Vaden issued a Hearing Officer's Determination in Case No. 2011-0935 (hereinafter "Vaden HOD"), involving the identical parties. The issues in that case were as stated in the HOD (at p. 4).

Whether DCPS has denied Student, an alleged interstate transferee, a FAPE by neither providing IEP services comparable to those described in Student's May 25, 2011 New Jersey IEP nor developing and implementing a new IEP for Student; and

Whether DCPS is denying Student a FAPE for failing to provide him an appropriate residential placement.³

Hearing Officer Vaden dismissed the complaint on the basis that Petitioner failed to establish that he was a legal resident of the District of Columbia, a condition precedent to receiving benefits and services from the District of Columbia Public Schools under IDEA.

STATEMENT OF THE ISSUES

As stipulated to in the Prehearing Order of July 13, 2012, the issues in this case are as follows:

³ Hearing Officer Vaden's HOD is R. Exh. 3.

1. Whether Respondent failed to provide a FAPE by not convening an MDT meeting to review DCPS' assessment results and develop an IEP?⁴
2. Whether Respondent failed to provide FAPE by refusing to permit an IEP team member of the parent's choice to observe the student in a classroom setting?
3. Whether Respondent failed to provide FAPE by refusing to permit an Independent Educational Evaluation ("IEE") at private expense?

FINDINGS OF FACT

1. Student is an adult aged 19 years old. P. Exh. 4.⁵
2. Student was born in Lima, Peru. He came to the United States with his birth mother in June 2006. They settled in the New York City-New Jersey area. Student attended the Therapeutic School in New York City from January through May 2008. In 2008, his birth mother was incarcerated and Student became a ward of the State of New Jersey through its Division of Youth and Family Services in mid-2008. This agency then placed Student in the _____ School in _____, _____ (hereinafter "Residential School"). The Residential School is a residential facility that serves children and adults with disabilities. P. Exh. 5; Testimony of Step-Mother.

⁴ Two other issues were listed in the Prehearing Order as issues originally raised by the Due Process Complaint. However, Petitioner withdrew those claims and any request for an applicable remedy during the proceedings. Those issues were: "Whether _____ High School is an appropriate placement for the student" and "Whether DCPS failed to provide FAPE by refusing to accept and implement an out-of-state IEP." Accordingly, those questions will not be addressed by this HOD.

⁵ Petitioner's Exhibits shall be designated as P. Exh. ____ and Respondent's Exhibits shall be designated as R. Exh. _____. If a page within an exhibit is specifically referenced, it shall be referenced as for example, P. Exh. __, p. ____.

3. Throughout his life, Student has been disabled as defined by IDEA. He has been diagnosed with autism spectrum disorder, intellectual disability and ADHD. He cannot express himself verbally. He can engage in simple picture identification exercises. He has limited attention span and cannot engage in many of the daily living tasks without some varying degrees of assistance. He is prone to tantrums and unless watched on a continuous basis is capable of running away. He engages in self-biting on a somewhat regular basis. On more than one occasion his step-mother has kept him from running away or acting in an aggressive manner by tying her belt to his belt. Testimony of Psychologist and Step-Mother.

4. Since mid-June 2008, Student has been a resident of the Residential School which is out of state. No representative of this school testified. It is clear from the numerous documents relating to Student from the Residential School that were introduced into the record, that the Residential School considered Student as a student eligible for benefits and services under IDEA. These documents included various annual evaluations, a Behavior Intervention Plan, Individual Education Plan, Psychological Assessments and an Individual Service Plan. P. Exhs. 5-8, 19, 27, 37; R. Exh. 29.

5. Petitioner Father is the biological father of Student. P. Exh. 10. Father married Step-Mother in 2000. Testimony of Step-Mother. Birth mother was deported to Peru in 2010. P. Exh. 5, p. 2.

6. Since at least January 2011, Petitioners have had their principal place of residence in the District of Columbia. Testimony of Step-Mother.

7. By Order of the Superior Court of New Jersey, Chancery Division, on July 19, 2011, legal custody was awarded to Father. P. Exh. 12.

8. The Petitioners desired that Student physically reside closer to them. Thus, in July 2011, Petitioners first initiated contact with DCPS seeking information about placement of Student under DCPS' control and supervision. DCPS forwarded enrollment information to the Petitioners advising them to enroll their Student in their neighborhood school. DCPS further advised Petitioners that once Student was enrolled, and identified as a student with a disability under IDEA, DCPS "will make a recommendation as to school location." Testimony of Step-Mother and P. Exh. 11.

9. Although involved from time to time, the father was out of the country regularly in connection with his employment. Consequently, the job of advancing the enrollment process fell to Step-Mother. Step-Mother's English is limited and the process was not easy for her. Nevertheless, in August 2011, she went to _____ High School, the neighborhood school to provide those documents that she was advised would be responsive to demonstrate that Petitioners were residents of the District of Columbia and that Student was eligible for benefits and services under IDEA. Among other things, she brought various IDEA related reports from the Residential School, court

documents regarding custody and such papers as utility bills under their name to demonstrate residence. Testimony of Step-Mother; P. Exhs. 4 through 10.

10. Student was "enrolled" in _____ High School in August 2011. However, parents did not physically relocate him to Washington, DC as they believed it would be impossible for him to be schooled in a non-residential facility. Thereafter, _____ High School Staff began making automated calls to Petitioners' residence stating that Student is not at school and is otherwise a truant. Testimony of Step-Mother. By mid-September, DCPS deemed Student as withdrawn for the failure to attend class. P. Exh. 16.

11. Thereafter, Petitioners filed the first of several Due Process Complaints in this jurisdiction. As a result thereof, on September 28, 2011, a Resolution Session was conducted. No resolution was reached although DCPS did craft a written Settlement Agreement. A document purporting to be a one page DCPS form entitled, "Prior to Action Notice" was admitted into evidence. DCPS witnesses sought to disown this form, asserting that the form was no longer used and that no person in authority prepared the form. In substance, boxes were marked that indicated a) that the Student is eligible for special education services "as a student with Intellectual Disability (ID) and Autism (AU)" and b) that the Student's placement is being changed from the Residential Educational Center to _____ High School. The document listed by name Compliance Case Manager as the DCPS contact person. The former educational advocate for Petitioner's Counsel credibly testified in

rebuttal that he was given this document at the end of the Resolution Session and that, thereafter, he faxed it to Counsel for Petitioner.⁶ The document does not purport to be part of a Settlement Agreement but rather is a formal legal requirement of IDEA for the purpose of notifying parents of contemplated action by DCPS. P. Exh. 18 including P-6; Testimony of Step-Mother and testimony of former Educational Advocate.

12. On October 26, 2011, by Order of the Superior Court of the District of Columbia, Probate Division, Father was named guardian of Student due to the fact that Student is "incapacitated." P. Exh. 22.

13. On November 3, 2011, two representatives of DCPS, including DCPS' Applied Behavior Analysis Coordinator and a colleague with DCPS from the same work group traveled to Residential School by car to observe Student at The Woods School. They observed Student during a music class. They were only allowed there for approximately ninety (90) minutes. The Residential School is no longer recognized as an approved residential facility by DCPS due to some tragic accidents at the facility in the past few years resulting in the death of two students. Testimony of Applied Behavior Analysis Coordinator.

⁶ Advocate's testimony was by phone. The undersigned found his testimony very credible in part because of his clear answers including the detail as to where he stopped on his way from the meeting to fax to Petitioner's Counsel. In marked contrast and notwithstanding the difficulty of proving a negative, DCPS Counsel and its witnesses at various times gave somewhat contradictory explanations; first casually suggesting the possibility of fraud, then seemingly abandoning that notion due to the absence of any factual support, then asserting that the form was no longer in use while failing to proffer any logical explanation for its presence in Petitioner's Resolution Session documents. It is also noteworthy that the existence and relevance of the Prior to Action Notice was recognized by Hearing Officer Vaden. See Vaden HOD, Findings of Fact, No. 27.

14. In February 2012, in connection with an appeal of Hearing Officer Vaden's HOD in Case No. 2011-0935, DCPS agreed that Student was in fact a resident of the District of Columbia. This followed the receipt of documents wherein Student became eligible for Supplementary Security Income payments (SSI) and that such payments would be sent to him at his Father's address in the District of Columbia. This led to the withdrawal of the appeal of the HOD issued by Hearing Officer Vaden. R. Exh. 34; R. Exh. 4 and R. Exh. 8-A.

15. Thereafter, on March 9, 2012, Student re-enrolled at _____ High School. At the request of DCPS, Student was scheduled to be observed at _____ High School in the District of Columbia on March 16, 2012. Petitioner also advised _____ High School that Psychologist would also be observing the Student on March 16 at their expense. Yet, when the Psychologist appeared for that observation, he was not allowed to observe. Testimony of Psychologist. No witness for DCPS testified as to why the Petitioners had not been told in advance that Psychologist would not be allowed to participate in the observation. Scant reference was instead made to DCPS' "Procedure for School Visitors" dated October 29, 1984. R. Exh. 6, Attachments (DCPS Exh. P. 44).

16. The Student attended _____ High School on March 16 and while the Psychologist was not allowed to participate, the Applied Behavior Analysis Coordinator and her colleague did. They observed him for nearly the full school day and thereafter filed a comprehensive single-spaced four and a

half page report on the observation. The report described in some detail Student's ability to engage in daily life activities and the extent of his potential to learn. At the end of the report, the authors made certain recommendations regarding the nature of a possible class environment, possible actions to limit problem behavior and levels of supervision that would be required. Testimony of Applied Behavior Analysis Coordinator.

17. The autism teacher for the self-contained classroom where Student was observed was called by Petitioner as a witness. She testified that based on her observations that same day, that if Student was permanently placed in her class, he would require full-time attention and that, as a result, she would not be able to maintain a planning period. Additionally she stated that her full-time aid could not devote all her time to Student because of the aid's other responsibilities. Finally, she opined that it would have been helpful for Psychologist to observe Student in her classroom because with his expertise, the MDT team could best develop an educational plan for Student. Testimony of SETI.

ANALYSIS AND LEGAL CONCLUSIONS

Statutory Framework

The Individuals with Disabilities Education Act (IDEA) provides that States and Territories, including the District of Columbia, that receive Federal educational financial assistance must establish policies and procedures to

ensure that they extend a "Free Appropriate Public Education" to children with disabilities. Free Appropriate Public Education or FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. §1401(28); see also 34 C.F.R. §300.39 and DCMR Title 5-E §3001.1. The term "child with a disability" is defined to mean a child with any one of a certain named type of condition or impairment that "by reason thereof need special education and related services." 20 U.S.C. §1401(3)(i) and (ii). The statute provides that States may issue their own regulations supplementing the Federal scheme. Accordingly, the District of Columbia has enacted its own provision defining a student with a disability. District of Columbia Code, §38-2561.01(14) and DCMR Title 5-E §3001. Painted with a broad brush, in order to comply with IDEA, each State and Territory receiving Federal educational assistance must act affirmatively to ensure that "all children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and evaluated." *Reid v. District of Columbia*, 401 F.3d 516, 518-519, 365 U.S. App. D.C. 234, 236-237 (D.C. Cir. 2005). "Once such children are identified, a 'team' including the child's parents and select teachers, as well as representatives of the local educational agency with knowledge about the school's resources and curriculum, develops an 'individualized education program' or 'IEP' for the child." *Id.* citing 20 U.S.C. §§ 1412 (a)(4), 1414 (d).

Did DCPS Deny FAPE By Failing to Evaluate Student

This case raises issues relating to Respondent's duty to identify, locate and evaluate the student, commonly referred to as the IDEA's "Child Find" requirements. In a nutshell, this case revolves around the question of whether Respondent acted with sufficient dispatch to render it in compliance with the Act's Child Find responsibilities. At various times during the hearing and in its post-hearing brief, DCPS argued that it had not denied FAPE because (a) the parents failed to make the Student available for evaluation when it first failed to maintain his enrollment in school following the initial enrollment at _____ High School in August 2011; (b) the parents thereafter in March 2012 failed to have the Student return to class in the following days and weeks in March 2012 when he was observed by Respondent's Autism Team for one day;⁷ and (c) Student was not a resident of District of Columbia ----- at least until Respondent recognized that status in February 2012. In addition to these points, Respondent also raised the fact that any information obtained via The Residential School was tainted and otherwise without any or little value because a) while the Student was at The Residential School there was no Local Education Agency (LEA) that referred Student to that institution since the New Jersey Division of Youth and Family Service was not a designated LEA as required by the statute and b) The Residential School was no longer recognized

⁷ This was the same day the Psychologist was not permitted to observe. Testimony of Psychologist.

as an appropriate private placement by DCPS due to two tragic accidents occurring a few years earlier involving several residents of the school.

Based on all of the record evidence, the undersigned Hearing Officer rejects all of the above-referenced defenses of the DCPS and otherwise holds that DCPS denied Student FAPE by failing to timely convene a Multi Disciplinary Team ("MDT") meeting and prepare an IEP. Conversely, the Hearing Officer concludes that Petitioners met their burden of proof. In this respect, this Hearing Officer relies on the following for this conclusion:

1. DCPS' Child Find duty is an affirmative one. *Hawkins v. District of Columbia*, 539 F. Supp. 2d 108, 113-114 (D.D.C. 2008) citing *Reid*, 401 F.3d at 518-519. There was no delay in Petitioners providing information to Respondent. Much of the information was diligently provided by the step-mother whom it is concluded acted in good faith at all relevant times. Even assuming *arguendo* that she and her husband categorically rejected anything other than a private residential placement as the ultimate location for Student, nonetheless neither she nor her husband failed to act in anything but a responsible way in providing documents or making Student available to be observed in the District of Columbia.

Respondent certainly seems to suggest that parents shirked their duty when, for example, they failed to return Student to _____ High School after the classroom observation on March 16, 2012. Under the circumstances, particularly in light of the unique circumstances of the case, the Hearing

Officer rejects that contention. Rather, given the statutory affirmative duty imposed upon an LEA regarding Child Find, Respondent should have traveled to the Residential School again to further observe the Student if it believed more observation time was necessary. The undersigned concludes that, under all the circumstances, Petitioners failure to return Student for further observation on March 16, constituted conduct insufficient to otherwise excuse DCPS' Child Find responsibilities. A casual "expect to see you Monday" was not sufficient and was not reasonably understood by the Petitioners to require further observation. It is noteworthy that throughout this process, Respondents engaged in virtually no contact with Petitioners that served to encourage their participation in the process. Indeed, the only direct communication from August 2011 through March 2012 between DCPS and Petitioners of the time in consisted of automatic calls from _____ High School noting Student's truancy and warning them of the consequences. New to this process, it is no wonder that Petitioners became disillusioned and ultimately did what many disillusioned persons do – they retained counsel.

2. Furthermore, DCPS is flatly wrong in its assertion that Student must be enrolled in school in the District of Columbia as a condition precedent to being evaluated under IDEA. The case law is clear that the affirmative Child Find duty obligates DCPS to travel to observe a Student if that is necessary to meet the statutory obligation. As long as the Student is a resident of the District of Columbia, the LEA may be assigned to observe the Student out of

state if that is where the Student is present physically. *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 86 (D.D.C. 2007) (“Just because Connecticut may have child find responsibilities of its own and just because S.A. is currently enrolled in school in Connecticut does not relieve DCPS from having to fulfill its own responsibilities as the LEA of residence to evaluate the student and make FAPE available.”) Indeed, the LEA must evaluate the student even if the student is not attending school at all. *Jones v. District of Columbia*, 646 F. Supp. 2d 62 (D.D.C. 2009).

3. With respect to residence, as per the HOD of Hearing Officer Vaden, Student was not a resident as of April 2011. However, largely coinciding in time with the Petitioners’ efforts to enlist DCPS to assist Student, Petitioners began what appears to be a fairly exhaustive legal process culminating in Student’s obtaining legal residence in the District of Columbia. It was uncontroverted that Petitioners were motivated to act so that Student could be physically located in the Washington, DC area where they lived. First, legal custody was awarded to the father in July 2011. Then, Father was awarded guardianship in October 2011 and then in November, Student became eligible for Supplementary Security Income. The undersigned concludes that, under all the circumstances, Student became a resident of the District of Columbia in late 2011. However, even if it did not occur until shortly before

DCPS acknowledged it in its February 14, 2012 legal papers,⁸ DCPS should have acted with dispatch to call an MDT meeting and progress towards the development of an IEP.

4. Taken in conjunction with the conclusions reached in paragraphs 1 through 3 are additional facts supporting the conclusion that Respondent did not act in a manner compatible with the statute. At various points in the proceedings, DCPS seemed to indicate that an eligibility determination regarding Student was premature and that, among other reasons, the shortcomings of The Residential School in terms of depth of instruction and quality of security prevented such a determination from being reached. The undersigned rejects these contentions as well. There can be no dispute and it must be deemed self-evident to all that Student is eligible for IDEA coverage. What services and where they might be performed might be an open issue even today, but there can be no dispute regarding Student's eligibility.⁹ Indeed, Applied Behavior Analysis Coordinator, a leader on Respondent's autism team, answered the question propounded by the Hearing Officer that Student was IDEA eligible affirmatively and without hesitation or qualification. Given this obvious fact, Respondent's contentions regarding the level of quality of The

⁸ On page 2 of Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss, DCPS states, "Since the filing of the instant action, Plaintiffs have provided additional documents to Defendant that will establish Student's residency in the District." R. Exh. 4, p. 000030. The documents presumably provided were the documents reflecting custody, guardianship and SSI eligibility mentioned above.

⁹ The Hearing Officer declines to apply Hearing Officer Vaden's Findings of Fact that "Student is a child with a disability as defined by the IDEA" as a Finding of Fact here in accordance with to the doctrine of *res judicata* or collateral estoppel. Since Hearing Officer Vaden ruled that Student was not eligible under IDEA, this finding was not necessary to the holding and for that reason neither *res judicata* or collateral estoppel would apply. See *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980).

Residential School are irrelevant to the underlying issue.¹⁰ Indeed, the serious nature of Student's disability should have caused Respondents to move at a seemingly more rapid pace through the process since the real issue should have been what services are to be provided and where they are to be provided and not simply whether they are to be provided.¹¹

5. Finally, DCPS asserts that the Hearing Officer should take into account that is sought to resolve the matter in April 2012. The undersigned rejects this contention. Assuming *arguendo*, the admissibility of such settlement proposals which were exchanged between and among counsel and the fact that the proposed settlement agreement fell far short of what Petitioners had requested both as to placement and some of the issues resolved by this HOD, such a contention cannot be deemed sufficient to cure a delay which this Hearing Officer concludes was already well underway by the April 6, 2012 date of the proposal. Respondent should not be permitted to escape its responsibilities by a proposal to resolve the matter at the proverbial eleventh hour. The undersigned agrees with Hearing Officer Leff who concluded in another case "[t]he extended delay in responding to petitioner's request for evaluation cannot be cured by simply doing it now, months after the evaluation

¹⁰ Furthermore, there is the fact that DCPS acknowledged Student's disability way back in September 28, 2011, by virtue of the Prior to Action Notice form. The Hearing Officer concludes that DCPS issued this Notice to Petitioners and that it is a form used in or at least was used in the ordinary course of business by DCPS and was independent of the Settlement proposal though it was physically attached to the Settlement proposed by DCPS on the same date. Even had the undersigned not reached this conclusion regarding the Prior to Action Notice Form, the evidence described in this opinion is otherwise sufficient in its own right to justify the ultimate conclusion of the denial of FAPE.

¹¹ The Hearing Officer wishes to make it perfectly clear that he takes no position on location of placement of Student. That issue, though originally placed before me, was withdrawn and nothing articulated in this opinion is otherwise intended to lend support for any particular outcome.

should have been completed.” *District of Columbia State Educational Agency*, 111 LRP 24657, at slip op. 6 (January 19, 2011).

For all of the above-stated reasons, the undersigned concludes that Respondent denied Student FAPE by delaying its evaluation of Student and that such delay exceeded the 120-day statutory period provided for such evaluation.¹²

**Did DCPS Deny FAPE By Refusing to Permit the Parents’
Designated Psychiatrist the Right to Observe Student
in a Classroom Setting and Whether Respondent
Failed to Provide FAPE by Refusing to Permit an
Independent (IEE) at Private Expense**

The undersigned views these two remaining issues as integrally intertwined. There is no automatic right to have an independent professional, or any type of agent, of the Petitioner observe the Student in a classroom setting. See, *Letter to Mamas*, 104 LRP 45071 (OSEP May 26, 2004). Therein OSEP stated, in pertinent part, as follows:

While the IDEA expects parents of children with disabilities to have an expanded role in the evaluation and educational placement of their children and be participants, along with school personnel, in developing, reviewing, and revising the IEPs for their children, neither the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement. The determination of who has access to classrooms may be addressed by the State and/or local policy. However, we encourage school district personnel and parents to work together in ways that meet the needs of both the parents and the school, including providing opportunities for parents to observe their

¹² D.C. Stat. §38-2561.02(a).

childrens' classrooms and proposed placement options. In addition, there may be circumstances in which access may need to be provided. For example, if parents invoke their right to an independent educational evaluation of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement.

The evidence in this case suggests that whatever the reason, DCPS failed "to work together in ways that meet the needs of both the parents and the school" The Petitioners hired Psychologist in the first place because of what they perceived as indifference or even hostility to the very difficult problems they faced in trying to achieve a positive environment for their son. When Psychologist arrived at the school with some form of advanced notice to the school, the school officials refused his entry with no explanation whatsoever. Thus, no effort was made to engage in a rational discussion regarding the feasibility of Psychologist's participation and, how, among other things, he could have advanced the evaluation process. Instead, he was unceremoniously told to leave without attempting to discuss the reason for his visit or forced exit.

For its defense, DCPS' relies upon the Memorandum issued by the Superintendent's Office of DCPS, dated October 29, 1984, entitled "Procedure for School Visitors." R. Exh. 6, p. 000044. There is no evidence that this Memorandum was actually relied upon on March 16, 2012, to bar Psychologist from the school building. More importantly, this Memorandum, even assuming its viability in 2012, does not bar visitors in any respect. Indeed, in its most

relevant and salient statement it states signs shall be posted throughout schools addressed to "All Visitors" stating, "[u]pon entering this building you must report immediately to the administrative office or receive permission to be on the premises. Only those individuals who have school-related business to conduct will be granted permission to remain" *Id.* at p. 00045 (emphasis added). Thus, the document permits rather than bars visitors and is otherwise not contrary to the OSEP pronouncement identified above.

At the hearing, Psychologist demonstrated significant in-depth and scholarly understanding of autism and intellectual disability. It is not a stretch to assume that he would have been very helpful to Respondent's autism professionals that spent most of the day observing Student.

Given the surrounding circumstances identified throughout this opinion, it is concluded that Respondent denied FAPE to Petitioner by not allowing Psychologist to utilize his professional skills in a classroom observation of Student. In connection with this observation and other analysis of Student, Psychologist intended to prepare an Independent Educational Evaluation at Petitioners' expense and to make that part of the overall assessment that would be used to create an IEP. Given that the denial of access prevented him from completing an IEE, DCPS also denied FAPE in that respect as well.

This Hearing Officer further concludes that Petitioners are the prevailing party.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, the entire record herein including the testimony and exhibits and with due consideration to the Post-hearing Briefs of Counsel, it is hereby ORDERED:

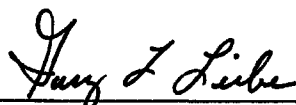
1. Within twenty-one (21) days of the issuance of this Order, DCPS shall allow Psychologist full access to a classroom where Student may be observed for a period of time to be determined by Psychologist and Petitioners, but not to exceed two full days of school unless that amount of time is shortened or lengthened by the parties' mutual agreement.
2. Psychologist may prepare an IEE at Petitioners' expense which shall be transmitted to Respondent for its use in connection with the development of Student's IEP.
3. Within no more than thirty (30) days following the final classroom observation set forth in paragraph 1, DCPS shall convene or reconvene its MDT/IEP Team for the purpose of reviewing and analyzing all data collected relating to Student and formulating an IEP for student.
4. It is not expected that Petitioners will in any way delay the processes outlined above. In the event such delay occurs as a result of Petitioners failure to attend a meeting or failure to respond to scheduling requests, the applicable deadline shall be extended by the amount of the delay.

5. Respondent is ordered to classify Student as a student with two disabilities: autism and intellectually disabled. This should not, however, prohibit the inclusion of additional disabilities consistent with further review by the MDT.

6. This case shall be, and is hereby closed.

IT IS SO ORDERED

Date: 9-12-12



Gary L. Lieber
Hearing Officer

Copies to: All Counsel of Record
District of Columbia Public Schools
Student Hearing Office, OSSE

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).

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