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Office of Compliance and Review
Student Hearing Office*

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STUDENT HEARING OFFICE
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Confidential

<p>STUDENT¹, by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date: March 27, 2009</p> <p><u>Representatives:</u></p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On February 17, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to reconvene the Student's Multidisciplinary Team ("MDT") meeting to discuss and determine placement, and by unilaterally deciding placement which denied the parent a meaningful opportunity to participate in the placement process. The Petitioner also alleged the Respondent refused to allow the Student to resume classes at School which has resulted in the Student's failure to receive special education instruction and its related services. The Petitioner requests the Respondent be deemed to have denied the Student a FAPE and as a relief ordered to immediately fund and place the Student at a full-time therapeutic school of the Petitioner's choosing, with transportation. Additionally, the Petitioner requests that within 30 days of the Student's enrollment at an appropriate school, the Respondent convene an MDT meeting to review the evaluations and revise/update the Student's individualized education program ("IEP") as necessary.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on February 25, 2009 at 5:00 PM. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. Counsels provided a synopsis of their witnesses' testimony. The parties stipulated that on January 7, 2009, a MDT agreed that was not an appropriate placement for the Student and the Respondent offered The Petitioner withdrew the request for a compensatory education award. The Petitioner argued she requested an opportunity to visit and other schools and the MDT agreed. However the Student later was taken to without the Petitioner's consent and not allowed to return to SES.

The Respondent asserted there was a meeting to discuss the parent asked two weeks to look at the school and other schools, two weeks passed and the Petitioner did not contact the SEC. The Respondent further asserted that since the Student was in an inappropriate placement at the placement decision was made for the change to The Respondent contends the Student has not been denied a FAPE and that can implement the Student's IEP.

On March 13, 2009, the parties were ordered to be prepared at the hearing to prove the appropriateness of the proposed placement and how the parent was provided a meaningful participation in the decision making process. The parties were further instructed to explain how the Student's IEP was/was not taken into account when determining the placement.

A hearing was held on March 20, 2009. The Petitioner presented a disclosure letter dated March 13, 2009 to which twenty-five documents were attached, labeled P-1 through 25 and which listed ten witnesses. Three witnesses testified – the Mother, the Education Advocate, and the Admission's Director of the private school. The Respondent presented a disclosure letter dated March 17, 2009, identifying twelve witnesses and to which six documents were attached, labeled DCPS 1 through 6. Three witnesses testified – two Special Education Coordinators, and the DCPS Placement Specialist. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEIA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30,

including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

1. Did the Respondent fail to reconvene the Student's MDT meeting to discuss and determine placement, and was placement unilaterally decided?
2. Was the Petitioner denied a meaningful opportunity to participate in the educational placement decision process?
3. Was the Student denied a FAPE?

II. FINDINGS OF FACT

1. The Student is eligible to receive special education and its related services under the IDEIA. The Student's most recent IEP provides 26 hours of specialized instruction, and 90 minutes weekly of behavioral support services. The Student's disability classification is multiply disabled with an emotional disturbance, other health impairment, and a learning disability.²
2. A multidisciplinary team meeting was held on or January 7, 2009, in which the IEP/MDT reviewed the Student's evaluations, revised and updated the Student's IEP. The IEP Team agreed that the Student was in need of a new placement that could provide a full-time special education program. At the meeting, the Respondent offered the _____ as the placement for the Student and the SEC from _____ discussed the program.³
3. The parent and her educational advocate ("EA"), requested, that the Petitioner be allowed two weeks to visit the program at _____ as well as other programs and that the Student's MDT Meeting be reconvened so that the IEP team could make a decision on behalf of the a Student regarding placement. The Respondent agreed to the request and indicated that by January 21, 2009 the Student would be placed in a therapeutic setting. ⁴
4. The EA participated in the January 7, 2009 meeting the MDT heard of the different challenges the Student had at _____. The team agreed that _____ was not an appropriate setting and given the emotional needs of the Student she needed a therapeutic setting. The team agreed to allow the Petitioner to visit schools and then the MDT would reconvene to make the final determination on placement. The EA agreed to communicate by January 21, 2009 with the Respondent on the status of the visits. The EA did not contact any of the Respondent's representatives and the MDT has not been reconvened. ⁵
5. The MDT agreed to place the Student in a full-time ED program and if it didn't hear back from the parent within two weeks the Respondent would move forward with _____ as the placement. The JRC was recommended as the placement because it has the services and opening available, at

² P# 20 IEP dated 1/07/09.

³ DCPS #5 MDT meeting notes dated 1/07/09.

⁴ DCPS #5 MDT meeting notes dated 1/07/09.

⁵ Testimony of the educational advocate.

forementioned meeting the program was explained to the mother. On January 23, 2009, the Respondent issued a prior notice of placement indentifying the as the placement for the Student.⁶ The Student attended a couple of days, a Complaint was filed and a stay put Order went into effect. A meeting was scheduled for March 2, 2009; however because of the hazardous weather conditions the meeting was not held. The meeting was not been rescheduled because it was not clear where the Student had been placed.⁷

6. The was recommended as the placement before the January 7, 2009 where the Student's IEP was updated because it has the services and opening available. The team knew the Student was ED and that was not an appropriate placement, therefore they use evaluations and the information to determine placement without the IEP.⁸
7. The Petitioner requested and it was agreed by the Respondent that she could have two weeks to visit other programs. There was also an agreement that the Petitioner would contact the Respondent by January 21, 2009. The Respondent didn't hear back within two weeks it moved forward with the placement at A packet with evaluations, reports and trackers was sent to the site review group. The placement was offered based on the Student's prior IEP, because an HOD required that placement be discussed.⁹
8. The Respondent's bus driver took the Student to the without the Petitioner's consent or knowledge. The parent received a call from staff at the inquiring as to why the Student was at the school, and the parent was unsure because she had not authorize the Student's change in placement, and further never signed any documentation or was notified that the Student placement was changed. The mother visited and and she observed the class in and did not like that the Student would be the only girl. The mother was told by the Student that there is cursing and fighting in the room. The mother tried to send the Student back to but was not able to get her back in the school. The principal on various occasions told her that because the school could not give the Student all the services that she requires, she must sign a release of liability form. The parent did not want to sign the release. The mother was invited to a February 2, 2009 meeting and she did not agree to reconvene. The Student has been attending classes at for approximately a month. The Student is showing interest and is eager to go to school and do homework. The Student is doing better in reading and spelling.¹⁰
9. is a therapeutic full time program for students with emotional disturbance; it's a partnership with the District of Columbia's Department of Mental Health. The program provides counseling and social skills building. There is a behavior modification program based on color coding and bonuses for activities and opportunities to purchase items in the school store. The proposed class for the Student has eight boy students, ages 11 through 12 and three adults. The students have multiple disabilities including learning disabled, emotional disturbance, and attention deficit hyperactivity disorder, most have an emotional disturbance. The Student's prior IEP was to use the frame the Student's current placement.

⁶ P#25 Prior Notice Letter dated 1/23/09.

⁷ Testimony of the special education coordinator at

⁸ Testimony of the special education coordinator at

⁹ Testimony of the DCPS placement specialist.

¹⁰ Testimony of the Mother.

10. The Student is attending the primary school for approximately two weeks, the school's population is 53 students in the building. The students' ages range from 5 to 12. Student's disabilities are mostly emotional disturbance and multiple disabilities. The Student is currently in a classroom of a student's three paroles and five bullets ranging in the ages of 6 to 8. The behavior program has a points system for doing the work, good relationships with peers, which earn points to buy things in school. The Student is doing very well; she follows directions on the first prompt and is doing homework assignments. The school offers a full time program and transportation as required. The school can reconvene the MDT meeting after 30 days, to review progress and adjust IEP if necessary. The cost to attend as approximately

IV. CONCLUSIONS OF LAW

FAPE Determination

The DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia. The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

Pursuant to the IDEIA at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a)1 regarding hearing officer decisions on the provision of FAPE, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

The Respondent did not meet its legal obligation under the IDEIA. Here is why.

Educational Placement

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living. See id. § 1400(d)(1)(A).

An MDT Meeting was held for the Student on or about January 7, 2009, in which the IEP Team reviewed the Student's evaluations, and revised and updated the Student's IEP. The IEP team including the Petitioner agreed that the Student was in need of new placement, and a full-time special education program was warranted. At the meeting, the Respondent offered the as the placement for the Student and the SEC from discussed the program.

According to the IDEIA at 20 U.S.C. 1412(a)(5) the determination of the educational placement of a child with a disability should be done annually and must be based on a child's IEP. The IDEIA and its regulation at 34 C.F.R. § 300.17 requires the Respondent as the local state education agency, to make certain that the educational placement, for the child with a disability within its jurisdiction, is able to implement the student's individualized educational program.

Additionally in an accordance with 34 C.F.R. § 300.116 of the IDEIA regulations when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is 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.

Also pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP." This Student's current IEP was created January 7, 2009. The Respondent determined an educational placement for the Student prior to January 7, 2009. The fact that the Respondent made the determination of the placement prior to the January 7, 2009 IEP being finalized, without consideration neither to the Student's unique interest nor to the Petitioner input, makes the determination of placement inappropriate.

The Respondents have pointed to no evidence in the record contradicting the Petitioner's claims that the Student's IEP was not considered by the Respondent to make placement determination.

The Petitioner alleged the Respondent refuse to allow the Student to resume her studies at SES. The evidence was that the Petitioner declined to follow through the procedural requirement of signing a document acknowledging that the placement she was choosing, could not offer the totality of services the Student requires. However, the Petitioner choose not to communicate with the Respondent before the end of the agreed time, then the Respondent unilaterally placed the Student at on the basis of its proximity to the Student's home, that it has the services and an opening was available.

The District of Columbia Code imposes a strict order of priority for special-education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia." ¹¹ A local government meets its federal and local statutory obligations to implement a student's IEP -- and thus provide a FAPE -- where public placement is "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207. ¹²

The Respondent offered services at the that according to the Respondent could rationally provide the Student with an educational benefit. The Student at the time was in a placement that was not appropriate and the entire MDT including the Petitioner agreed required a therapeutic setting. The Petitioner chose to not avail herself of the services, by insisting that the Student be readmitted into The Petitioner had the obligation file a request before the Hearing Officer if there were extraordinary circumstances that required a reenrollment order, she did not. On the other hand, the placement at was offered based on the Student's prior IEP, because an HOD required that placement be discussed and there was an opening. ¹³

¹¹ D.C. Code § 38-2561.02(c) (2007).

¹² *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)

¹³ Testimony of the DCPS placement specialist.

Special education 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), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1. The FAPE requirement is satisfied when the State provides personalized instruction that is rational calculated to permit the child to benefit educationally. ¹⁴

Under IDEIA 20 U.S.C. 1412(a)(5) and its regulation at Sections 300.114 through 300.118, consistent with implementing the Act’s strong preference for educating children with disabilities in regular classes with appropriate aids and supports. Specifically, Section 300.114, requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. Further, a student or parent must have an opportunity to demonstrate that a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled; and in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that the students needs.

In evaluating whether a FAPE is denied, the Supreme Court has established a two-part test to guide the analysis: “First, has the State complied with the procedures set forth in the [IDEA] And second, is the individualized educational program developed through the [IDEA]’s procedures reasonably calculated to enable the child to receive educational benefits?” Rowley, 458 U.S. at 206-07. If these requirements are met, the Court explained, then defendants have “complied with the obligations imposed by Congress and the courts can require no more.” ¹⁵

Undoubtedly the LEA in this case the Respondent has a statutory obligation to implement the IEP through an appropriate placement. The Petitioner proved that the placement decision was flawed because the Student’s current IEP which is the cornerstone of the Student’s program was not considered; there was no evidence that this Student’s unique needs were addressed. The Respondent failed to comply with the IDEIA.

Meaningful opportunity to participate

The Petitioner argues that the Respondent unilaterally decided the placement, which has denied the parent a meaningful opportunity to participate in the placement process. The evidence was that the Respondent failed by determining a placement for the Student prior to finalizing the current IEP. Simultaneously, the Petitioner did participate and was given an opportunity to visit other schools, the Petitioner choose to not act within the agreed terms. Neither the EA nor the Petitioner responded to the Respondent informing of the placement decision. The Petitioner in this case was offered the opportunity to participate in the decision making process and failed not to respond with her choice.

“Although the IDEIA guarantees a Free Appropriate Public 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 [child with a disability] 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 parent or guardian of the child. Thus proof alone that loving parents can draft a better program than a state offers does not, alone, entitle them to prevail under the Act.” *Shaw v. The District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002)

¹⁴ *Hudson Id.*

¹⁵ *Id.*

V. SUMMARY OF DECISION

The Respondent has a statutory obligation to implement the IEP through an appropriate placement. The Petitioner proved that the placement decision was flawed because the Student's current IEP which is the cornerstone of the Student's program was not considered; there was no evidence that this Student's unique needs were addressed in the proposed placement decision. The Respondent failed to comply with the IDEIA. However, the Petitioner failed to meet her obligation of communicating her placement decision in a timely manner. The Respondent must reconvene the MDT to discuss and determine based on the Student's unique needs today, the current evaluations and the January 7, 2009 IEP an appropriate placement for the Student. At the MDT meeting the parent must be given an opportunity to present evidence towards the appropriateness of the placement she has chosen. The MDT will discuss the options in the DCPS system and non public options.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, The Respondent will reconvene the MDT by April 15, 2009 at that meeting the team must discuss and determine based on the Student's unique needs today, the current evaluations and the January 7, 2009 IEP an appropriate placement. At the MDT meeting, the parent must be given an opportunity to present evidence towards the appropriateness of the placement she has chosen. The MDT will discuss the options in the DCPS system and non public options and document the pros and cons.

IT IS FURTHER ORDERED, should the Respondent fail to convene a meeting by April 15, 2009 and make a placement determination based on the Student's current needs, the Respondent will issue a Prior Notice of Placement to the Student at the year. The Respondent shall fund the placement of the Student at the with transportation and related services for the 2008-2009 school year.

IT IS FURTHER ORDERED, upon the Student attending the School for 30 consecutive days a MDT will convene to review the Student's progress and make adjustments as necessary.

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.

This order resolves all issues raised in the Petitioner's February 5, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. Final decisions of special education Hearing Officer may be appealed to a state or federal district court of competent jurisdiction. (20 U.S.C. §1415(i)(2) and 34 C.F.R. §300.516)

/s/WI Restorres electronically signed
Wanda I. Resto - Hearing Officer

Date: March 27, 2009