District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE
2009 APR 13 AM 9:36

Confidential

STUDENT[1], by and through his Parent Petitioners, v. DCPS Respondent. Case #	HEARING OFFICER'S DETERMINATION Hearing Dates: March 31, 2009 April 7, 2009 <u>Representatives:</u> Counsel for Petitioners: Fatmata Barrie 10 R Street, NE Washington, DC 20002 Counsel for DCPS: Nia Fripp, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and revised.

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DCPS MOTION TO DISMISS:

DCPS in its response to the complaint moved to dismiss the complaint on two grounds: (1) The complaint allegedly did not state a claim upon which relief could be granted and (2) because Petitioner prevailed in a previous claim Petitioner was allegedly barred from re-litigating under the doctrine of *res judicata.* DCPS alleged the previous Hearing Officer Determination (HOD) set forth procedures for both parties to follow in the event Petitioner was dissatisfied with the implementation of the HOD and only a claim that DCPS has not complied with the February 13, 2009, HOD could be now brought.

The Hearing Officer ruled on the motion to dismiss in the pre-hearing order and concluded the complaint stated a claim upon which relief could be granted and the complaint is not barred under *res judicata.* The complaint was brought because the student remains in a placement that this Hearing Officer determined to be inappropriate in a November 16, 2008, HOD. In the Conclusions of Law of the February 2009 HOD the Hearing Officer stated Petitioner could file due process complaint for the remedy of placement.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened March 31, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on February 26, 2009, alleging the issue(s) outlined below. The Hearing Officer indicated in the pre-hearing order that the parties could convene a MDT meeting prior to the due process hearing to determine the student's placement. A meeting was not held prior to the due process hearing first convening on March 31, 2009. The Hearing was continued so that a multidisciplinary team (MDT)/Placement meeting could be held. That meeting was held on Thursday April 2, 2009. The due process hearing reconvened April 7, 2009.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-15 and DCPS Exhibits 1-18) which were admitted into the record.

ISSUE(S): [2]

Did DCPS deny the student a free and appropriate public education (FAPE) by failing to provide the student an appropriate placement?

FINDINGS OF FACT [3]**:**

1. The student is years old, currently attends School A and resides in the District of Columbia with the student's parent(s), (hereinafter "Petitioner" or "Parent"). (Petitioner's Exhibit 2)

2. The student has been identified as needing special education and related services and has a disability classification of mental retardation (MR). (Petitioner's Exhibit 2)

3. The parent, through counsel, filed an administrative due process complaint on November 6, 2008. The complaint resulted in a Hearing Officer's Determination (HOD) issued November 16, 2008. The HOD directed DCPS to conduct evaluations and convene a multidisciplinary team (MDT) meeting within forty-five (45) days of the issuance of the HOD to review the evaluations and review and revise the student's individualized educational program (IEP) and discuss and determine placement. The MDT meeting was to be scheduled through the parent's counsel. (Petitioner's Exhibit 2)

4. The November 16, 2008, HOD ordered DCPS to conduct a comprehensive psychological, a Vineland, a speech and language and a vocational assessment within 30 calendar days of the issuance of the HOD and that within 45 days of the issuance of the HOD a MDT/IEP meeting be convened to review the evaluations, review and revise the IEP and to discuss and determine appropriate placement for the student. This Hearing Officer determined that the student's current placement at School A was inappropriate in the November 16, 2008, HOD. However, neither Petitioner's counsel nor DCPS counsel had an alternative placement to propose at the due process hearing. The Hearing Officer did not direct DCPS in the HOD to immediately convene a placement meeting to determine an appropriate placement for the student. (Petitioner's Exhibit 2)

5. On February 2, 2008, Petitioner filed another due process complaint, alleging DCPS did not comply with the November 16, 2008, HOD by not conducting the evaluations and not convening the MDT meeting. DCPS filed a response to the complaint and alleged in the response the evaluations were not conducted because the student did not attend school

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[2] The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

[3] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

regularly and that a notice of the MDT meeting was sent to Petitioner's counsel. The response also stated that a MDT was held on January 9, 2009. Petitioner allegedly attended the meeting without counsel and/or an educational advocate. (Petitioner's Exhibit 2)

6. The Hearing Officer ultimately concluded that DCPS had not complied with the HOD and authorized (in a February 12, 2009, HOD) Petitioner to obtain independent evaluations and directed DCPS to convene a MDT/IEP meeting once the evaluations were received and that the student's IEP be updated and that placement be determined. (Petitioner's Exhibit 2)

7. Although the student has been accepted to the School there was no witness available to testify at the February 2, 2009, due process haring as to the services that could be provided at the school. The Hearing Officer concluded that Petitioner could file for an expedited hearing to address placement and present sufficient evidence of an appropriate placement. Thus, Petitioner filed the current complaint seeking placement at the School. DCPS had not conducted a placement meeting prior to the due process hearing being convened and the student has remained in an inappropriate placement at School A since the November 16, 2008, HOD up to and including the date of the due process hearing on March 31, 2009. (Petitioner's Exhibit 1&2)

8. The student has been interviewed and accepted by the in Laurel, Maryland, a full time special education placement. The School serves students of various disability classifications. can provide the student specialized instruction and related services prescribed by her IEP and these services will be provided by certified special education teacher and certified related services providers. can implement the student's IEP and provide the student vocational and transition services to prepare the student for a career following high school. testimony)

9. On April 2, 2009, at the direction of this Hearing Officer, DCPS convened a MDT meeting to review the student's evaluations, review and revise the student's IEP as appropriate and determine placement. The MDT updated the student's IEP to include the following weekly services: 27.5 hours of specialized instruction, 45 minutes of counseling and 30 minutes of speech and language therapy. The MDT concluded the student "requires a more restrictive highly structured high intensity setting that will address her academic, social and emotional needs." The MDT meeting notes indicate that DCPS would issue a prior notice of placement placing the student at with transportation services. DCPS issued the prior notice authorizing the student to attend (DCPS Exhibits 14, 16, 17)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief. [4] In this case the student/parent is seeking relief and has the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Did DCPS deny the student a free and appropriate public education (FAPE) by failing to provide the student an appropriate placement? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

Pursuant to 34 CFR 300.116, in 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; and (2) Is made in conformity with the LRE provisions of this subpart, including §§300.114 through 300.118;

This Hearing Officer determined that the student's placement at School A was inappropriate in November 2008. The student remained in an inappropriate placement for four months. Although DCPS was not directed to convene an immediate placement meeting to determine a placement for the student once the inappropriateness of the placement was determined, DCPS could have, under its obligation to provide FAPE, convened a meeting to comply with 34 CFR 300.116 without being directed to do so. The student was denied a FAPE by remaining in an inappropriate placement.

[4] 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 with FAPE.

ORDER:

DCPS shall ensure it complies with the decisions regarding the student's placement made by the MDT at the April 2, 2009, MDT/IEP meeting to place and fund the student at the in Laurel, Maryland and provide transportation services.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

/s/ Coles B. Ruff, Esquire

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Coles B. Ruff, Esq.
Hearing Officer
Date: April 10, 2008