DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

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STUDENT HEARING OFFICE
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Confidential

STUDENT[1], by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.	**HEARING OFFICER'S DETERMINATION** Date: April 3, 2009 **Hearing Officer: Wanda I. Resto, Esquire**

[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 24, 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 participate in the February 6, 2009 multidisciplinary ("MDT") individualized education program ("IEP") team meeting and by failing to approve a residential placement for the Student as determined needed by the MDT. The Petitioner requests the Respondent be found to have denied the Student a FAPE and ordered to immediately place and fund the Student at a residential placement selected by the Petitioner. The Petitioner also requests within 30 days of the Student's enrollment in the new placement that the Respondent convene an individualized education program team meeting to review and if necessary revise the Student's IEP.

A telephonic pre-hearing conference for the above reference matter was conducted on March 11, 2009 at 4:00 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. The Respondent argued that the Student will be placed in a residential setting within the next few days by the District Court.

An Order on March 16, 2009, instructed the Petitioner to prepare to demonstrate at the hearing why the Student requires a residential placement and how the Petitioner's choice of placement is appropriate for the unique needs of the Student. The Respondent must present evidence to demonstrate that the proposed placement is appropriate and that it acted appropriately when it did not approve a residential placement for the Student. The Respondent must also present evidence to clarify its assertion that the Student is requesting a residential placement for community and not educational reasons.

On March 18, 2009, the Petitioner filed a Motion for Directed Verdict or in the Alternative a Motion in *limine*. The Petitioner alleged that the Respondent failed to supply the required response and as a result the Petitioner is deprived of the ability to adequately prepare for the due process hearing. The Petitioner further alleged the Respondent never issued a: prior written notice" addressing the issues raised by the Petitioner's Complaint. The Petitioner requested that a finding in favor of the Petitioner be entered. In the alternative the Petitioner requests that an order prohibiting the Respondent from offering any affirmative defenses via documents or testimony on the issues raised in the Complaint.

The DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed on March 19, 2009. The Respondent alleged that it has not made a determination that the Student requires a residential placement for educational purposes. The Respondent argued that the residential placement is requested for community reasons and not for educational reasons. The Respondent reiterated that the Student's placement was no longer an issue because the residential setting was determined by the District Court.

On March 20, 2009, the Respondent filed an Opposition to Petitioner's Motion for a Directed Verdict/Default Judgment. The Respondent argued that there is no authority, neither statutorily nor through case law, establishing a penalty for the LEA's untimely response or even

failure to respond. The Respondent further argued that the prior written notice and response provisions of the IDEIA are to inform the parent in writing of an agency's final action on a proposal or refusal to initiate or change the identification, evaluation, educational placement or the provision of FAPE and the DCPS has not made a determination.

The Respondent further alleged that it responded to the allegations at a pre hearing conference. It's the Respondent's position that the Petitioner's case has not been prejudiced because the Petitioner does know the Respondent's position and defense. The Respondent alleges that the Petitioner had an opportunity to prepare for the hearing based upon the oral response that was presented at the pre-hearing conference. Furthermore, alleged the Respondent that in its response file on March 19, 2009, it reiterated the defense and provided the same information as in the pre-hearing conference. The Respondent argued that the Student's substantive rights were not affected. The Respondent requests that the Petitioner's motion for directed verdict be denied.

A hearing was held on March 25, 2009. The Petitioner presented a disclosure letter dated March 18, 2009 to which thirteen documents were attached, labeled P-1 through 13 and which listed five witnesses. Four witnesses testified –the Father, a Counselor, , and the Director of the current placement, The Respondent presented a disclosure letter dated March 18, 2009 identifying five witnesses and to which one document was attached, labeled DCPS 1. One witness testified – the DCPS Nonpublic Placement Specialist. The documents were admitted without objections. Counsel for the Petitioner asserted the Respondent failure to issue a prior written notice deprived her of the ability to adequately prepare for the due process hearing. However, the Petitioner could not demonstrate that there was a surprise in the Respondent's defense or that an untimely Response harmed the Student.

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 participate in the February 6, 2009 MDT/IEP meeting?

2. Did the Respondent have an obligation to approve a residential placement for the Student?

3. Did the Respondent deny the Student a FAPE?

III. FINDINGS OF FACT

1. The Student is a student with disabilities under the Individuals with Disabilities Education Improvement Act ("IDEIA"). The Student's most recent IEP is dated February 6, 2009 and provides 25 hours of specialized instruction and 2.5 hours of

counseling services weekly. The Student's disability classification is emotional disturbance ("ED").[2]

2. The District Court in October 2008 ordered a Psychiatric evaluation to consider if the Student is eligible for residential placement. The Student most recent psychological testing of 5/1/08 gave him an IQ score of 96 within the average range. The evaluation indicates that the student has engaged in a variety of antisocial maladaptive behaviors in the home and school over much of his life. The student has a diagnosis of fetal alcohol syndrome since birth and according to the evaluator that would explain what appear to be signs of developmental delays in speech and language skills as well as his inattention and impulsivity. The Student's DSM-IV psychiatric diagnosis was:

   - AXIS I: mood disorder NOS, Cannabis abuse, attention deficit hyperactivity disorder (history) up, developmental mathematics disabilities, R/O obsessive compulsive disorder, R/O chronic posttraumatic stress disorder, parent child conflict.

   - AXIS IV: severe stressors include early abuse and neglect, antisocial behaviors, anger, speech and language problems.

   The evaluator's opinion is that the Student requires a more consistent, intensive treatment than he has been able to receive. The evaluator states the Student's best treatment so far seems to have been in the locked, secured, daily monitoring treatment environment of an inpatient psychiatry unit. The evaluator believes that setting provided the Student the educational, psychological, substance abuse, psychiatric inclusive of medication, cultural and dodger supports that he requires to reach productive adulthood. The Student has strengths related to reading and writing music, but is expressing himself through dangerous channels. In the evaluator's view the Student is not safe to himself or for the community in which he lives. A recommendation for speech/language, and a neurological assessment was made.[3]

3. A meeting was held for the Student on February 6, 2009, in which the MDT reviewed the Student's occupational therapy and vocational assessments, revised and updated the Student's IEP. The teacher reported the Student is high functioning academically, his behavior has deteriorated, he is defiant and there are overall safety concerns both for the Student and others. The teacher reported that the Student does well academically and he has been able to retain a lot of information. She also reported the Student is at grade level and functioning appropriately. There are concerns with his actions in the community and that he refuses to take his medication. *Neither the speech/language nor the psychiatric evaluations were available. The representative of the DMH, the parents, and HRA agreed that the Student was in need of new placement, and a residential treatment program was warranted.*[4] The Respondent's representatives reported that she could not approve a

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[2] P#12 IEP dated February 6, 2009.

[3] P#9 Psychiatric evaluation from October 2008.

[4] Multidisciplinary team meeting notes dated February 6, 2009

residential placement at that time and requested a copy of the psychiatric. She stated she was to get information on the following Monday concerning how to perceive with residential placements and would contact Counsel for the Petitioner to inform her of the decision. There were no other placement alternatives discussed that day. The MDT has not been reconvened. [5]

4. The representative of the Respondent at the MDT meeting indicated that she could not make an approval of a residential placement and needed to consult with her supervisors.[6]

5. The Student's current educational placement is The Student had a "honeymoon period" for approximately one or two months and now the is no longer an appropriate placement for the Student.[7]

6. The Therapist provided the Student intensive case counseling, medication and school monitoring. The Student is failing the ninth grade, leaves classes and his attendance is poor. The Student was receiving community based intervention services from a team of providers. The team consensus is that the Student has received the highest level of intervention and requires a residential placement because of the totality of his needs.[8]

7. The Student is detained at the Youth Service Center –for an offense in the community. After the MDT meeting in February the Respondent's representative has been in conversations with the Student's Probation Officer ("PO"). The PO informed the Respondent that the Student was placed by a Judge at Pines and they are working on an interstate agreement between Virginia and the District of Columbia government. The Respondent has the responsibility for monitoring Student's educational placements outside of the jurisdiction.[9]

8. The Student has been placed at a residential educational placement by a District of Columbia Judge. The family is awaiting approval and documents to be exchanged between the state of Virginia and the District of Columbia. The parents desired that the Respondent remain vigilant on the Student's IEP Services and to maintain educational supervision over the Student while in the residential placement in Virginia. [10]

9. in Portsmouth, Virginia has approximately 6 to 8 student per class, with a variety of disabilities classification ranging from emotional disturbed, learning disable, mental retardation and other health impairments. The Pines provides a structured therapeutic program 24 hours of the day. The Student's evaluations and IEP were reviewed; it can be implemented at the Pines and the required counseling

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[5] Testimony of the DCPS Placement Specialist and Multidisciplinary team meeting notes dated February 6, 2009.

[6] Testimony of the director at

[7] Testimony of the Director at

[8] Testimony of the Therapist

[9] Testimony of the DCPS Placement Specialist.

[10] Testimony of the Father.

can be provided. The Pines can teach at the Student's level and he can receive an educational benefit. The Student's referral packet for the Pines was sent by the Student's Probation Officer and the Student has been accepted.[11]

IV. CONCLUSIONS OF LAW

Preliminary matters

Counsel for the Petitioner asserted the Respondent failure to issued a: prior written notice" or a response deprived of the ability to adequately prepare for the due process hearing.

Pursuant to 34 C.F.R. 300.508 (e) and (f), the party receiving a due process complaint must, within 10 days of receipt, send to the other party a response that specifically addresses the issues raised in the due process complaint.

The Respondent filed a Response approximately (13) days after the date a Response for the due process complaint was mandated. Nonetheless, the Response address the issues raised in the due process complaint as required by the IDEIA.[12] The Respondent at a pre hearing conference alerted the Petitioner of its position and defenses and a day later file a written response. The Petitioner had an opportunity to prepare for the hearing based upon the oral and the written response. Furthermore, the Petitioner failed to demonstrate there was a surprise in the Respondent's defense, nor that an untimely response harmed the Student or that the Student's substantive rights were affected by a delayed response.

The Hearing Officer is not persuaded that in this case the delay in response is sufficient to trigger the ultimate penalty to the Respondent of granting a Default Judgment or not allowing in defenses. The Petitioner's motion for directed verdict is denied.

FAPE Determination

The Respondent 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)."

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

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[11] Testimony of the Special Education Teacher at

[12] See: 20 U.S.C. 1415(c)(2).

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 has met its legal obligation under the IDEA. Here is why.

Educational Placement

The Petitioner contends the DCPS cannot abdicate its responsibilities to the Department of Mental Health, and placements determinations are to be made by the MDT.

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. [13] The IDEIA regulations require 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. [14] The regulations also require that "the parents of a child with a disability be afforded an opportunity to participate in meetings with respect to ... [the] educational placement of the child." [15]

An MDT Meeting was held for the Student on or about February 6, 2009, in which the MDT reviewed the Student's occupational therapy and vocational assessments, revised and updated the Student's IEP. Neither the speech/language nor the psychiatric evaluations were available. The representative of the DMH, the parents, and agreed that the Student was in need of a new placement, and a residential treatment program was warranted. At the meeting, the Respondent did not offer another placement; she requested a copy of the psychiatric evaluation and an opportunity to consult supervisors before determining placement.

It is clear from the testimony and notes that at the placement discussion not all of the evaluations were discussed, nor was there any explanation on why the Student required a residential placement beyond the behavior concerns.

In an accordance with 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."

Furthermore, 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." 16 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. 17

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[13] See: 20 U.S.C. 1412(a)(5).

[14] See: 34 C.F.R. § 300.116

[15] *See: 20 U.S.C. § 1414(e); 34 C.F.R. § 300.501(b)(1)*

[16] D.C. Code § 38-2561.02(c) (2007).

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

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.

This Student's current IEP was created February 6, 2009 and the Petitioner does not challenge its appropriateness. T There was no evidence in the notes or the testimony to demonstrate that the placement decision made by the group on February 6, 2009 was a full MDT that reviewed and discussed the Student's educational needs or psychiatric evaluation. The Respondent made the determination to request an opportunity for consideration of the placement recommendation. It is obvious that the placement recommendation was made by a group that was not the entire MDT, without all the evaluation, and with no discussion on why the least restrictive environment for this Student would require maximum restriction, the Respondent's actions in the present matter were appropriate. The parent had an opportunity to participate and contributed to the decision made on February 6. 2009 which was later confirmed by the District Court Judge.

The Petitioner alleged the Respondent refused to accept the residential placement as agreed by an MDT. The claim is moot the evidence was that the Petitioner accepted through his testimony that what is pending is a procedural requirement of signing a document acknowledging that the placement will be out of the jurisdiction of D.C.

The Petitioner has pointed to no evidence in the record contradicting the Respondents' claim that the Student's placement determination and funding has been determined by the Court.

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." [18]

Undoubtedly the placement decision in this matter was flawed because the Student's current evaluation were not discussed which should be used as foundation to design the Student's program; there was no evidence that this Student's unique needs were addressed. However, the placement decision has been taken out of the hands of the Respondent and this Hearing Officer.

The Petitioner was very clear at the Hearing, the residential placement at was already granted by the District Court Judge. The Petitioner purpose at the hearing was to get an

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[18] Id.

order so the Respondent is watchful of the Student's education while outside the District of Columbia.

Violations

Even if the Respondent failed to place the Student in a timely in this case it constituted a procedural violation. A procedural violation is only actionable "if those procedural violations affected the student's *substantive* rights." *LeSesne ex rel. B.F. v. Dist. of Columbia*, No. 04-CV-620, 2005 WL 3276205, at *9 (D.D.C.2005) (holding that child was not harmed despite defendant's delinquency since, despite technical violation, child received a FAPE), *aff'd*, 447 F.3d 828.

The evidence is that the Respondent did not violate a statutory obligation to provide an appropriate placement in a timely manner. The Respondent was in communication with the Student's PO, and was informed that all that was pending to finalize the residential placement of the Student was an interstate agreement. In the circumstances of this case it was appropriate for the Respondent to assume the placement decision has been rendered.

The Petitioner did not show that an educational harm was caused by any procedural violation the Respondent may have committed. The evidence was that a District Court Judge has already authorized the placement of the Student at the Pines. The Petitioner failed to demonstrate that the Student's right to a FAPE was denied or that the parent was significantly impeded from participating in the decision making process, the father testified that the Student has received the placement chosen by the Petitioner. The father further testified that his purpose for being at the hearing was to make certain that the Respondent does not "drop the ball" because the Student is being transferred out of the District of Columbia; he wants to make sure DCPS continues to monitor the Student's education.

The Petitioner cites *Diamond v. McKenzie, 602 F. Supp. 632, 638 (D.C.Cir.1985)* to assert that the Respondent cannot defer a residential placement decision to another committee or agency. The Petitioner quotes "Hearing Officers need only look to DCPS when entering determination and requiring appropriate action. To hold otherwise would be to subject children and their parents to an additional step not required by EHA."

The Petitioner fails to acknowledge that the Hearing Officer in *Diamond* declined to provide a residential placement because she concluded that she did not have the power to do so.[19]

This case is distinguishable from *Diamond* because here the Hearing Officer has no doubt that if the student is eligible for special education she can make a residential placement decision and do so without referring the matter back to DCPS. The record before the Hearing Officer consistently demonstrated that residential placement decision was decided by a Judge of the D.C. District Court, prior to the Hearing date.

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[19] Counsel-Elizabeth Jester- 3/31/09-Letter and a copy of Diamond-no other documents were attached.

The Petitioner must be mindful that he came to the Hearing looking for a reaffirmation of a decision that was not made by a committee of the DCPS, but by a Judge, whom the Hearing Officer has no authority to overrule. The Petitioner chose an additional action that is not appropriate. The Respondent did not deny the Student a FAPE.

V. SUMMARY OF DECISION

The Petitioner did not show that an educational harm was caused by any procedural violation the Respondent committed. The evidence was that a District Court Judge has already authorized the placement of the Student at the Pines Residential Treatment Center a placement with which the parent agrees. The Petitioner failed to demonstrate that the Student's right to a FAPE was denied or that the parent was significantly impeded from participating in the decision making process. The Respondent acknowledged it has the responsibility for monitoring Student's educational placements outside of the jurisdiction.

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 not denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, the Complaint is **Dismissed.**

This order resolves all issues raised in the Petitioner's February 24, 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)

WIRestorres **Date: April 3, 2009**
Wanda I.ris Resto Torres - Hearing Officer