DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT
STATE ENFORCEMENT AND INVESTIGATION DIVISION

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STUDENT, a minor, by and through her Parent(s),[1]

Petitioners,

- against -

District of Columbia Public Schools,

Respondent.

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HEARING OFFICER DETERMINATION

SHO Case No.

Deusdedi Merced, Hearing Officer

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioners Notice of Due Process Complaint, filed on or about March 5, 2010 (hereinafter, "Complaint"). HO 1.[2] I was appointed shortly thereafter. HO 2. Respondent's Response to the Complaint was filed on or about March 15, 2010. HO 6. A resolution meeting was held on March 29, 2010. HO 9. The parties, however, were not able to reach an agreement. Id. A pre-hearing conference in the matter was scheduled for, and held on, March 29, 2010. HO 10. The Pre-Hearing Conference Summary and Order was issued on March 29, 2010. HO 10.

Petitioners sought an expedited hearing with the filing of the Complaint. See HO 4. The concern warranting an expedited hearing was a "high likelihood that the student will abscond." HO 4-1. Petitioners' motion was denied, in part, because the motion

[1] Personal identification information is provided in Appendix A, attached herein.
[2] The Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioners Exhibits will be referred to as "P" followed by the exhibit number; and, Respondent Exhibits will be referred to as "R" followed by the exhibit number.

failed to set forth in any level of detail why an expedited hearing was warranted other than stating that the student might runaway. HO 5-4. Petitioners did not include any supporting affidavit(s), declaration(s), or document(s) from the parents or anyone else to substantiate that any of the conditions set forth in Standard Operating Procedures § 1008 applied. See, generally, HO 4; HO 5. Documents were readily available, however, but were not shared with the undersigned until disclosures were due, a month after the Complaint had been filed. See, e.g., P 11, P12.

A hearing was held on April 14, 2010.[3] It was a closed hearing, and the Petitioners were represented by Roberta Gambale, Esq. Respondent was represented by Tanya Chor, Esq. Petitioners entered into evidence exhibits 1 to 32; Respondent entered into evidence exhibits 1 to 11.

JURISDICTION

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter, "IDEIA"),[4] 20 U.S.C. § 1400 et seq., its implementing regulations, 34 C.F.R. § 300 et seq., and the District of Columbia Municipal Regulations, Title 5, Chapter 30, Education of Handicapped (2003).

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[3] Petitioners presented the testimony of the parent; Clinical Forensic Psychologist, DiCon, LLC; Licensed Professional Counselor and school psychologist; Assistant Educational Director, and, Eileen Hammond, Care Manager, Health Services for Children with Special Needs. Respondent presented the testimony of Special Education Coordinator, District of Columbia Public Schools; and, Program Manager for Residential Unit, District of Columbia Public Schools. Witness testimony will be referred to as "Testimony of" followed by the name of the witness.

[4] In 2004, Congress reauthorized the Individuals with Disabilities Education Act (hereinafter, "IDEA") as the IDEIA. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005.

BACKGROUND

The student is years old and presents with significant emotional issues that require placement in a therapeutic, residential school. The parties disagree, however, on the student's interim school placement while Respondent identifies an appropriate therapeutic, residential school. Petitioners would like to have the student attend an approved, therapeutic non-public day school for the provision of special education and related services. Respondent avers that the student can be serviced in Transition and asks the undersigned to consider this school program as an alternate to

ISSUES

The sole issue being presented for determination is what interim school placement would be appropriate for the student while Respondent engages in the process of identifying an appropriate therapeutic, residential placement for the student.[6]

Petitioners' seek interim placement of the student in with the provision of a dedicated aide and transportation.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is years old. P 2-2.

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[5] is being offered for consideration after the undersigned requested of Respondent that it be prepared to offer testimony at the hearing on an alternate interim placement to for the student in the event that I were to determine that would not be appropriate.

[6] Initially, Petitioners had identified the sole issue as whether Respondent denied the student a free and appropriate public education when it failed to identify an appropriate location of services that can implement the student's July 23, 2009 Individualized Education Program (hereinafter, "IEP"). See HO 1-5, HO 10-5. However, during the course of the hearing, the parties agreed that the student required placement in a therapeutic, residential school and that what was being asked of the undersigned was to determine an interim school placement until such time as an appropriate residential school is identified.

2. The student is adopted. P 2-3.

3. The student is attending since early April 2010. Testimony of Parent; See P 22-1. The parent has taken leave from work to transport the student to and from and home. Testimony of Parent.

4. The student's teachers at report that the student is doing well and participating in classroom instruction. Testimony of Parent.

5. The student is classified as having Multiple Disabilities.[7] P 10-1.

6. The student's most recent IEP is dated July 23, 2009 (hereinafter, July 2009 IEP"). See P 10; HO 6-2.

7. At the time of the July 2009 IEP Team meeting, the student required a full-time, therapeutic placement "free from violent behaviors." See P 10-4; HO 6-2; P 10-12.

8. The IEP Team did not determine the student's school placement on the day of the IEP Team meeting. See P 10-10.

9. The parties, however, endeavored to identify a non-public school day placement for the student. See P 10-12.

10. The parties disagreed on whether the student required a residential placement. P 10-13.

11. The parties, however, now agree that the student requires a therapeutic, residential placement, (Testimony of and Parent; Stipulation of the Parties), but disagree on where the student should attend school while an appropriate

[7] The Prior Notice Letter dated July 23, 2009 identifies the student's primary disability as Emotionally Disturbed. See P 10-10.

therapeutic, residential placement is identified (See Testimony of Parent, and Austin).

12. On January 4, 2009, the student was admitted to and discharged on February 14, 2009.[8] P 11-4. She was admitted because of "psychosis." P 11-11. Specifically, upon returning from celebrating the new year, the student was "emotionally non-responsive, not eating, non-verbal, not performing personal hygiene and disconnected with reality." R 6-1.

13. Four days after being discharged, the student was readmitted for another inpatient admission after her behavior regressed in the home. P 11-4. Specifically, the student was not communicating well with others and on everything and refused to use the toilet. R 8-1, P 11-4.

14. The student remained in from February 18, 2009 through March 13, 2009. P 11-11.

15. The discharge diagnosis was Psychotic Disorder NOS. P 11-11, R 8-4.

16. On September 15, 2009, the student underwent a Comprehensive Psychological Evaluation. See P 12. The purpose of the evaluation was to assess the student's current level of cognitive, emotional, and academic functioning to assist with educational planning. P 12-1.

17. Pius O. Ojevwe, Psy.D., a clinical forensic psychologist, supervised the administration of the Comprehensive Psychological Evaluation. P 12-18.

[8] The student's actual inpatient period is recorded inconsistently in various documents entered into evidence. See, e.g., P 11-4, R 6-1, and R 8-1.

18. The student's overall thinking and reasoning abilities exceed those of approximately 16% of children her age. P 12-8. However, her overall cognitive ability is considered an underestimate of her actual functioning. Id.

19. The student's reasoning abilities on verbal tasks and processing speed skill are generally in the Borderline range. P 12-7 – P 12-9, P 12-15. However, the student's nonverbal reasoning abilities and working memory abilities are in the Average range. Id.

20. Academic functioning is low average in mathematics and math calculation skills, low average in broad reading, low average in written language, and low written expression. P 12-9 – 12-12, P 12-15. The student's academic functioning is commensurate with her cognitive functioning. P 12-15.

21. Socio-emotional testing suggests that the student is –

> an emotionally distressed and behaviorally defiant young woman who is experiencing considerable emotional discomfort. She is depressed and functions with a considerable degree of affective discomfort that seemingly manifested when she was relatively young, and was mostly like [sic] precipitated by sexual abuse and a disruption in attachment....Currently, she appears to [sic] engaging [sic] a significant degree of self-destructive (prostitution, unprotected sex, drug use) behaviors, seemingly in an attempt to assuage her emotional arousal, while simultaneously enhancing her severely impoverished self-concept....Lastly, the results from testing further suggests a proclivity for utilizing illicit drugs in an attempt to ameliorate her sense of hopelessness; however, the resulting outcome of her drug use has been emotional dyscontrol, behavioral dysregulation, and intense despair.

P 12-13 - 12-14.

22. The student was diagnosed to have a Mood Disorder NOS, "as she has a long history of insidious low-grade depression, as well as anxiety, which appears to have manifested after she was sexually abused and subsequently removed from her mother's home." P 12-16; Testimony of

23. The student was also diagnosed with Posttraumatic Stress Disorder, "as she was exposed to an extremely traumatic stressor that has subsequently led to recurrent and intrusive distressing recollections of the event." Id.

24. Further, the student was diagnosed Disruptive Behavior Disorder, NOS because of her "highly disruptive manner." Id.

25. The student's school placement resulting from these findings warranted a recommendation that she be placed in a "fulltime therapeutic program, preferable a residential placement for young girls with a history of sexual abuse." P 12-17; Testimony of

26. The adoptive parents had agreed with that the student requires a residential placement. See P 15-1, P 15-2, P 15-3, P 17-1.

27. The recommendation for a residential placement remains unchanged. Testimony of is "very firm" that the student continues to require a residential placement seven months after his initial recommendation given the "plethora of issues" that the student presented, and continues to present, with post the evaluation. Id.

28. The residential placement must provide the student with access to a psychiatrist, an environment that is closely monitored and supervised, family therapy one hour per week by either a licensed clinical social worker or psychologist, individual therapy two times per week (45 minutes each), parent training for the adoptive parents, and small classes with no more than 4 – 5 students per class. Testimony of

29. The student was admitted to on January 4, 2010 and discharged on January 26, 2010. P 11-4.

30. The student had ran away from home in September 2009 and did not return to her adoptive parents until the night of her admission to

See P 11-4.

31. The student was admitted because she had "gone crazy"; "she walked out of the house without shoes, upper clothes, and was acting bizarre." P 11-4.

32. The student had gone without her medication since September 2009. Id.

33. The discharge diagnosis was Schizophrenia – chronic, undifferentiated. P 11-6.

34. Upon discharge, the student continued with "significant symptoms" but was "showing improvement of functioning with antipsychotic regimen." P 11-9.

35. There is a history of bipolar disorder and schizophrenia in the biological father's family. P 11-5.

36. The student's father was murdered when she was an infant. The student was taken away from her biological mother after it was discovered that the student was sexually abused while the mother was in the area when the abuse was taking place. P 11-5.

37. The student is suspected of abusing alcohol when she can get it, marijuana on a daily basis, and ecstasy frequently. Id.

38. The student has a history of running away and does so "in order to avoid being complaint." P 12-2.

39. The student has stolen items from all her family members, destroyed furniture in the home, and destroyed her clothing and items in her bedroom. Id.

40. Two dead cats were discovered in the student's room, and it is reported that the student "snapped the neck of one cat and had drowned the other, after she had painted one cat green." Id. When confronted about it, the student "just laughed." Id.

41. The student has a history of suicidal thoughts and, on one occasion, she described how she would want to herself. P 12-6.

42. The student has also attempted to assault her adopted mother's granddaughter and has physically assaulted a teacher. P 12-2, P 12-4.

43. The student has been three times for theft. P 12-3.

44. The student has abused drugs and engaged in Id.

45. The student was retained at the end of the 2008 – 2009 school year and was scheduled to repeat the grade during the 2009 – 2010 academic year. P 12-4. However, the student has not attended school during the 2009 – 2010 school year. Id.

46. The student has a history of chronic absenteeism. Id.

47. On or about March 26, 2010, the student was accepted to for the 2009 – 2010 school year "with the appointment of a dedicated aid on a 30-day contingency basis." P 23-1.

48. The student's acceptance in however, was premised on the misunderstanding by personnel that Respondent had refused to consider a residential placement for the student. Testimony of

49. agrees that the student requires placement in a therapeutic, residential program. Id.

50. In April 2010, the student was offered a seat in

(hereinafter, Testimony of Parent.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Residential placements are highly restrictive and should not be considered for a student with a disability unless the student requires a residential placement to receive educational benefit. See 34 C.F.R. § 300.104; See, e.g., Department of Educ., State of Hawaii, 51 IDELR 262 (SEA HI 2008) (finding that a teenager with limited communication skills but who functioned at the level of a grade schooler needed a residential placement to receive FAPE). Failure to consider a residential placement despite a student's indentified need can amount to a denial of FAPE. See, e.g., Plainville Bd. of Educ., 52 IDELR 27 (SEA CT 2008) (holding that the student was denied FAPE when the district proposed a therapeutic day program despite evaluators opining that the student needed a residential placement).

The fact that a student exhibits emotional or behavioral outbursts outside the school environment does not in itself demonstrate a need for a residential placement. See, e.g., Ashland Sch. Dist. v. Parents of Student R.J., 109 LRP 76642 (9th Cir. 2009) (holding that the district did not have to pay for a student's placement in a residential school because the placement resulted solely from the student's risky and defiant behaviors in the home). However, where a student's educational needs are inseparable from social, emotional and mental health needs, and the student would not be able to

derive educational benefit without the therapeutic aspects of the residential placement, the programming is considered intrinsic to the student's education and the district must bear the cost. See 34 C.F.R. § 300.104; Kruelle v. New Castle County Sch. Dist., 552 IDELR 350 (3d Cir. 1981); North v. District of Columbia Bd. of Educ., 551 IDELR 157 (D.D.C. 1979) (holding that, because the student's emotional needs were "closely interwoven with his educational needs," the school district had an obligation to provide and fund an appropriate residential program). But see Richardson Indep. Sch. Dist. v. Michael Z. and Carolyn Z., 52 IDELR 277 (5th Cir. 2009) (rejecting the Kruelle standard as overly broad and adopting its own test requiring that it be determined whether the residential placement is "essential to the student's education").

None of the evidence in this case indicates, and indeed none of the witnesses assert, with the exception of one (i.e., that the student does not need a therapeutic, residential placement.[9] See, e.g., P 12; Testimony of Parent. The student presents with an inability to function normally in the home, risk of flight if not supervised and monitored constantly[10], and chronic absenteeism from school. See P 12-2 – 12-5; Testimony of Parent. The student is also a danger to self and others if not supervised and monitored constantly. Testimony of She requires learning basic living skills (such as communicating and self-hygiene) in order to benefit from the overall educational experience. These demonstrated severe

[9] Witness however, was not a credible witness. Her testimony appeared to be influenced by the adoptive parents' initial opposition to placing the student in a residential placement. And, although testified that the student was "much more stable now than before," said assessment was in direct contradiction to the credible testimony offered by who had evaluated the student, and the student's therapist.

[10] Even when in the school setting, the student would run off with her boyfriend and biological mother. P 12-4.

emotional and educational problems can appropriately be dealt with only by intensive treatment in a therapeutic, residential setting. See Testimony of

Given that said emotional needs are closely interwoven with the student's educational needs, and that there is no dispute amongst the parties that the student requires placement in a therapeutic, residential program (Stipulation of the Parties), I concur that the student requires placement in a therapeutic, residential placement and that said placement would be the least restrictive environment for the student at this time.

Respondent contends, however, that while the student's emotional difficulties demand residential treatment, in the interim, whilst the parties are in the process of identifying an appropriate program, the student's educational needs can be met by attendance at the Testimony of Petitioners have expressed preference for placement in Testimony of Parent. It is clear from the record evidence that neither placement in would be appropriate for the student.

In the student would be in a school environment where approximately 75% of the student population is male, and all have been identified as having emotional disturbances. See Testimony of Austin. For a student with a reported recent history of prostitution and promiscuity, placement in tantamounts to leading the lamb to the lion's den.

Further, although Respondent asks that the undersigned consider as an alternative placement to Petitioners' desired placement, Special Education Coordinator Austin (hereinafter, "Austin") did not offer convincing testimony that would have an appropriate class placement for the student. Id. First, Austin has a superficial

understanding of the student's needs. Id. Although she testified that she had reviewed the student's recent IEP, she did not recall its content but, nonetheless, opined that it can be implemented at Shadd. Id. Austin did not participate in the educational placement process. See 34 C.F.R. § 300.116.

Moreover, a specific classroom has not been selected for the student; the student would be assigned to a class when she showes up at the schoolhouse door. Id. While there are no federal standards for class composition, class composition matters for consideration during the IEP and placement process to the extent that these issues impact FAPE. See, e.g., Letter to Anonymous, 17 IDELR 424 (OSEP 1991) (IDEA does not impose any mandatory class sizes or teacher-pupil ratio for special education students). Letter to Buell, 29 IDELR 902 (OSEP 1997) (The composition of a class must be considered when developing the student's IEP.) In the absence of any information whatever on the composition of the class that would be available to the student should she enroll in the undersigned cannot, and will not, consider Respondent's request for alternate placement in

Placement in is also not appropriate, and the school presents with similar deficiencies as Assistant Educational Director (hereinafter, testified that when the admissions committee met the student in February/March 2010, the student was "very fragile," "non-responsive," and that her "motoric skills" were "slow and labored." Testimony of The admissions committee further observed that the student would require a one-on-one aide to escort her throughout the school day, and conditioned the student's entry into the school on the assignment of an aide. P 23-1; Testimony of Given the student's overall

presentation, and need for one-on-one assistance, identified a class of two boys and one girl; all three students are classified as being mentally retarded. Testimony of However, readily admitted that placement in a therapeutic, residential school is what the student requires and that the proposed placement in resulted from being led to believe that Respondent would not go forward with a residential school for the student. Id.

Further, does not provide a safer haven from boys than Shadd. A primary concern of the parent in placing the student in is that the male population in is approximately 75%, and that the student has a recent history of prostitution and promiscuity. Testimony of Parent. The male population in however, fairs no better – it is approximately 65%. Testimony of Accepting the parent's assertion that placing the student in an overwhelmingly male environment might pose a safety issue for the student, I cannot credit the parent's testimony that does not pose the same security concern as

Moreover, the proposed class is too low functioning. Said composition would be inappropriate both educationally and emotionally for the student, even if for the interim. First, all three of the students in the proposed class are working towards certificates of completion rather than a regular District of Columbia High School Diploma because of their low intellectual and academic functioning. See Testimony of The student has been identified as being able to graduate with a District of Columbia High School Diploma. P 10-9. Secondly, given the student's "impoverished self-concept," placing the student in a class with all mentally retarded children can further compromise her emotional discomfort and sense of hopelessness. See P 12-13 – 12-15.

Neither is the undersigned convinced that the other two proposed classes would be appropriate for the student.[11] Although these two classes would house children identified with emotional disturbances and learning disabilities, testified that the school had initially considered these two classes for the student but rejected the classes after having interviewed the student and it being determined that the student "needed more" than what the two classes would offer. Testimony of Again, the student's acceptance to appears to have been an accommodation to the student rather than what would be appropriate for the student because was led to believe that Respondent would not consider a residential placement for the student. Testimony of concurs that the student requires placement in a therapeutic, residential placement.

For the reasons stated herein, Petitioners have failed to meet their burden of demonstrating that would provide appropriate interim services to the student. Neither has Respondent convinced the undersigned that would be an appropriate alternate to Petitioners' desired placement. Tasked, however, with determining where the student should attend school on an interim basis while Respondent identifies an appropriate residential school for the student, the undersigned finds that the student should remain at where reportedly she is doing well and participating in class instruction. Testimony of Parent. Removing the student from given the parent's testimony about the student's functioning in would be disruptive to this fragile student.

[11] Petitioners' counsel recalled Assistant Educational Director during the hearing to offer two alternate class options for the student. This precipitated from the undersigned having expressed concern with the student's placement in a class with all mentally retarded children. See Testimony of

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within 45 calendar dates from the date on this Order, Respondent shall place the student in an appropriate therapeutic, residential placement and make the requisite travel arrangements to get the student to the residential school.

2. The therapeutic, residential placement should have available to the student access to a psychiatrist, an environment that is closely monitored and supervised, family therapy by either a licensed clinical social worker or psychologist, individual therapy for the student, parent training for the adoptive parents, and small classrooms with no more than 4 – 5 students per class.

3. Within 30 days of the student's placement in the therapeutic, residential placement, Respondent shall convene an IEP Team meeting to review all current evaluations and any other pertinent information and revise, as appropriate and necessary, the student's July 23, 2009 IEP. The July 23, 2009 IEP shall be amended to reflect the student's placement in a therapeutic, residential school.

4. The student is to remain at on an interim basis pending placement in a therapeutic, residential school. The student is to be provided with transportation services to and from and home.

5. The student shall also be provided with the services of a one-on-one aide while at The aide, or an appropriate designee to be determined at the discretion of the principal, shall escort the

student to and from the school building and the school bus during morning drop off and afternoon pick up.

6. Petitioners' request for interim placement in is hereby DENIED.

7. Respondent's request for interim placement in is hereby DENIED.

IT IS SO ORDERED.

DATED: April 19, 2010

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NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. § 1415(i)(2)(B).