DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

STUDENT,[1]

Petitioner,

Hearing Officer: Nathaniel Baccus

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE
2012 JUN 18 PM 12: 10

HEARING OFFICER DETERMINATION
ON CROSS MOTIONS FOR SUMMARY ADJUDICATION

I. Background

Petitioners filed a Due Process Complaint ("Complaint") and served the Respondent on March 30, 2012. The Respondent filed a response on April 26, 2012. A prehearing conference was held, via telephone, on May 31, 2012. Participating in the prehearing conference were Petitioner's Counsel, and Respondent's Counsel, A Prehearing Order was issued on June 1, 2012.

Pursuant to a discussion of the issues between the parties and the Hearing Officer, the parties agreed to the filing of cross motions for summary adjudication on June 5, 2012. Both parties filed dispositive motions on June 5, 2012, and neither party filed a reply to the other parties motion. This decision followed the submissions of the parties.

The Petitioner filed a motion for pre-hearing summary adjudication and the Respondent filed a motion to dismiss. After careful consideration of the pleadings, motions, undisputed facts, and the Hearing Officer's independent research, Petitioner's motion for summary adjudication is granted with regard to development of the IEP.[2] The

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[1] Personal identification information is provided in Attachment A.

[2] Although the IDEA, nor the District of Columbia Municipal Regulations (DCMR) for special education hearings, provide procedures for summary disposition, the Hearing Officer may make a determination under the authority to complete the hearing in an efficient and expeditious manner, upon review of the pleadings, decisions and applicable regulations under the IDEA. See Section 600.1, Student Hearing Officer Standard Operating Procedures (SOP).

issues raised the provision of free appropriate public education (FAPE) to the student once a determination of eligibility for special education and related services has been made.

II. Findings of Undisputed Facts

Upon consideration of the pleadings of both parties, including their motions, the Hearing Officer makes the following findings of material undisputed facts.

1. The student, age lives with his parents in the District of Columbia,[3] and is enrolled as a non-attending student in DCPS.[4]

2. The student "is diagnosed with a severe mood disorder and ADHD-combined type, . . . has a history of significant emotional dysregulation and disruptive behaviors in school and the community, . . . and was hospitalized on June 26, 2011, and in a partial hospitalization program from August 5, 2011 through September 10, 2011."[5]

3. That on November 2, 2011, the student and his mother met with the Special Education Coordinator (SEC) at and provided her with current evaluations and other school records necessary to assist in an eligibility determination and IEP process.[6]

4. On November 16, 2011, the student was withdrawn from School and on November 28, 2011, the student enrolled at the School, a private school located in the District of Columbia. DCPS was provided written consent to observe the student at

5. On February 21, 2012, DCPS convened an MDT meeting with the parents and determined that the student is eligible for special education as a student with Multiple Disabilities, which include "ADHD, Mood Disorder, and Other Health Impairments." DCPS determined that a classroom observation was needed and that a DCPS school psychologist would conduct a classroom observation on the student at

6. During the MDT meeting "[I]t was reported that the student is currently not producing any work at and the parents reported that had a hands off approach as it relates to academics which is somewhat helpful to them and takes some of the burden off of them at home.[9]

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[3] Petitioner's Pre-Hearing Motion for Summary Judgment, p. 1.
[4] Petitioner's Motion for Pre-Hearing Summary Adjudication, Exhibit 3 (E-mail dated March 5, 2012).
[5] Due Process Complaint Addendum, p. 1, paragraphs 2-4.
[6] Due Process Complaint Addendum, p. 2, paragraph 7; Petitioner's Pre-Hearing Motion for Summary Decision, p. 1-2.
[7] Ibid., paragraphs 9-11, p. 2.
[8] Petitioner's Pre-Hearing Motion for Decision, Exhibit 1, DCPS MDT Meeting Notes, p.3, para. 4.
[9] Ibid., Ex. 1, at p. 3.

7. The student is currently receiving extensive community based services. The student sees a social worker 3 days a week, an acupuncturist, and a personal trainer. The supervisor of Home Based Services reported that the following services are being provided in the home: family counseling, clinical intervention and mentoring 2 times a week.[10]

8. The DCPS Private and Religious Office (PRO) process was explained to the parents and advocate. The parents and advocate stated that they would not enroll the student as an attending student until they know what services DCPS has to offer the student. The parents indicated that they would like DCPS to write an IEP for the student.[11]

9. The DCPS PRO Case manager was to follow-up with PRO Program Manager to address the parents concerns with regard to what educational services DCPS has to offer the student. The DCPS PRO Case Manager was to notify the parents once the PRO Program Manager provides an answer to their question.[12]

10. The MDT was scheduled to reconvene on March 8, 2012 at 10:00 a.m. at Deal Middle School. Prior Written Notice was to be issued. The parents signed Procedural Safeguard receipt for manual.[13]

11. DCPS will not develop an IEP for the student unless he physically enrolls and attends the Alice Deal Middle School, stating that " . . . [P]ursuant to the IDEA students who have been placed by their parents in a private school, and who have indicated their desire for the student to remain in the private school, have **no** right ' . . .to receive some or all of the special education and related services that the child would receive if enrolled in a public school." See 34 C.F.R. sec. 300.137(a)." DCPS has published its policy in this regard and the parent and her attorney are aware of the policy for Private and Religious Office (PRO) students."

12. Further, DCPS maintains that "this student has indicated a desire to remain in a Private placement and the parent has a right to keep the student in the placement, but DCPS is not obligated to develop IEPs or placements until such time as the student complies with the Pro policy to enroll and attend a DCPS school."[14]

III. Conclusions of Law

1. "Child with a disability – a child who satisfies District registration and residency requirements and who has been evaluated in accordance with sections 3005-3006 of this Chapter as having one of the following conditions and who, as a result of the impairment,

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[10] Ibid.
[11] Ibid., Exhibit 1, p 3; Exhibit 2, p.2.
[12] Ibid., Exhibit 1, p.3; Exhibit 2, p. 2.
[13] Ibid., Exhibit 1, p.3.
[14] DCPS Motion to Dismiss, at p. 3.

needs special education and related services: . . . (h) Multiple disabilities." 30 DCMR 3001.1.

2. "Individualized education program (IEP) – a written statement for a child with a disability that is developed, reviewed, and revised in a meeting in accordance with 20 U.S.C. Section 1414, and this Chapter." 30 DCMR 3001.1.

3. "The LEA shall make a free appropriate public education (FAPE) available to each child with a disability, ages three to twenty-two, who resides in, or is a ward of the District." 30 DCMR 3002.1((a).

4. "The LEA shall ensure that an IEP is developed and implemented for each child with a disability served by the LEA." 30 DCMR 3002.3(c).

5. "The IEP team shall conduct an initial evaluation of the child within a reasonable time of receiving a written referral and parental consent to proceed and within times lines consistent with Federal Law and D.C. Code sec. 38-2501(a)." 30 DCMR 3005.2.

6. "The IEP team shall meet and develop an IEP for a child with a disability within thirty days of a determination that a child needs special education and related services." 30 DCMR 3007.1.

7. "An IEP must be in effect before special education and related services are provided to a child with a disability, including children with disabilities placed in or referred to a nonpublic school by the LEA; . . ." 30 DCMR 3010.1.

8. "The LEA shall ensure that the educational placement decision for a child with a disability is: . . . (e) Based on the child's IEP;" 30 DCMR.3013.1(e).

9. " The SEA is not required to pay for the cost of education, including special education and related services, of a child with a disability if the LEA has made FAPE available to the child and the parents elected to place the child in a private placement."30 DCMR 3018.1

10. "Free and appropriate public education or FAPE means special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the state involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of sections 300.320 through 300.324." 34 C.F.R. Section 300.17.

11. "If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Sections 300.320 through 300.324." 34 C.F.R. Section 300.306(c)(2).

12. "A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services." 34 C.F.R. Section 300.323(c)(1).

IV. Discussion

"The Individuals with Disabilities Education Act (IDEA or Act , 84 Stat. 175, as amended, 20 U.S.C. Section 1400, et seq., requires States receiving federal funding to make a "free appropriate public education" (FAPE) available to all children with disabilities residing in the State. Section 1412(a)1)(A)" *Forest Grove School District v. T.A.,129 S.Ct. 2484, 2487 (2009); See also, James v. Upper Arlington City School District, 228 F.3d 764,768(2000)(The obligation to prepare an IEP derives from residence in the district not from enrollment.).*

The student here is a resident of the District of Columbia, registered with DCPS as a non-attending student, and has been evaluated and determined by a DCPS MDT team as having multiple disabilities, including ADHD, Mood Disorder and Other Health Impairments." As such, the student meets the District's definition of "Child with a disability" at 30 DCMR 3001.1. The MDT team made that determination based on the existing data, and thus the student is eligible for special education and related services. See 30 DCMR 3006.

The MDT Notes indicate the "Next Steps" as the DCPS PRO Case Manager was to follow-up with the PRO Program Manager to address the parents concerns regarding what educational services DCPS has to offer the student, and for the DCPS school psychologist to conduct the classroom observation of the student at the Parkmont School.

During the MDT meeting, the parents requested that DCPS prepare an IEP for the student. Although the MDT meeting records end at this point, DCPS subsequently took the position that it would not develop an IEP for the student until the student enrolls and attends the School. DCPS asserts as a basis for its action "that students who have been placed by a parent in a private school, have no right ". . . to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. sec. 300.137(a). DCPS contends that since this student has indicated a desire to remain in a private placement, the student is entitled to "equitable services," citing 34 C.F.R. sec. 300.138, the HOD in case 2012-1207, and N.T. v. DCPS, 58 IDELR 69 (2012).

While the regulations may provide LEAs with such an option in the delivery of services to privately placed students, the regulations do not alter what is required for an eligibility determination, or the requirement for an IEP. Moreover, the cases cited by DCPS are distinguishable from the case at bar in that they involve situations where an IEP had been developed, and the question was whether DCPS can provided FAPE, and if not, to what extent it must reimburse the student's parents for the student's private placement. Thus, as the Supreme Court noted in *School Committee of the Town of Burlington, Massachusetts, et al. v. Department of Education of Massachusetts*, 471 U.S.

359, 368 (1985), "[T]he *modus operandi* of the Act is . . . the "individualized education program," which is necessary for the LEA to be able to provide FAPE for the student.

"FAPE means special education and related services that . . . (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sections 300.320 through 300.324." Therefore, the development of an IEP is an essential part of FAPE, and necessary for the LEA to know exactly what special education and related services are needed for the eligible student, and how and where they can be provided.

> (2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with sections 300.320 through 300.324. (Emphasis added.)

34 C.F.R. Section 300.306(c)(2). The District of Columbia Municipal Regulations reflect this position. See 30 DCMR 3002.3. Further, the significance of developing an IEP is brought home in the regulations at 300.323(c)(1) which state,

> Each public agency must ensure that-
> (1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; [15]

The DCMRs provide similar requirements. See 30 DCMR 3002.3 and 30 DCMR 3007.1. Based upon the foregoing, DCPS must reconvene its MDT (or an IEP) meeting and develop an IEP for this student. Failure to develop an IEP for the student is a violation of the Act.

Private School Placement By The Parents

The student attended the School until his parents withdrew him on November 16, 2011, but there was no prior notification of the withdrawal to DCPS, or of any intention to enroll him in a DCPS school, or elsewhere. Twelve days later, on November 28, 2011, the student was enrolled in the School, a private school in the District of Columbia.

The student's mother met with the School Special Education Counselor (SEC) on November 2, 2011 and provided information to assist in determining the student's eligibility and for the IEP process. The parents contend that they enrolled the student in the School because DCPS had not acted on their request, and now seek reimbursement for the cost of the private school that they enrolled the student in independently.

[15] It is important to note that these provisions do not address the issue of what, if any, services the LEA must actually provide to a parentally placed private school student within the District.

Because there is no IEP setting forth the specific individualized special education and related services needed for this student, and how and where they will be provided, DCPS has not offered FAPE to this student. Absent an IEP, DCPS has provided little, if any, guidance for determining an appropriate placement. Therefore, relief at this point is speculative.

Moreover, there is no indication as to whether, or when all the information needed to develop an IEP was provided. Without an IEP an appropriate placement consistent with DCPS's obligation to provide FAPE cannot be made. Nor can DCPS answer the question posed by the parents regarding what services DCPS can provide the student, or for that matter at what school. Under these circumstances, "a court or hearing officer may require the SEA to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the LEA had not made FAPE available to the child in a timely manner prior to that enrollment, and that the private placement is appropriate." See 20 U.S.C. Sec. 1412(a)(10)(C)(ii),(iii) and (iv); 30 DCMS 3018.3; *Forest Grove School District*, *supra*, at 2494 and Fn. 10; and *Burlington*, *supra*, at 369-370. In considering the appropriateness of the parental private school placement, the hearing officer must consider all the criteria set forth and the equities. *Ibid.*

First, providing information to the SEC on November 2, 2011, to assist in the eligibility determination and IEP, withdrawing the student from St. Andrew's School on November 16, 2011 and enrollment of the student in School 12 days later on November 28, 2011, all without prior notice to DCPS, raises questions. These actions appear to undermine their contention that they enrolled the student in the private placement because DCPS had not acted timely.

Whether DCPS had all the information needed for the IEP at the time of the eligibility determination on November 2 when the student's mother met with the SEC is not known. Even assuming DCPS had all the information, within 26 days from the mother's visit to the SEC, the parents withdrew the student from one private school and enrolled him in another private school. These actions raise questions about any DCPS failure to timely provide FAPE prior to the student's enrollment at the School. Indeed, DCPS's actions at this point were not untimely.

Similarly, the assertion by the parents that the Deal SEC told them that the student's needs could not be met at the School is also unpersuasive as a basis for their action.[16] The SEC was not the DCPS MDT official. Furthermore, there was no IEP and DCPS may have been able to assign personnel to provide any IEP identified services at or possibly provide any such identified services at another DCPS school, before pursuing other options.

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[16] The Petitioner's motion has made no allegation that they attempted to enroll the student at the School on November 2nd or 10th, 2011, and such a claim appears inconsistent with the position the parents took at the MDT meeting that they wanted to know what DCPS had to offer the student before he would be enrolled and attend the

Also of concern is the information reported to the MDT team "that the [student] is currently not producing any work," and the parents report to the MDT team "that the School have a hands off approach as it relates to academics which is somewhat helpful to them and takes some of the burden off them at home." No information regarding the School has been provided. All of these factors, as well as DCPS action is refusing to develop an IEP until the student enrolls and attends School must be considered together, and add to the importance of the IEP.

At this point, the Hearing Officer concludes that the issue of tuition reimbursement should not be resolved at this time, and may be appropriate for resolution, or determination after the IEP is developed and the specific individualized special education and related service needs are identified, and an appropriate placement proposed. While the Act and regulations provide broad authority to determine an appropriate placement under certain circumstances, making that determination after the development of the IEP appears in the best interest of the student, and the parents. That will allow the parents and DCPS to better assess the appropriateness of the current private school placement and permit the parents to seek reimbursement for the entire period if they believe the current placement is "appropriate."

ORDER

Based upon the foregoing, it is this 18th day of June, 2012, hereby,

ORDERED that DCPS develop an IEP for this student within 45 days and bare any expense required to update any evaluations or assessments needed to complete the process, including classroom observation of the student; and it is further

ORDERED that Petitioner's request for reimbursement of the cost of parental private school placement of the student at School starting on November 28, 2011, is denied, without prejudice.

By: /s/

Nathaniel Baccus
Hearing Officer
Date: June 18, 2012

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination 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 ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).