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**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
1150 Fifth Street, S.E.
Washington, DC 20003

Parent/Guardian, on behalf of
STUDENT¹

Petitioner,

Hearing Officer: Paul Ivers

v.

SHO Case No.

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DECISION

Introduction

Presently before me is Petitioner's Motion for Summary Adjudication and Respondent's Motion to Dismiss and Response to Petitioner's Motion for Summary Adjudication.

Each submission is accompanied by a set of exhibits. Petitioner has submitted 82 pages of documents divided into 8 sequentially numbered exhibits. The individual exhibit pages are not numbered. Respondent has submitted 41 pages of documents that are not identified or numbered in any manner as exhibits.

The Pre-Hearing Order of July 18, 2010, required the parties to separately identify and number the respective exhibits they intended to introduce into evidence at hearing. The Second Pre-Hearing Order, which governs the present Motions, does not contain a similar requirement that the supporting exhibits also be identified and numbered. However, the parties were expected to adhere, as Petitioner has at least in part, to the requirements for supporting exhibits stated in the July 18, 2010 Pre-Hearing Order. The failure to identify and sequentially number offered exhibits unnecessarily complicates the task of ensuring that the Hearing Officer Decision (HOD) contains appropriate and accurate references to the documentary evidence.

Accordingly, I will accept Petitioner's exhibits into evidence and I have numbered their individual pages. I decline to accept all of Respondent's attached documents into evidence. I will accept the document located on page 10 of its submission, which consists of an email from Respondent's counsel to Petitioner's counsel and the Hearing Officer that was

¹ Personal identification information is provided in Appendix A.

behavior based upon his therapy and the effect of his prescribed medication (Focalin and Risperdal), such that his recommended psychological services were reduced to 1.5 hours per week. (Petitioner Ex 1, p. 36-37, 43-45).

The meeting notes further record that a new comprehensive psychological evaluation would be conducted and that the removal of the student's other health impaired classification would be discussed upon the receipt of the results of that evaluation. (Petitioner Ex.1, p.46).

A comprehensive psychological evaluation was completed on March 31, 2010. This evaluation, in significant part, revealed that the student had made progress at [redacted] and was benefiting from the program of special education and related services that he received there. It also described the student's continuing and significant difficulties with impulsivity and attention, and his continuing need for an appropriate program to address those difficulties. (Petitioner Ex. 3).

On May 26, 2010, an MDT meeting was convened. At this meeting, Respondent presented its intent to change the student's placement to one of Respondent's programs, [redacted] for the 2010-2011 school year. [redacted] provides a program geared to address the needs of students whose primary needs are based upon a learning disability. Much of the meeting was focused on a discussion of this proposed placement change. Respondent's representatives, in particular a school psychologist, argued for the change to a less restrictive environment, in significant part, on the basis that the student's behavioral and attention related issues were secondary to his primary specific learning disability. The parties disagreed over the present impact of the student's behavior-related needs including his impulsivity and attention related difficulties. Petitioner also expressed her refusal to discuss the proposed placement change with the principal of [redacted] Respondent's representatives indicated that the change in placement to [redacted] would be recommended. (Petitioner Ex. 2, 4).

On or about June 8, 2010, Respondent issued a prior written notice ("PNOP") that formally recommended that the student's placement be changed to PLC for the 2010-2011 school year, effective as of June 28, 2010. (Petitioner Ex.5).

Petitioner commenced these proceedings on June 8, 2010, by the service of a due process complaint notice ("DPCN"), which alleged that Respondent had failed to offer the student a free appropriate public education ("FAPE") by failing to offer an appropriate placement for the 2010-2011 school year. Petitioner challenged the appropriateness of the proposed change in placement and sought to continue the student's placement at [redacted] during the 2010-2011 school year.³

³ The DPCN alleges Respondent's failure to: include the parent in the decision-making process regarding placement, provide a legal prior to action notice regarding a proposed change in placement, and offer an appropriate placement. It further seeks relief described as "Declaratory" and "Injunctive" in nature.

As noted above, the student is entitled to receive extended year services; as such he attended _____ during the summer of 2010 in accordance with the "stay-put" provisions of the IDEA.

On June 13, 2010, I issued an Order with respect to the pending mandatory resolution meeting.

Respondent served a Response to the DPCN on June 28, 2010.

The parties attended a resolution meeting on July 7, 2010⁴, at which time they were unable to resolve the allegations stated in the DPCN, and agreed that the case should proceed to a due process hearing ("DPH"). Petitioner's counsel notified the Hearing Officer of this result on July 8, 2010, and the timelines were reset accordingly, whereby the date for the HOD was reset to August 21, 2010.⁵

The pre-hearing conference ("PHC") was originally scheduled to occur on Thursday, July 12, 2010. However, Respondent's counsel requested an adjournment, which was granted, and the PHC was rescheduled and held on July 14, 2010.

On July 17, 2010, I issued a Pre-Hearing Order, which, in part, scheduled the DPH for August 12, 2010. The parties' respective five-day disclosures were due on August 5, 2010. The Order further described the issues to be determined at hearing:

"As a result of the discussions, the parties concurred that the case should be decided under the principles of law governing unilateral placements when FAPE is at issue, as stated in the IDEA, 34 C.F.R. §300.148, and controlling Supreme Court decisions, e.g., School Comm. of Town of Burlington, Mass. v. DOE, 471 U.S. 359 (1985).

Accordingly, it must be determined if the evidence establishes the following.

1. Has Respondent has offered the student a FAPE for the 2010-2011 school year?
And if not -
2. Will the student's continued placement in _____ for the 2010-2011 school year be appropriate to meet his educational needs?
And, if so-
3. Do equitable considerations support an order maintaining the student's placement at _____ for the 2010-2011 school year at Respondent's expense?"

By correspondence dated August 4, 2010, Respondent advised Petitioner's counsel that it had revoked the June 8, 2010 PNOP, and affirmatively stated that the student could remain at _____ for the 2010-2011 school year. (Petitioner Ex. 7). On the same date,

⁴ The 30-day period within which to conduct a mandatory resolution meeting expired on July 8, 2010.

⁵ The HOD was originally due on July 22, 2010.

Respondent's counsel, by email, notified Petitioner's counsel and the Hearing Officer of the revocation and her belief that the allegations in the DPCN were now moot. (Petitioner Ex.8; Hearing Officer Exhibit 1).

A second PHC was held on August 5, 2010 to discuss the effect of Respondent's revocation of the June 8, 2010 PNOP on this litigation. Following the conclusion of the second PHC, I advised the parties by email that I would decide the case by motion practice. (Petitioner Ex. 8).

On August 10, 2010, I issued a Second Pre-Hearing Order, which in significant part canceled the DPH that was scheduled for August 12, 2010 and prescribed a schedule for the parties' submission of their respective motions.

The Positions Of the Parties

Petitioner makes several arguments. First, that there are no genuine disputes as to the material facts in this case. This is based upon Respondent's August 4, 2010 revocation of the June 8, 2010 PNOP and affirmative statement that the student may attend . Second, Petitioner contends that Respondent's action does not also moot its claims. Petitioner bases this argument on two separate grounds, the application of the doctrine of "voluntary cessation" and that the Hearing Officer can still grant effectual relief. That relief would be comprised of an order that (1) requires Respondent to issue a new prior written notice that recommends the student attend for the 2010-2011 school year, (2) finds that Respondent violated the IDEA by failing to include the parent in the placement decision-making process at the May 26, 2010 MDT meeting and by failing to provide the student with an appropriate placement for the 2010-2011 school year, and (3) directs Respondent to place the student at for the 2010-2001 school year.

Respondent also argues that there are no genuine disputes as to the material facts due to its August 4, 2010 revocation of June 8, 2010 PNOP and concomitant affirmative statement that the student can attend Respondent also relies on the fact that at no time has the student either had his educational program at interrupted or denied. However, Respondent seeks a decidedly different result. In support of its request for the dismissal of the DPCN, Respondent contends that its action renders the allegations and request for relief in the DPCN moot. Respondent also contends that no violation of the IDEA resulting in a denial of a FAPE for the student has occurred, and the Hearing Officer is without jurisdiction to provide any relief for Petitioner in the absence of a finding of a denial of a FAPE.

Discussion

Petitioner argues that no genuine disputes of material fact exist and that the case may be decided by summary adjudication. I concur.

Petitioner initiated these proceedings following Respondent's issuance of the June 8, 2010 PNOP that formally changed the student's placement recommendation to and the

allegations and relief sought in the DPCN are entirely focused on challenging that recommended change and maintaining the student's placement at _____ at Respondent's expense for the 2010-2011 school year.

As noted above, the parties had agreed that the issues to be determined at hearing were:

- “1. Has Respondent has offered the student a FAPE for the 2010-2011 school year? And if not –
2. Will the student's continued placement in _____ for the 2010–2011 school year be appropriate to meet his educational needs? And , if so-
3. Do equitable considerations support an order maintaining the student's placement at Accotink Academy for the 2010-2011 school year at Respondent's expense?”

Accordingly, I find that Respondent's revocation of the June 8, 2010 PNOP and affirmative statement that the student can remain at _____ resolves the fundamental factual dispute at the heart of this case, i.e., the placement that the student should attend at the commencement of the 2010-2011 school year. Placement in this context also includes the actual location where the student would receive his recommended program of special education and related services. That program, as prescribed by the December 10, 2009 IEP was never in question. Given the parties' apparent agreement that the IEP should be implemented at _____ there are no genuine disputes of material fact.

Petitioner next contends that its request for relief is not moot and that I can still grant effectual relief. Putting aside any consideration of the application of the voluntary cessation doctrine for the moment, the case would obviously not be moot if I am able to grant effective relief.

Petitioner contends that I can offer that relief in three different ways. First, by finding that Respondent failed to offer the student a FAPE for reason that it failed to include the parent in the placement decision-making process at the May 26, 2010 MDT meeting, and also failed to provide the student with an appropriate placement for the 2010-2011 school year.

Respondent is required to ensure that the parents of a child with a disability are members of any group that makes decisions concerning the educational placement of their child. 28 USC §1414(e); 34 CFR §§, 300.327, 300.501(c). I find that Respondent satisfied its obligation in this regard. The MDT that assembled on May 26, 2010, was such a group. The corresponding MDT meeting notes establish that Petitioner was a participant at that meeting and was provided ample opportunity to and did express her opinion regarding the proposed placement change, both personally and through her educational advocate. Further, Petitioner's position was fully argued and supported by the _____ staff. In fact, the notes record that Petitioner expressed strident opposition to the participation of the principal of _____ at the meeting and refused to discuss the student's potential placement there. Petitioner's disagreement with Respondent's proposed placement change, however strongly felt, did not compromise her opportunity to participate in the decision-making process.

Further, Respondent's revocation of the June 8, 2010 PNOP and affirmative statement that the student can remain at _____ effectively resolves Petitioner's request for a finding that Respondent failed to offer the student an appropriate placement for the 2010-2011 school year. Respondent has affirmatively stated that the student should attend the placement that Petitioner sought to obtain and maintain.

Second, Petitioner contends that I can provide effective relief by directing Respondent to place the student at _____ for the 2010-2011 school year. However, such a direction is simply unnecessary. Respondent has already affirmatively stated that the student's placement at Accotink will continue.

Before I proceed to consider Petitioner's third method of providing effective relief, I note that the effective resolution of these specific requests for relief would also resolve the first issue that was identified for determination at hearing.

I further note that Respondent's revocation of the June 8, 2010 PNOP and affirmative statement that the student can remain at _____ would also obviate the need to determine the second and third issues that were identified for determination at hearing; the appropriateness of the student's continued placement at _____ at the commencement of the 2010-2011 school year and whether equitable considerations support an order maintaining the student's placement there at Respondent's expense.

Although I make no findings on this point, I take notice of the fact that Respondent is required by law to offer the student a FAPE for the 2010-2011 school year, *E.g.*, 28 USC 1412(a)(1). Respondent has now, albeit perhaps belatedly, affirmatively expressed its decision in more than one writing that the student should attend _____ (*E.g.*, Petitioner Ex. 7). Petitioner's position on a FAPE for the student is obvious.

Petitioner's third basis for providing effective relief is in the form of an order that directs Respondent to issue a new prior written notice, which records Respondent's decision that the student can remain at _____. The IDEA attaches significant importance to a prior written notice. *See* 28 USC §1415(c). This case is the direct result of Respondent's issuance of such a notice, the June 8, 2010 PNOP. On August 4, 2010, Respondent revoked that PNOP and affirmatively advised Petitioner that the student could remain at Accotink. However, Respondent did not, and has not to date, issued a new prior written notice recording this critical decision.

Moreover, the IDEA expressly requires Respondent to provide a prior written notice to a parent whenever it proposes to initiate or change a child's educational placement or the provision of a FAPE to the child. It further describes in detail the content of the required notice. *E.g.*, *Id.*⁶

⁶ The June 8, 2010 PNOP essentially comports with the IDEA's requirements. *Compare* Petitioner Ex. 5 *with* 28 USC §1415(c)(1).

The failure to provide timely prior written notice can rise to the level of the denial of a FAPE. However, I find that Respondent's failure to issue new prior written notice is *de minimis*. Although Respondent has not provided a prior written notice recording its decision to change the recommended placement from _____ to _____ it has at least affirmatively indicated that decision to Petitioner in writing. Respondent's arguments in these proceedings also substantiate the fact that the student will continue to attend the _____ at Respondent's expense during the 2010-2011 school year. Additionally, the student's attendance at _____ has never been impeded or denied.
28 USC §1415(f)(3)(E)(ii).

Regardless, I have authority to require Respondent to issue a new prior written notice that formally records its decision to recommend that the student's placement be changed from _____ to _____ 28 USC §1415(f)(3)(E)(iii). While Respondent's failure in this regard does not constitute a violation of its obligation to provide the student with a FAPE, the issuance of a new prior written notice is not only consistent with applicable law it is also a significant procedural action in the context of this case.⁷

Finally, I note that the record does not contain any evidence to substantiate either the reason for Respondent's revocation of the June 8, 2010 PNOP or its decision to maintain the student's placement at _____. All that the record contains on that action is circumstantial in nature; a chronological series of events that might lead a reasonable person to logically conclude that Respondent's actions were at least in part influenced by the initiation of these proceedings. Further, I note that while this HOD provides Petitioner with only the specific procedural relief it sought, Petitioner has essentially obtained the substance of the relief sought in the DPCN, the student's continued attendance at _____ for the 2010-2011 school year, where he will receive the program of special education and related services that are recommended by his December 10, 2009 IEP.

⁷ Since I am able to provide Petitioner with affirmative relief I do not need to consider the application of the voluntary cessation doctrine.

Order

Respondent's Motion to Dismiss is denied.

Petitioner's Motion for Summary Adjudication is granted in part. No later than 10 business days from the date of this Order, Respondent shall issue a prior written notice that formally records its recommended change in placement from _____ to _____ for the 2010-2011 school year, effective as of June 28, 2010. All other requests for relief are denied and the DPCN is dismissed.⁸

IT IS SO ORDERED.

DATED: August 20, 2010 (corrected)

/s/ Paul Ivers,
Hearing Officer

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⁸ The student's current IEP is in effect until December 2010 and is subject to the periodic, annual review and reevaluation processes prescribed by the IDEA. Nothing in this HOD is either intended, or applies, to alter the application of those processes. 28 USC §§1414(a)(2) and (d)(4).

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).