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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONERS, on behalf of
[STUDENT],¹

Petitioner,

Date Issued: November 28, 2011

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by FATHER and STEPMOTHER (the "Petitioners"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). Student, an incapacitated adult, has been placed by the Superior Court of the District of Columbia under the permanent general guardianship of the Petitioners. In their Due Process Complaint, the

¹ Personal identification information is provided in Appendix A.

Petitioners allege that DCPS has denied Student a FAPE by failing to comply with U.S. Department of Education Individualized Education Program ("IEP") requirements for students with disabilities who transfer to the District from another state.

The Petitioners are residents of the District of Columbia. Student lives at RESIDENTIAL CENTER in Pennsylvania. The Petitioners' Due Process Complaint, filed on September 14, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on September 16, 2011. The parties met for a resolution meeting on September 28, 2011 and failed to reach an agreement. The 45-day time line for issuance of this HOD began on October 15, 2011. On October 4, 2011, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

On September 30, 2011, the Petitioners filed a motion to strike DCPS' response to their due process complaint as legally insufficient. The Hearing Officer denied the motion.

On November 7, 2011, Respondent District of Columbia Public Schools ("DCPS") filed a motion to dismiss Petitioners' complaint for due process on the grounds that Petitioners have failed to state a claim upon which relief may be granted. Specifically, DCPS contended that prior to the filing of the due process complaint, Student had not become a resident of the District of Columbia and that Petitioners had not made a good faith attempt to enroll Student in a DCPS school. The Hearing Officer found that genuine issues of material fact existed in this case as to Student's residency status, the Petitioners' guardianship status and Petitioners' efforts to enroll Student in DCPS schools. The motion to dismiss was denied.

The due process hearing was held before the undersigned Impartial Hearing Officer on November 21 and 22, 2011, at the Student Hearing Office in Washington, D.C. The hearing, which was open to the public, was recorded on an electronic audio recording device. A Spanish

language interpreter attended the hearing to interpret the proceedings for Stepmother and to interpret Stepmother's testimony, given in Spanish. The Petitioners and Student appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by ABA COORDINATOR 1 and by DCPS COUNSEL. Witnesses were excluded from the hearing on motion of the Petitioners.

Prior to the taking of evidence and again, at the conclusion of Petitioners' case in chief, Petitioners made oral motions for a directed finding in their favor. The Hearing Officer denied both motions.

Both Petitioners testified and called as witnesses PSYCHIATRIST, EDUCATIONAL ADVOCATE 1, EDUCATIONAL ADVOCATE 2, and COURT APPOINTED ATTORNEY. DCPS called as witnesses ABA COORDINATOR 1, COMPLIANCE CASE MANAGER, ABA COORDINATOR 2, AUTISM PROGRAM MANAGER and PROGRAM MANAGER-RESIDENTIAL. Petitioners' Exhibits P-1 through P-34, were admitted into evidence without objection. DCPS Exhibits R-1 through R-18 were admitted into evidence without objection, with the exception of Exhibits R-5, R-11, R-12, and R-18, which were admitted over Petitioners' objections.

Following the hearing, counsel for both parties submitted legal memoranda by electronic mail.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

- Whether DCPS has denied Student, an alleged interstate transferee, a FAPE by neither providing IEP services comparable to those described in Student's May 25, 2011 New Jersey IEP nor developing and implementing a new IEP for Student; and
- Whether DCPS is denying Student a FAPE by failing to provide him an appropriate residential placement.

For relief, Petitioners seek an order for DCPS to fund Student's continued placement at Residential Center, retroactive at least to August 10, 2011, based on Student's New Jersey IEP, and for DCPS to convene an MDT meeting to review all of Student's evaluations and to develop a DCPS IEP for Student, to include a residential placement.

FINDINGS OF FACT

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

1. Student is an AGE young man. His birthdate is BIRTHDATE. Student resides at Residential Center in Pennsylvania. Exhibit P-6.
2. Student is a "child with a disability" as defined by the IDEA. He is diagnosed with Autistic Disorder and Severe Cognitive Impairment. He is severely incapacitated due to emotional, behavioral, cognitive, and social disabilities related to his diagnoses. He is non-verbal and has no awareness of danger. Exhibit P-22.
3. Student was born in Lima, Peru. Student is a U.S. citizen and has a U.S. passport and Social Security number. Exhibits, P-6, P-9. In June 2006, Student moved to New York with BIRTHMOTHER. In New York, Birthmother obtained services for Student through the New York Administration for Children's Services. Student attended NY THERAPEUTIC DAY SCHOOL from January 2008 through May 2008. Exhibit P-6.

4. In May 2008, while on a visit with Student to New Jersey, Birthmother was incarcerated for aggravated assault at Passaic County Jail in Patterson, New Jersey. Due to there being no one else available to care for Student, the New Jersey Division of Youth and Family Services ("NJ-DYFS") took custody of Student. In June 2008, NJ-DYFS placed Student at Residential Center. Exhibit P-6. Student has resided at Residential Center ever since.

Testimony of Psychiatrist.

5. Residential Center provides services to several hundred residents, ranging in ages from 6 or 7 to 60 or 70. Most residents are placed at Residential Center because of behavioral needs. Residents live in separate, small home units, with at most 20 residents per unit. Student lives in a unit with 12-18 residents functioning at approximately his level. Student attends school from 9:00 a.m to 3:00 p.m. in a separate building at Residential Center. His class is made up of about 10 residents from his residential unit. The class is taught by a teacher and 2-3 educational aides. He has no school exposure to non-disabled peers. Testimony of Psychiatrist.

6. Residential Center used to be a D.C. Office of State Superintendent of Education ("OSSE") approved facility. Following two accidental student deaths at Residential Center, allegedly caused by inadequate controls or supervision, OSSE has suspended making placements at the facility. Testimony of Program Manager-Residential.

7. Birthmother was deported from the United States in July 2010. Exhibit P-9.

8. Student's most recent IEP, developed on May 25, 2011 at Residential Center, identifies the New Jersey Department of Social Services as his Local Education Agency ("LEA"). The IEP provides, *inter alia*, that Student will receive full-time special education supports and services, that Student attends school within a full-time residential facility and that he does not have access to students in regular education. The IEP indicates that Student will

attend an Approved Private School (Residential) for more than 50% of the school day. Exhibit P-8.

9. In addition to his diagnoses of Autistic Disorder and Severe Cognitive Impairment, Student has Attention Deficit Hyperactivity Disorder (“ADHD”) with hyperactivity and severe impulsivity. Testimony of Psychiatrist.

10. Student requires 24 hour supervision within eyesight of responsible adults, because he has no awareness of danger and is at risk of “elopement.” Testimony of Psychiatrist.

11. Student is not aggressive toward others. He “bites himself” on his hand, which is a safety concern for Student. At Residential Center, he can usually be redirected from this behavior or restrained if necessary. Testimony of Psychiatrist.

12. Student is ambulatory and requires no assistance when traveling from place to place. He feeds himself with verbal prompting, bathes himself with verbal prompting and some assistance, and can dress and undress with minimal prompting. Exhibit P-9.

13. Student participates in off-site outings with the Residential Center staff. He has gone bowling, to a mall, to Six Flags Great Adventure park, to an aquarium and on van rides off campus. However, Student requires close-reach supervision when traveling anywhere outside of his living area, whether on or off the Residential Center campus. Exhibit P-9.

14. In 2008, Petitioners received a letter from NJ-DYFS regarding Student. Petitioners first visited Student at Residential Center in 2010. Petitioners now generally visit Student every two weeks. Testimony of Stepmother.

15. In October 2010, New Jersey authorities contacted Father regarding Student. Testimony of Father. At a hearing on February 2, 2011, in the Superior Court of New Jersey for Passaic County, Chancery Division – Family Part (“NJ Court”), Father acknowledged submitting

to a paternity test and acknowledged that he is Student's father. The NJ Court ordered that Student would continue under the physical custody of NJ-DYFS and granted legal custody, jointly, to Father and to NJ-DYFS. The NJ Court further ordered that Student would remain in residential placement at Residential Center and that NJ-DYFS would assist to obtain a New Jersey ID card for Student from DMV. Exhibit R-12.

16. In an order filed July 26, 2011, the NJ Court transferred legal and physical custody of Student to Father. The NJ Court further ordered that, effective July 19, 2011, Student "is deemed domicile [*sic*] in Washington, D.C., but he is to remain in [Residential Center] educational program in the State of Pennsylvania." The Court ordered NJ-DYFS to assist Father in finalizing the appropriate placement for Student "within his residential district." Exhibit P-13.

17. Father is a contract foreign service worker and is regularly stationed overseas for extended periods. Testimony of Father. Father and/or Stepmother own dwellings in Virginia and the District of Columbia. Testimony of Stepmother. At a May 25, 2011 Individual Service Plan meeting for Student convened at Residential Center, which Stepmother attended, Father's address was reported to be in Arlington, Virginia. Exhibit P-9.

18. On July 8, 2011, Father returned from a posting in Afghanistan. He moved into an apartment in northeast Washington and has lived there, with Stepmother, since that date. Prior to July 2011, Father had addresses in Florida and Virginia. Testimony of Father.

19. Student has never resided in the District of Columbia. Exhibit R-6, Testimony of Psychiatrist, Testimony of Stepmother. Student traveled to Washington to attend a District of Columbia court guardianship hearing on August 30, 2011 or September 1, 2011. Testimony of Father. Student also attended the due process hearing in this matter.

20. On October 26, 2011, the Superior Court of the District of Columbia granted Permanent General Guardianship of the person of Student to Father and Stepmother. The Petitioners' petition for guardianship over Student was filed on or about July 28, 2011. Testimony of Court Appointed Attorney, Exhibit P-26. The guardianship hearing was held August 30 or September 1, 2011. Testimony of Father.

21. In April of 2011, Stepmother contacted DCPS regarding obtaining services for Student. On May 3, 2011, Stepmother met with DCPS staff regarding enrollment of Student. She authorized NJ-DYFS to release Student's educational and healthcare records and evaluations to DCPS. Testimony of Stepmother, Exhibit R-8. DCPS arranged for Stepmother to visit DCPS SCHOOL A, which DCPS staff understood would be Student's home school. After the school visit, the Petitioners made it known that they were only interested in a residential placement for Student. Testimony of Autism Program Manager.

22. On July 11, 2011, DCPS PROGRAM COORDINATOR sent a letter to the Petitioners, with a copy to NJ-DYFS, providing a DCPS enrollment packet to be completed for Student. The letter explained that,

Only residents of the District of Columbia are eligible to receive a free public education in the District. . . . The completed enrollment packet, including verification of residency should be taken to your child's neighborhood school to complete registration. . . . Once your child is registered and has been identified as a student with a disability under IDEA, DCPS will review your child's educational record and make a recommendation as to school location. Upon attendance at a DCPS school, DCPS will provide comparable services to that contained in your child's IEP. Those comparable services will continue until such time that an IEP meeting is convened within 30 days of attendance to review the IEP.

Exhibit R-10.

23. Educational Advocate 1 assisted Stepmother to complete the enrollment packet. On August 10, 2011, Educational Advocate 1 and Stepmother went to NEIGHBORHOOD HIGH SCHOOL ("NHS"), and registered Student. The same day, they met with NHS SPED COORDINATOR, who made copies of Student's evaluations, IEPs and other records.

Testimony of Educational Advocate 1.

24. In late August 2011, Autism Program Manager requested DCPS ABA Coordinator 1 to follow up with Petitioner on Student's enrollment in DCPS. ABA Coordinator 1 contacted Stepmother and asked to set up a home visit. ABA Coordinator 1 was informed that Student was at Residential Center, not at Petitioners' home in the District. Testimony of ABA Coordinator. This was the first time that DCPS staff became aware that Student was not physically in the District. Testimony of Autism Program Manager.

25. On August 1, 2011, DCPS NON-PUBLIC UNIT DIRECTOR emailed Father to inquire if Student was enrolled in DCPS. Father responded that NHS was the neighborhood school for his area. However, Father advised that Student was in Residential Center in Pennsylvania and Father sought assistance in transferring Student to an "equivalent residential school" in the Washington, D.C. area. Non-Public Unit Director advised Father that he must formally enroll Student in DCPS at his neighborhood school "so that we can begin the process of determining his appropriate location of services." On August 5, 2011, ABA PROGRAM COORDINATOR emailed Father that he must first enroll Student in DCPS at his neighborhood school. "Once that occurs autism team and LRE team will work with you to determine his appropriate placement." Exhibit R-13.

26. On September 9, 2011, the NHS registrar notified Petitioners by letter that it was mandatory that they re-enroll Student for the 2011-2012 school year, and that if they failed to re-enroll Student by September 16, 2011, Student would be withdrawn from NHS. Exhibit P-15.

27. On September 28, 2011, following a resolution meeting with Father and Educational Advocate 2, DCPS issued a Prior to Action Notice informing Petitioners that Student's placement was being changed from Residential Center to NHS. Exhibit R-20.

28. If Student attends NHS, he initially would be placed in a self-contained classroom for observation and assessment of his needs. In the self-contained classroom, there are 5 Intellectually Disabled students, who are taught by a teacher experienced in working with students with autism. In 30 days or sooner, a Multidisciplinary Team ("MDT") would be convened to develop an IEP for Student. Testimony of Compliance Case Manager.

29. Petitioners never had Student attend NHS because they understood that the NJ Court judge would not allow Student to attend NHS out of safety concerns, and because neither Father nor Stepmother wanted Student to attend NHS. Testimony of Stepmother.

30. On November 1, 2011, two DCPS staffers, ABA Coordinator 1 and ABA Coordinator 2, traveled to Pennsylvania to observe Student at Residential Center. These staff members observed Student for approximately 1 hour in a music class and in his regular classroom. Both DCPS staffers opined that Student could make educational progress in a self-contained classroom environment, utilizing applied behavior analysis methodologies and techniques. Testimony of ABA Coordinator 1, Testimony of ABA Coordinator 2.

CONCLUSIONS OF LAW

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

DISCUSSION

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Issues

1. HAS HAS DENIED STUDENT A FAPE BY NEITHER PROVIDING IEP SERVICES COMPARABLE TO THOSE DESCRIBED IN STUDENT'S MAY 25, 2011 NEW JERSEY IEP NOR DEVELOPING AND IMPLEMENTING A NEW IEP FOR STUDENT?

The Petitioners' core claim is that DCPS has denied Student a FAPE by not complying with the IDEA's requirements imposed on receiving states, for a student who transfers from one state to another. The IDEA, 20 U.S.C. § 1414(d)(2)(C)(ii), provides:

Transfer outside State In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

Id. See, also, 34 C.F.R. § 300.323(f)². I find that the Petitioners' reliance on § 1414(d)(2)(C)(ii)

² IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public

is misplaced for two reasons: First, under District of Columbia law, Student is not eligible to enroll in a DCPS school because he is an adult and does not have an address in the District. Second, when the due process complaint was filed, in the summer of 2011, Student was not transferring school districts within the same academic year.

The IDEA requires that DCPS ensure that “[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.” 20 U.S.C. § 1412(a)(1)(A) (emphasis supplied). At the due process hearing, considerable, sometime conflicting, evidence was offered regarding the state of residence of Father and Stepmother. I found that the preponderance of the evidence established that Stepfather established residence in northeast Washington on July 8, 2011.³ However, because Student is an adult,⁴ it is the Student’s address, not the Petitioners’ residence status, that determines whether DCPS must provide a FAPE. Under D.C. Regs., tit. 5-E, § 3002.1(a), DCPS must make a free appropriate public education available to each child with a disability, ages

agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency—

(1) Conducts an evaluation pursuant to §§300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§300.320 through 300.324.

34 C.F.R. § 300.323(f).

³ Stepmother only became co-guardian of Student on October 26, 2011, so the date she became a Washington resident may be disregarded.

⁴ Student is an adult under D.C. Law. *See* D.C. Code § 46-101. (Setting age of majority in the District at 18 years of age.)

three to twenty-two, who resides in, or is a ward of, the District. *Id.* To be entitled to enrollment without payment of nonresident tuition, an adult student must be a resident of the District.

Significantly for this case, “the residence of an adult student is the address of the adult student, not the address of the adult student’s parent, custodian, guardian or other primary caregiver.”

D.C. Code § 38-307, para. 2.⁵

I conclude therefore that, under D.C. Code § 38-307 and D.C. Regs., tit. 5-E, § 3002.1(a), for Student to enroll in D.C. public schools and to be entitled to a FAPE from DCPS, Student’s address must be in the District. Student, however, does not have an address in the District. The evidence establishes that since Student arrived in the United States in 2006, he has always lived in New York, New Jersey or Pennsylvania. He was placed at Residential Center by a New Jersey public agency. In fact, the evidence does not establish that Student has ever been physically present in the District, except to attend his guardianship hearing in the D.C. Superior Court and the due process hearing in the present matter. Until Student establishes a residence address in the District, he cannot be deemed to have transferred school districts or enrolled in a DCPS school.⁶

⁵ The District’s requirement that adult students have a D.C. address does not appear to run afoul of the IDEA. *See* 20 U.S.C. § 1412(a)(1)(B):

A State’s obligation to provide FAPE does not apply with respect to children—
(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges . . .

Id. However, had Student been placed at Residential Center by a D.C. public agency instead of by NJ-DYFS, OSSE may have been responsible for ensuring that Student receives FAPE. *See Letter to Covall*, 48 IDELR 106 (OSEP 2006) (For a child placed outside the State by an educational or non-educational State or local agency, the State initiating the placement generally is responsible for ensuring that the Child’s IEP is developed and implemented.)

⁶ In its order of July 25, 2011, the NJ Court ordered that Student was “deemed domicile” in Washington, D.C. However, under the case law in the District of Columbia, the two requisites

The second reason that the IDEA's state-to-state transfer provision does not apply in this case is that Petitioners sought to effect Student's transfer from the New Jersey LEA (NJ-DYFS) to DCPS during the summer of 2011⁷ – not “within the same academic year.” Code § 1414(d)(2)(C)(ii) only applies to inter-state transfers within the same academic year. *See, e.g. Maynard v. District of Columbia*, 701 F.Supp.2d 116, 123 (D.D.C. 2010) (Court finds 34 C.F.R. § 300.323(f) inapposite because G.M. transferred schools during the summer, not “within the same school year.”)

In summary, I find that DCPS is not required to provide FAPE to Student as an interstate transferee under 20 U.S.C. § 1414(d)(2)(C)(ii), because Student is not a District resident under District of Columbia law and because Student did not transfer school districts during the same academic year.

2. IS DCPS DENYING STUDENT A FAPE BY FAILING TO OFFER HIM AN APPROPRIATE RESIDENTIAL PLACEMENT?

As explained in the preceding section, the IDEA requires that DCPS ensure that “[a] free appropriate public education is available to all children with disabilities, between the ages of 3 and 21, residing in the State. 20 U.S.C. § 1412(a)(1)(A). Because Student is not residing in the District, it follows that DCPS has no obligation to provide a FAPE to Student or to provide Student an IEP placement, whether residential⁸ or otherwise.

for establishing a change of domicile are “(1) physical presence, and (2) an intent to abandon the former domicile and remain [in the new one] for an indefinite period of time.” *Heater v. Heater*, 155 A.2d 523, 524 (D.C. 1959). The evidence in this case does not establish that Student meets either requisite.

⁷ See Complaint for Due Process, ¶ 15. (Alleging that Stepmother registered Student at NHS on August 10, 2011.)

⁸ The evidence on whether Student requires a residential placement was conflicting. Psychiatrist, an expert in neurodevelopmental disorders, opined that Student needs the structure of a residential placement for his safety. Autism Program Manager, who qualified as an expert on programming for children with special education disabilities, opined that Student has

ORDER

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

– All relief requested by the Petitioners herein is denied.

Date: November 28, 2011

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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 U.S.C. §1415(I).

potential to succeed in a dedicated classroom setting and does not require a residential placement. DCPS' ABA Coordinators opined that Student could make educational progress in a self-contained classroom environment, utilizing applied behavior analysis methodologies and techniques. Psychiatrist was not knowledgeable about the IDEA's least restrictive environment requirements (*See* 34 CFR §§ 300.114-300.120) and I would be inclined to discount his opinion on the appropriate educational placement for Student. However, because I find that DCPS is not obligated to provide a FAPE to Student, I do not reach the issue of whether he would require a residential placement.