

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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Parent on behalf of Student<sup>1</sup>,

Petitioner,  
v.

Hearing Officer: Gary L. Lieber  
Case No: 2012-0621

District of Columbia Public Schools,

Respondent.

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STUDENT HEARING OFFICE

**HEARING OFFICER'S DETERMINATION**

**Introduction and Procedural Background**

This case was brought as a due process complaint pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §1400 *et. seq.* and Title 5-E, Chapter 5-E 30 of the District of Columbia Municipal Regulations. Petitioner is the Mother of Student, age 8. Petitioner alleges that Student was denied a Free and Appropriate Public Education ("FAPE") by a failure to convene a Multi-Disciplinary Team (MDT) meeting for the purpose of reviewing an Independent Educational Evaluation (IEE) so that

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<sup>1</sup> Personal identification information is provided in Appendix A and the Appendix must be removed prior to public distribution.

a determination of IDEA eligibility could be made and, thereafter that an Individualized Education Plan (IEP) could be written.<sup>2</sup>

The Petitioner seeks an Order that such MDT meeting be scheduled and held within ten (10) business days of such Order and that at that meeting a determination of eligibility be made and an IEP drafted for the benefit of the child (P. Exh. 10, p. 6).

The Due Process Complaint was filed on September 7, 2012 (P. Exh. 10). Respondent District of Columbia Public Schools ("DCPS") filed a Response to the Due Process Complaint on September 19, 2012, in which it denied that it failed to provide FAPE to the child (P. Exh. 11). On October 5, 2012, a Resolution Meeting was held in which both parties participated. No resolution of the dispute occurred (R. Exh. 8).<sup>3</sup>

On October 9, 2012, the undersigned conducted a Prehearing Conference and on October 12, 2012, a Prehearing Order was issued which, *inter alia* set the date for the Due Process Hearing as November 5, 2012 (P. Exh. 13). The five-day disclosures were timely filed on October 29, 2012.

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<sup>2</sup> See Due Process Complaint, Petitioner Exhibit 10, p. 6. Throughout this Decision, Petitioner's Exhibits shall be referred to as P. Exh. \_\_\_\_; Respondent's as R. Exh. \_\_\_\_ and Hearing Officer's H.O.'s Exh. \_\_\_\_.

<sup>3</sup> The forty-five day time period deadline for the issuance of a Hearing Officer's Determination is November 19, 2012.

The Due Process Hearing was conducted on November 5, 2012. The hearing was closed to the public and was electronically recorded. Both parties were represented by counsel.<sup>4</sup>

### **The Record Evidence**

The Mother was the sole witness called by Petitioner. Respondent called the Special Education Specialist for Respondent who was responsible for the Elementary School where the Student attended and the Principal of the school; the Mother gave rebuttal testimony.

The following exhibits were admitted into evidence. Petitioner's 8 through 13 and 15; Respondent's 1 through 11.<sup>5</sup>

### **Stipulations**

At the hearing, the parties stipulated that the Independent Educational Evaluation ("IEE") (P. Exh. 8) was done at public expense following an earlier determination on May 1, 2012, that the Student was not eligible for special education under IDEA (R. Exh. 7).

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<sup>4</sup> Petitioner was represented by Carolyn Houck, Esquire and Respondent was represented by Daniel McCall, Esquire.

<sup>5</sup> Petitioner's 11 was not submitted as part of the original disclosures. The undersigned admitted it during the hearing over the objection of Respondent on the basis that it was a Letter of Invitation ("LOI") to attend a meeting to review the Student's IEE that was issued following the five-day disclosure and after the issuance of a substantively identical LOI for a meeting scheduled for October 30, 2012. As it turned out, the October 30, 2012 meeting was cancelled due to Hurricane Sandy. Accordingly, Petitioner's Exhibit 11 was deemed necessary only because of the intervening hurricane and served to only complete the record that the hurricane caused the cancellation of the first meeting and the subsequent rescheduling of that meeting to a later date. As such, I concluded that Respondent was not prejudiced by this exhibit.

### **Jurisdiction**

This Hearing Officer has jurisdiction pursuant to IDEA, 20 U.S.C. § 1415, the statute's implementing regulations at 34 C.F.R. §§ 300.511 and 300.513 and the District of Columbia Code of Municipal Regulations ("DCMR") at 5-E § 3029 and 5-E § 3030. This decision constitutes the Hearing Officer's Determination, the authority for which is set forth in 20 U.S.C. §1415(f)(3)(E) and 34 C.F.R. § 300.513.

### **Statement of the Issues**

1. Did the Respondent commit a procedural violation of FAPE by failing to timely schedule an MDT meeting?
2. Was the Student denied FAPE by the failure to conduct an MDT meeting?

### **Findings of Fact**

1. Student is [REDACTED] (R. Exh. 5).
2. Student attends \_\_\_\_\_ Elementary School. He is now in second grade having repeated first grade (Testimony of Mother; R. Exh. 9).
3. The Mother has sought special education eligibility for student since early 2012 (Testimony of Mother).
4. Following a Confidential Psychological Evaluation in April 2012, Respondent issued an Evaluation Summary Report and a finding on May 1, 2012, that Student was not eligible for special education and related services

under the statutory disability category of "Other Health Impairment" (R. Exhs. 3, 4, 6 and 7).

5. Thereafter, Petitioner notified Respondent that it disagreed with that determination of non-eligibility and arranged for an Independent Educational Evaluation (IEE) to be conducted of Student at public expense.<sup>6</sup> A licensed clinical psychologist conducted the IEE on July 16, 2012, and a written report entitled, "Confidential Comprehensive Psychoeducational and Clinical Evaluation" was issued by the psychologist on July 30, 2012 (P. Exh. 8). The psychologist concluded that Student suffered from Attention Deficit Hyperactivity Disorder ("ADHD") and that he would benefit from special education and related services. *Id.*

6. On August 4, 2012, counsel for Petitioner transmitted the IEE to \_\_\_\_\_, special education representative of Respondent (P. Exh. 9, p.1). Subsequent correspondence indicated that that representative forwarded the IEE to \_\_\_\_\_ Elementary School (*Id.* at p. 2). However, there is no evidence that in the weeks that followed that anyone at \_\_\_\_\_ Elementary School reviewed the IEE. Indeed, all but a few teachers and administrators of the school had been replaced. Moreover, mid-August was a time when many school officials were on vacation (Testimony of Principal). The IEE was not uploaded into the Student Evaluation Data System (Testimony of Special Education Specialist).

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<sup>6</sup> See 34 C.F.R. §300.502(b).

7. On a day in August 2012, Mother visited the School to enroll Student and introduce herself to \_\_\_\_\_, the new principal. Mother testified that they talked generally and the Principal invited her to meet with him in a couple of weeks to discuss the Student in more detail. The Principal testified in some detail, stating that Mother told him during that first discussion that she was suing because there was no IEP for Student. The Principal stated he had just started and could he have a copy of the relevant documents. According to the Principal, Mother stated that the matter was being handled by a lawyer and that all papers were going through the lawyer. Nevertheless, she said she wanted to come in in a couple of weeks to discuss her child's educational needs (Testimony of Principal).

8. During the second week of school on September 4, 2012,<sup>7</sup> Mother returned to the School and met with the Principal (Testimony of Mother; Testimony of Principal).

9. There is some discrepancy between Mother and the Principal as to what occurred at this meeting in connection with whether a copy of the IEE was offered to the Principal. Mother testified that the Principal expressly stated that she showed the Principal a copy of the IEE and that after reviewing he expressly told her he did not need it (Testimony of Mother). The Principal stated that he was given the IEE to peruse but that Mother was very reluctant

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<sup>7</sup> Neither Mother nor Principal identified the date of the meeting. However, the Resolution Session Meeting notes identify the date as September 4, 2012. Inasmuch as that date is otherwise not inconsistent with either the testimony of Mother or Principal, I conclude that the meeting took place on September 4, 2012. See P. Exh. 8, p. 12.

to hand over the IEE to the Principal to copy. The Principal further declared that he respected her position on the submission of the IEE, but also admitted that he did not press her for a copy because Mother had reiterated at this meeting that the matter was being handled by an attorney and, that, therefore the Principal assumed he would obtain a copy in the normal course of the litigation. The Principal also said that while he skimmed through the IEE, he did not have any ability to render any judgment on it. He further stated that had he been given a copy, he would have set up a meeting (Testimony of Principal).

10. The testimony of the Mother and the Principal are consistent in larger part and inconsistent as to one significant piece of testimony. They both agree that they met twice. They both agree that Mother showed the Principal a copy of the IEE and he reviewed it. There is also general agreement that whatever the Mother stated, the Principal did not insist upon a copy of the IEE. With respect to the issue of disagreement, namely whether the Mother stated that she did not feel comfortable giving him a copy of the IEE, I credit the testimony of the Principal. Although he testified on the phone and not in person, and therefore, I was unable to observe him, he was extremely lucid and the manner in which he delivered such testimony enhanced his believability. Mother appeared to give generally honest testimony but testified with much less detail in a more conclusory manner. Moreover, the evidence is undisputed that, at that time, her counsel had been participating. For all of these reasons, I conclude that it was reasonable for her to be reluctant to act without counsel

even as to the disclosure of the IEE. Therefore, I conclude that the Principal's testimony that Mother expressed reluctance in providing the Principal with a copy of the Report on September 4 is credible and it is, therefore, credited herein.<sup>8</sup> Similarly, I credit the testimony of the Principal against the silence of the Mother that in their first meeting in August, as referenced above in more detail, that Mother had told him that the matter was being handled by her lawyer and that all the papers were going through the lawyer.

11. On September 7, 2012, three days after the meeting between the Mother and the Principal, Petitioner filed the Due Process Complaint (P. Exh. 10).

12. The Resolution Session Meeting was held on October 5, 2012 (R. Exh. 8). During that meeting, the Resolution Meeting Specialist made it clear that once she received the IEE, an MDT meeting would be convened to reconsider the Student's eligibility for special education services. *Id.* at p. 2.

13. Other than the copy that was never utilized as set forth in Paragraph 6 above, Respondent did not receive the IEE until it was supplied in mid-October by Petitioner's counsel (Testimony of Special Education Specialist). Thereafter, the Special Education Specialist and the Compliance Specialist arranged to have a Letter of Invitation ("LOI") sent to the Mother by

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<sup>8</sup> I make these credibility findings based on the testimony of these two witnesses. It is noted that the notes of the Resolution Meeting which occurred a month later are consistent with my findings. The notes were admittedly written by Respondent and especially to the extent that they paraphrase the Mother, they are hearsay (R. Exh. 8, p. 2). Yet, the fact that they are not inconsistent with the Principal's testimony serves to bolster the independently made credibility findings set forth above.

having the letter placed in the Student's backpack. The first notice was sent on October 15, 2012 for a meeting on October 23, 2012, assuming that that date was good for the Mother. According to the Special Education Specialist, when there was no response from Mother, the Special Education Specialist together with the School Psychologist<sup>9</sup> called and left a message about the meeting (Testimony of Special Education Specialist). Mother denied that a message was left and she claimed that her voicemail was full and messages could not be left since October 10, 2012. I credit Special Education Specialist that Mother was called. Special Education Specialist testified credibly that Respondent uses a specific system by which to notify parents of special education meetings and that based on that explanation, I conclude that calling the parent was a likely step to take at this point. Moreover, whether the message was left or the voicemail was full, the evidence suggests that, at this point in the chronological list of events, Respondent acted responsibly and diligently to move matters forward (Testimony of Special Education Specialist).

14. When Mother failed to respond, Respondent sent another LOI on October 23, 2012, through the Student to the Mother for a proposed meeting on October 30, 2012 (R. Exh. 9). Mother did obtain knowledge of this LOI, but was unavailable on October 30, 2012 because Student had an eye doctor's appointment. In an email she sent, counsel for Petitioner reacted with some indignation about the scheduling of an MDT Meeting without first clearing the

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<sup>9</sup> School Psychologist did not testify, but Special Education Specialist testified that she was next to her when this call was made.

date with Mother. Counsel for Petitioner asked in that email that she be contacted to reschedule the meeting (P. Exh. 15).

15. No meeting was held on October 30, 2012, because the school system was closed due to Hurricane Sandy (Testimony of Special Education Specialist). Thereafter, another LOI was issued on November 2, 2012, for an MDT meeting for November 13, 2012 (R. Exh. 11). At least as of the time of the Due Process Hearing, Petitioner had not responded whether it could or would attend this meeting (Testimony of Special Education Specialist).

### **Analysis and Legal Conclusions**

#### **The Allegation that Respondent Unduly Delayed Conducting an MDT Meeting**

IDEA provides children and young adults with disabilities a Free and Appropriate Public Education ("FAPE"). 20 U.S.C. §§1400(d)(1)(A) and 1412(a)(1). Schools must provide disabled children with "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Hendrik Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). The Act provides both substantive and procedural rights inuring to those children or young adults that are disabled as defined by the statute. 20 U.S.C. §1415.

In the instant case, the failure to timely conduct an MDT meeting could constitute a procedural violation of IDEA. The Student had been determined ineligible under IDEA in May 2012. The Mother disagreed with that decision

and pursuant to the statute, an IEE was thereafter conducted at public expense. The IEE was completed on July 30, 2012.

What happened thereafter was, in retrospect, most unfortunate. Respondent was sent the IEE, but it was never uploaded into the appropriate database and those school officials who could have scheduled an MDT never saw the IEE. The failure to discover the IEE was caused by the fact that the School Administration and teachers had almost completely turned over since the last school year and the IEE was forwarded to the School at the height of the summer vacation period. This does not necessarily excuse the behavior, but does serve to explain what seems to have happened.

On September 4, 2012, the Mother met with the Principal to discuss the Student's needs. It was at this meeting, as described in the Findings of Fact, that Parent refused or failed to provide a copy of the IEE to Principal. As indicated in the Findings of Fact Nos. 8 through 10, the undersigned has determined that, for the reasons set forth therein, that the Principal's version of the events was more credible. While the Mother did not act in bad faith in refusing to provide the IEE, it is clear that her refusal to affirmatively make it available to the Principal unduly delayed the scheduling of the MDT meeting.

Thereafter, on September 7, 2012, the Mother commenced litigation by filing a Due Process Complaint seeking, among other things, <sup>10</sup> a legal order compelling an MDT meeting.

Mother and her counsel pushed forward with the processing of the Due Process Complaint. While that was Petitioner's right, there is no logical reason why the IEE was not shared with the School officials until mid-October when Counsel provided it. There is no evidence that even despite its own inaction in August described above, that Respondent acted in bad faith or otherwise sought to delay an MDT meeting. Indeed, this is evident from the Resolution Meeting notes where Respondent's officials made it clear that an MDT meeting would occur once it had received the IEE. Moreover, the School followed up thereafter with a series of LOI's inviting the Mother to an MDT meeting. While the Mother stated that she did not get adequate notice of the first two meetings (dated October 15 and October 23) it was incumbent upon her and/or her representative to thereafter reach out to the School for the purpose of scheduling a meeting. Rather than do that, Petitioner sat back and relied solely on the legal process.

A re-evaluation of eligibility should be conducted "in a reasonable period of time or without undue delay." *James Smith v. District of Columbia*, 2010 U.S. Dist. LEXIS 125754, at \*8 (D.D.C. Nov. 30, 2010) citing *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005).

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<sup>10</sup> The Complaint also alleged a "Child Find" violation and a request for a compensatory education. Petitioner chose not to go forward on those allegations. See Opening Statement of Counsel for Petitioner.

It is clear from the above factual narrative that Petitioner significantly contributed to the delay. A procedural violation of IDEA will not arise when the Parent or his or her agent or representative contributed to the delay. See *Lessesne v. District of Columbia*, 2005 U.S. Dist. LEXIS 35699 (D.D.C. July 26, 2005), *aff'd*, 447 F.3d 828 (D.C. Cir. 2006) (conduct of student and parent contributed to delay resulting in dismissal of allegations of procedural violation). See also *J.J. v. District of Columbia*, 768 F. Supp. 2d 214 (D.D.C. 2011), which in a case with several factual similarities to the case here, the court, in affirming the Hearing Officer, noted that a) parent failed to reach out to the school to schedule an MDT meeting and b) that the school system issued several invitations for an MDT meeting. *Id.* at 219-220.<sup>11</sup>

For these reasons, the undersigned concludes that Respondent did not commit a procedural violation of IDEA.<sup>12</sup>

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<sup>11</sup> In her brief, counsel asserts that Respondent is improperly relying upon facts contained within settlement discussions. I reject that contention. The information noted above came from Resolution Meeting notes and unilaterally issued Letters of Invitation (LOI). Resolution sessions are not deemed "settlement" discussions as those communications are defined in Rule 408 of the Rules of Evidence. See *Friendship Edison Pub. Charter Sch. v. Smith*, 561 F. Supp. 2d 74, 82-83 (D.D.C. 2008). The LOI's and the facts accompanying them occurred outside the context of any settlement discussion.

<sup>12</sup> Because of this conclusion of law, the undersigned need not go through the analysis to determine the significance of a procedural violation of IDEA upon Student's statutory substantive rights. This would have been necessary if a procedural violation was found since "a procedural violation is only actionable 'if those procedural violations affected the student's substantive rights,'" *Parker v. Friendship Edison Pub. Charter Sch.*, 577 F. Supp. 2d 68, 74 (D.D.C. 2008) citing *Lessesne v. D.C.* at 447 F. 3d at 834. The Student here was not then eligible for special education having been found ineligible in May 2012. Accordingly, any procedural violation could only be remedied at a later point should the Student later be deemed eligible.

### **The Petitioner's Claim That It is Entitled to an Order Compelling an MDT Meeting**

Separate from the allegation of an unlawful delay in scheduling an MDT meeting is the contention that the law guarantees the Petitioner an MDT meeting to reconsider the prior eligibility determination where Respondent concluded that the child was not disabled and, therefore, not eligible. Respondent contends that this matter should be dismissed as moot. Petitioner takes the contrary position.

The undersigned concludes that the matter is moot. A matter is moot when there is no Article III of the U.S. Constitution "case or controversy." The doctrine of mootness is recognized in IDEA. *Honig v. Doe*, 484 U.S. 305 (1988); *Theodore v. District of Columbia*, 655 F. Supp. 2d 136 (D.D.C. 2009). In this case, Respondent has agreed to do exactly what Petitioner seeks – conduct an MDT meeting. On several occasions, Respondent has issued LOI's to schedule such a meeting. The latest proposed date put forth by DCPS is November 13, 2012. Mootness occurs where, as here, Petitioner has received everything being sought. *Theodore v. D.C.* 655 F. Supp 2d at 144. Petitioner's only requested relief is to have an MDT meeting in which the Parent would be able to fully participate. That has been promised to Petitioner.

There is an exception to the invocation of the doctrine of mootness. The exception applies where the matter is "capable of repetition yet evading review." This occurs where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable

expectation that the same complaining party [will] be subjected to the same action again,” *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 112 (D.D.C. 2000).

I find that this mootness exception does not apply to this case. Specifically, I find that the re-evaluation of Student through an MDT meeting is not something that the Student is likely to be subjected to on a regular basis. The facts of this case are markedly different than *Zearley v. Ackerman*. There, the student was already eligible and the court concluded that the problems associated with an eligible student were likely to reoccur on a regular basis. Here, it is not anywhere near as likely that the convening of an MDT meeting is likely to occur on a continuing basis. While conceivable, it is not likely that the Mother would regularly and continuously, challenge a non-eligibility finding. In contrast, as the court in *Zearley* described, post-eligibility educational plans are subject to review and analysis every year. That is not the case in a separate discrete eligibility determination.

Accordingly, the relief requested in an Order compelling a meeting shall be dismissed as moot as Petitioner has received what she wants and the mootness exception is inapplicable.

### **Conclusion**

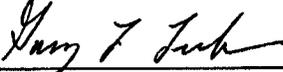
For the reasons described above, the Hearing Officer rejects the relief sought by Petitioner and they are, therefore, hereby dismissed.

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is  
Ordered that the Complaint in this matter is dismissed with prejudice.

IT IS SO ORDERED

Date: 11-15-12

  
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Gary L. Lieber  
Impartial Hearing Officer

Copies to: All Counsel of Record  
District of Columbia Public Schools  
Student Hearing Office, OSSE

### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1451(i)(2)(B).