DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)))))))))))	**Case No.** **Bruce Ryan, Hearing Officer** **Issued: July 9, 2011**

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HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed March 31, 2011, on behalf of a -year old student (the "Student") who resides in the District of Columbia and has been determined to be eligible for special education and related services as a child with a disability under the IDEA.

Petitioners claim that DCPS has denied the Student a free appropriate public education ("FAPE") by failing to: (a) timely review the Student's independent psychiatric evaluation and/or revise the Student's individualized education program ("IEP") as needed; and (b) develop an appropriate IEP that places the Student in a residential treatment program. As of this filing, the current IEP had been developed November 29, 2010. Petitioner alleges that the psychiatric evaluation was provided to DCPS on or about January 28, 2011, and that the MDT/IEP team convened on or about March 10, 2011, but was not prepared to review the evaluation at that time.

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

DCPS filed its Response on April 14, 2011, which denies the allegations. The Response asserts, *inter alia*: (a) that the MDT was scheduled to meet on 04/14/2011 to review the psychiatric evaluation; (b) that the Student's IEP provides an appropriate amount and type of special education services; and (c) that on 01/07/2011, DCPS convened an MDT meeting to discuss the Students' location of services, and parent agreed with DCPS' recommendation that the Student attend Private School.

A resolution session was held on April 22, 2011, which did not resolve the Complaint, and the statutory 30-day resolution period ended as of April 30, 2011. A Prehearing Conference ("PHC") was then held on May 5, 2011. At the PHC, the parties reported that the 04/14/2011 MDT meeting took place as scheduled; that the independent psychiatric evaluation was reviewed; that no changes were made to the Student's IEP at that time; and that the matter was then referred to DCPS' "LRE Committee" for further consideration of placement options. The Due process Hearing ("DPH") was then scheduled for June 2, 2011.

The June 2, 2011 DPH was cancelled due to an electrical power outage at the Student Hearing Office ("SHO") at 810 First Street, NE, which necessitated the closing of the SHO despite diligent efforts to secure adequate facilities for the hearing. Telephone conferences were then held on June 2 and 3 to discuss rescheduling of the hearing. The Hearing Officer indicated his availability to reschedule the hearing for June 10 (within the original 45-day HOD timeline) or, alternatively, for June 15, 29, or 30. However, DCPS counsel was not available for June 10, and Petitioner's counsel was not available for June 15. Both parties stated that they were available on June 29, and agreed to reschedule the hearing for that date and to extend the HOD timeline to July 9, 2011.

A motion for continuance was granted upon good cause on June 10; and the DPH was held on June 29, 2011. Petitioners elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioners' Exhibits: P-1 through P-26.

Respondent's Exhibits: R-1 through R-9.

In addition, the following Witnesses testified on behalf of each party:

Petitioners' Witnesses: (1) Parent; (2) Educational Advocate ("EA"); and (3) Psychiatrist.

Respondent's Witnesses: None.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The statutory HOD deadline is July 9, 2011.

III. ISSUES AND REQUESTED RELIEF

The following issues are presented for determination:

> **(1) Review of Independent Evaluation.** — Did DCPS deny the Student a FAPE by failing to ***timely*** review the Student's independent psychiatric evaluation and review/revise the Student's IEP as appropriate?
>
> **(2) Inappropriate IEP/Placement.** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP that places the Student in a residential treatment program?

Petitioner requests the following relief: (a) that DCPS identify and arrange for the Student's placement in a suitable residential facility; and (b) that DCPS provide appropriate compensatory education for the denials of FAPE. At the PHC, Petitioner's counsel agreed that the request for DCPS to reconvene the MDT to review the psychiatric evaluation was now moot in light of the 04/14/2011 meeting.

IV. FINDINGS OF FACT

1. The Student is a year old student who has been determined to be eligible for special education and related services under the IDEA as a child with a disability. *P-11; R-2.*
2. The Student has Multiple Disabilities. *P-11;* ... He was born with neurological problems and has been diagnosed with Bipolar Disorder, Oppositional Defiant Disorder, ADHD, and Dyslexia. [CITES]
3. During the 2009-10 school year, DCPS placed the Student in a residential program in Virginia ("Residential Program") due to his significant social/emotional and behavioral deficits.

4. At the beginning of the 2010-11 school year, the Student was discharged from the Residential Program and placed by DCPS at a non-public, special education day school ("Private School A").
5. During his placement at Private School A, the Student experienced difficulties with truancy and aggressive behaviors that significantly impacted his ability to access his education there.
6. On or about November 29, 2010, DCPS convened a meeting of the Student's MDT/IEP Team to discuss the difficulties he was having at Private School A. The IEP developed at this meeting provided for 26 hours per week of specialized instruction and 1.5 hours per week of behavioral support services in an Outside General Education (pull-out) setting. *See P-11, p. 7.*
7. On or about December 21, 2010, pursuant to DCPS authorization, an independent psychiatric evaluation of the Student was completed, based on an interview conducted at his home. *P-1.* The evaluator found (*inter alia*) that the Student was not making progress with regard to his overall level of functioning at school or within the community at that time. *Id., p. 1.* He was "not attending school regularly, [was] receiving no supervision at home, and [was] becoming a threat to the community." *Id., p. 2.* He had "no structure in his home life" and was "literally 'running the streets'." *Id.* According to school staff, he was "reportedly 'AWOL' from school and therefore not progressing satisfactorily." *Id., p. 3.* And when he did attend, he often engaged in disruptive behavior that resulted in removal from the classroom. *Id.* The evaluator recommended psychotropic medication and also thought he would benefit from a return to a residential treatment facility. *Id.*
8. On or about January 7, 2011, DCPS convened an MDT/IEP Team meeting and issued a Prior Written Notice changing the Student's placement to a different non-public, special education day school ("Private School B"). *See R-4; R-5.*
9. On or about January 28, 2011, Petitioner received the written psychiatric evaluation report and provided it to DCPS.
10. On or about March 10, 2011, DCPS convened another meeting of the Student's MDT/IEP Team to address continued behavior issues. Although DCPS had been provided a copy of the independent psychiatric report over a month earlier, DCPS had not reviewed the evaluation and was not prepared to discuss its findings at the 03/10/2011 meeting.

Following the 03/10/2011 meeting, the Student continued to experience behavioral difficulties that impeded his education.

11. At the time the Complaint was filed, DCPS had possession of the independent psychiatric report for over 60 days and still had not reviewed the evaluation at an MDT/IEP meeting.
12. Subsequent to the filing of the Complaint, DCPS finally convened a meeting of the Student's MDT/IEP team to review the independent psychiatric report on 04/14/2011. At this meeting, DCPS made no changes to the 11/29/2010 IEP, and noted that Private School B could implement the IEP, but the matter was referred to DCPS' "LRE Committee" to initiate a process for consideration of residential treatment center ("RTC") placement options. *R-7.*
13. A further meeting was then held on 05/25/2011 to follow up on the RTC referral and review the Student's progress with wrap-around services. *P-25.* The team stated that Student was a "no show" at Private School B; and that because there was no availability for observation and no threat to self or other students, DCPS would not refer the Student for residential. *Id.* The team also determined that Private School B was no longer an appropriate setting for the Student. *Id.*

V. DISCUSSION AND CONCLUSIONS OF LAW

The burden of proof in a special education due process hearing is on the party seeking relief. *See Schaffer* v. *Weast,* 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. DCMR 5-E3030.3.

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

As noted, Petitioner's 03/31/2011 Complaint alleged that DCPS denied the Student a FAPE in two ways: (1) by failing for over 60 days to take any action to review his independent psychiatric evaluation; and (2) by failing to develop an appropriate IEP placing the Student in a residential treatment facility ("RTF").

Following the filing of the Complaint, DCPS finally convened an MDT/IEP Team meeting on 04/14/2011 that reviewed the results of the evaluation, thus mooting the primary item of requested relief (*i.e.,* ordering a meeting). Petitioners did prove that DCPS failed to complete this review in a reasonably timely manner by taking over 75 days to do so, and then only in response to a due process complaint. However, Petitioners have not shown that such delay in reviewing the evaluation amounted to more than a procedural violation under the circumstances. Petitioner has not shown that such procedural violation caused a deprivation of educational benefit, or otherwise resulted in a substantive denial of FAPE. *See* 34 C.F.R. 300.513 (a) (2); *Lesesne v. District of Columbia,* 447 F.3d 828, 834 (D.C. Cir. 2006).

Petitioner's claim of an inappropriate IEP can only relate to the IEP developed on 11/29/2010, as that was the then current program complained of on March 31. Petitioner claims that, by that time, it had been shown that the Student's transition into a less restrictive setting was unsuccessful and that he required a residential placement to access his education. *See Complaint, pp. 3-4, 6.* However, the Hearing Officer concludes that Petitioners have not shown by a preponderance of the evidence that the ***11/29/2010 IEP*** should have provided for placement in an RTF, based on the information available to the Team at that time.[2] The Team noted that the Student was capable of completing his academic work, but that attendance continued to be a major factor impeding his progress at that time as he had missed 44 of 64 days in the 2010-11 school year at Private School A as of that date. *See R-3, pp. 1-3.* The Team was also awaiting the results of the independent psychiatric evaluation, which had not yet been received. *Id.*

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[2] To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education* v. *Rowley,* 458 U.S. 176,200,207 (1982). *See also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988); *J G. v. Abington School,* 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. "). Moreover, judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward ... at the time an IEP was created." *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207); *see also Fuhrmann* v. *East Hanover Bd. of Educ.,* 993 F.2d 1031, 1040 (3d Cir. 1993) (whether an IEP is appropriate "can only be determined as of the time it is offered for the student, and not at some later date").

Nor have Petitioners demonstrated that, at the time of the 11/29/2010 meeting, residential placement was "necessary for educational purposes," as opposed to being "a response to medical, social or emotional problems that are segregable from the learning process," as of February and March 2011. *McKenzie v. Smith,* 771 F.2d 1527 (D.C. Cir. 1985), *quoting Kruelle v. New Castle Country School Dist.*, 642 F.2d 687, 693 (3d Cir. 1981). For the most part, at the time the IEP was developed, the Student's psychiatric and behavioral problems appear to have been demonstrated in the home and community, rather than in the school setting.[3] Moreover, Petitioner specifically agreed to visit some recommended programs. And about a month later, all team members (including the parent) agreed that the Student would transfer to Private School B to try out that program to see if the Student could be more successful at that location.

With respect to any assertion that DCPS may have ***subsequently*** acted to deny the Student a FAPE, at MDT meetings held in April or May, 2011 – based on the results of the independent psychiatric evaluation – any such claim is not within the scope of the 03/31/2011 complaint. *See* 34 C.F.R. 300.511 (d). Petitioner would need to file a separate request for a due process hearing to present such issues. Absent compelling circumstances, an LEA's actions relating to the evaluation or educational placement should not be judged "on the fly" during ongoing litigation. Each action changing or refusing to change an IEP and/or placement needs to be assessed as a denial of FAPE on its own merits, through the normal complaint/resolution process under the IDEA. *See* 34 C.F.R. 300.507 (a) (1), 300.508, 300.510, 300.513 (c).

[3] *Cf. Ashland School Dist. v. Parents of Student R.J.*, 588 F.3d 1004 (9th Cir. 2009); *Linda E. v. Bristol Warren Regional School Dist.,* 55 IDELR 218 (D.R.I. 2010).

VI. ORDER

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

1. Petitioner's requests for relief in her Due Process Complaint filed March 31, 2011 are hereby **DENIED;**

2. The Complaint is **DISMISSED;** and

3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: July 9, 2011

Impartial Hearing Officer

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. §1415 (i) (2).