DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

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Confidential

STUDENT[1], by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.	**HEARING OFFICER'S DETERMINATION** Date: May 19, 2009 **Hearing Officer: Wanda I. Resto, Esquire**

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

I. PROCEDURAL BACKGROUND

On April 6, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to include the parent in a decision regarding placement, failing to implement the Student's Individualized Education Program ("IEP"), and failing to provide an appropriate educational placement. The Petitioner requests the Respondent be deemed to have denied FAPE to the Student and ordered to immediately fund and place the Student at a full-time Autism school of the Petitioner's choosing, with transportation. The Petitioner further requests that within 30 days of the Student's enrollment at an appropriate school, the Respondent convene an multidisciplinary team ("MDT") meeting to review all current evaluations, and to review and revise the Student's IEP as appropriate. Additionally the Petitioner requests that the Respondent at the MDT meeting discuss and determine an appropriate compensatory education plan.

The DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed on April 17, 2009. The Respondent alleged that on January 16, 2009, the parties were scheduled to meet to discuss the Student's eligibility and placement. The Respondent asserted that on January 15, 2009, Petitioner's Counsel informed the Respondent that she had not been able to contact the parent and needed to cancel the scheduled January 16, 2009, meeting. The Respondent further asserted that after many subsequent E-mails between the Respondent and Petitioner's counsel, a meeting was scheduled for February 20, 2009, neither the parent, nor her Counsel appeared on the meeting date. The Respondent contends that the agreement at the meeting February 20, 2009 was that the Student's Advocate would take to the parent the draft IEP and if the parent agreed with it, she would sign and return the IEP to the Respondent, and the Student would then be placed at the School. The Respondent asserted that the Petitioner returned the signed IEP one month later. The Respondent alleged that immediately after receipt of the final IEP, on March 20, 2009, it issued a Prior Notice of Placement ("PNOP") and the transportation forms to the School. Additionally, the Respondent argues that in the intervening month it took the parent to sign and return the final IEP to DCPS, the placement being held for the Student at the school was no longer available. Nor were any other DCPS Autism program available. The only other option at that point, was the Program at The Respondent then issued another PNOP to that school. The Respondent further argued that it has never disagreed to a meeting, nor has it withheld information or delayed providing services for the Student. The Respondent further asserted it has conducted all evaluations, determined the Student eligible, developed the Student's IEP, provided a placement that can implement the Student's IEP and has provided transportation. It's the Respondent contention that there has been no denial of FAPE to the Student.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on April 24, 2009. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The Respondent reasserted its defenses and that the Student has not been denied a FAPE. The Petitioner offered two witnesses; the

Respondent offered three witness and both Counsels provided a synopsis of their witnesses' testimony.

An April 27, 2009 Order required the Petitioner to demonstrate how the Respondent failed to include the parent in the decision regarding placement; what part of the Student's IEP was not implemented, what about the educational placement is inappropriate, how were the Student/Petitioner harmed and how is the Petitioner's choice of placement appropriate. The Petitioner was also required to prove that the Student's eligibility was untimely and (1) that as a result of Respondent' violation of the IDEIA, the Petitioner suffered an educational deficiency, (2) that but for the violation, Petitioner would have progressed to a certain academic level, and (3) that there exists a type and amount of compensatory education services that could bring the Student to the level Student would have been but for the Respondent's violation. The Petitioner was required to present evidence for purposes of establishing whether compensatory education is warranted, and if so, what type and amount of compensatory education is most appropriate and how the hours will be integrated into the Student's current educational program.

The Respondent was ordered to demonstrate that the parent had an opportunity to participate in the placement decision, that the Respondent acted appropriately when it placed the Student at the School and that it has provide a FAPE.

A hearing was held on May 14, 2009. The Petitioner presented a disclosure letter dated May 7, 2009 to which four documents were attached, labeled P-1 through 4 and which listed ten witnesses. One witness testified–the Mother. The Respondent presented a disclosure letter dated May 5, 2009 identifying four witnesses and to which five documents were attached, labeled DCPS 1 through 5. No witness testified. The documents were admitted without objections except DCPS 6 which was stricken from the record because the document was not included in the disclosure packet.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

1. Did the Respondent fail to include the parent in the Student's placement decision?

2. Whether the Respondent failed to implement the Student's individualized education plan?[2]

3. Was the Student denied a FAPE?

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[2] The Petitioner at the Hearing withdrew the claims of inappropriate educational placement.

III. FINDINGS OF FACT

1. Both parent and the Child are residents of the District of Columbia.

2. The Student is a student with disabilities under the IDEIA. The Student's most recent IEP is dated March 13, 2009 and provides 25.5 hours per week of specialized instruction, 60 minutes weekly of speech language pathology and 60 minutes of occupational therapy weekly. The Student's disability classification is Autism.[3] The Petitioner signed and agreed with the March 14, 2009 IEP.

3. On January 15, 2009, at 1:00 PM a meeting was proposed to discuss the Student's eligibility. Counsel for the Petitioner sent an E-mail to the Respondent indicating she had not been able to reach the Petitioner, had left several messages and suggested that the Respondent call the Education Advocate and to reschedule a meeting.[4] On January 22, 2009, Counsel for the Petitioner sent another E-mail apologizing for not been able to reach the Petitioner to agree on a meeting date.[5]

4. On January 29, 2009 Petitioner's Counsel sent an additional request to reschedule the eligibility meeting, that same day the Respondent offered the following Friday or the third week in February. [6]

5. On February 2, 2009, Counsel for the Petitioner via an E-mail offered February 20, 2009 as the preferred to date for an eligibility meeting.[7]

6. On February 14, 2009, the Respondent convened an MDT meeting at which speech and language, educational, psychological and occupational therapy evaluations of the Student were ordered. A meeting was convened on February 20, 2009 to review the evaluations. [8]

7. At the February 20, 2009 meeting the Respondent determined that the Student is eligible for specialize instruction and related services as a qualified child with a primary disability of autism; developed an IEP and recommended that the Student attend the Autism program at School

8. The Petitioner did not attend the February 20, 2009 meeting because she went to the wrong place. The last meeting the Petitioner participated in to discuss the Student was in 2008, because she has difficulties organizing herself and her other children to attend meetings. The Educational Advocate mentioned that placement at had been offered;

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[3] DCPS-2 March 14, 2009 Individualized Education Program

[4] DCPS-3 E-mail correspondence between the Petitioners's previous Counsel and the Case Manager at the Early Childhood Division.

[5] DCPS-3 Id.

[6] DCPS-3 Id.

[7] DCPS-3 Id.

[8] P-1 April 6, 2009, Complaint and facts as stipulated at the hearing.

[9] P-1 Id.

the Petitioner was not able to enroll the Student because she did not have transportation and didn't know who to contact to enroll the Student. The parent has not been provided any information about The Student has not received services or bus transportation to school. The Petitioner called her Educational Advocate and left voice messages, but did not hear back. The Petitioner did not request a meeting to discuss placement prior to filing the due process complaint.[10]

9. On March 20, 2009, the Special Education Advocate faxed the signed IEP and sign letter from the parent consenting to the initial IEP, services and requesting a final IEP, prior notice of placement and transportation form.[11]

10. On March 20, 2009, the Respondent notified the Petitioner that the Student would be going to Autism program at and that all DCPS Autism programs were full.[12]

11. The Respondent has not convened an MDT meeting to discuss Autism program at The Petitioner has not received any information regarding the Saint John's program nor a prior notice of placement. The Student has not received his IEP services since March 14, 2009. There was no prior notice of placement provided to the Petitioner or her representative and there has been no discussion about the program at There have been no meeting convened, nor has transportation been provided since March 14, 2000, when the IEP was signed.[13]

12. The Petitioner withdrew the claim for placement and compensatory education.

13. The parties agreed to submit the case based on the testimony from the Petitioner. And the written record admitted without the document identified as DCPS 6.

IV. CONCLUSIONS OF LAW

FAPE Determination

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable IDEIA regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

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[10] Testimony of the petitioner.

[11] P-4 Education Advocate's E mail to [redacted] Case Manager.

[12] P-4 Id.

[13] Testimony of the Petitioner.

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

The Respondent met its legal obligation under the IDEIA. Here is why.

Educational placement decision

The Petitioner alleged the Respondent did not allow the parent a meaningful participation in making the placement decision. The Respondent argues that the parent had an opportunity to participate in the placement decision making process, and that the parent is not entitled to choose a location.

Pursuant to 34 C.F.R. § 300.116 of the IDEIA regulations when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. Additionally the IDEA requires that the determination of the educational placement of a child with a disability should be done annually and must be based on a child's IEP.[14]

The IDEIA regulations require that "the parents of a child with a disability be afforded an opportunity to participate in meetings with respect to ... [the] educational placement of the child." [15]

The IDEA regulations also require the Respondent, as the local state education agency, to make certain that the educational placement, for the child with a disability within its jurisdiction, is able to implement the student's individualized educational program. [16]Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."

The evidence indicates that the Petitioner was represented by the Educational Advocate in the MDT/IEP meeting that crafted the IEP in February 2009. The mother signed the IEP in agreement with the program and a month later the IEP was returned to the Respondent. The Petitioner testified that the Educational Advocate had informed her of the placement at [redacted] and she did not visit the school. The testimony from the Petitioner was that she failed to participate in meetings because of logistical problems and she left messages for her Education Advocate who was not responsive.

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[14] 20 U.S.C. 1412(a)(5).

[15] 34 C.F.R. § 300.501(b)(1); see also 20 U.S.C. § 1414(e

[16] 34 C.F.R. § 300.17

Furthermore, the Petitioner's request for a meeting came at the hearing, there was no evidence that the Petitioner made any efforts to discuss with or contact the Respondent to address her concerns with the placement. The Respondent made various attempts in early January, again in February and then in March and the Petitioner did not make herself available. The Petitioner chose not to participate in the placement decision. Additionally, there has been no demonstration that an educational harm has been produced to the Student.

There was no evidence that the Student's IEP is inappropriate or that the Student requires services beyond those offered in the proposed program. The only evidence is that the parent disagrees with the location of the program chosen by the MDT because she allegedly did not have an opportunity to participate. The Petitioner since March decided to keep the Student from receiving a FAPE, when she did not enroll him in any school.

To provide meaningful participation is not to say the parent get what she requests. The Petitioner agreed to the Student's IEP and was not able to provide evidence that she was denied participation in the placement decision making process or that the Student suffered an educational harm.

Although the IDEIA guarantees a Free Appropriate Public Education, it does not, however, provide that this education will be designed according to the parent's desires. The primary responsibility for formulating the education to be accorded a [child with a disability] and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parent or guardian of the child. Thus proof alone that loving parents can draft a better program than a state offers does not, alone, entitle them to prevail under the Act." Shaw v. The District of Columbia, 238 F. Supp. 2d 127, 139 (D.D.C. 2002).

A school system has met this obligation as long as the program that it offers to a disabled student is "reasonably calculated" to deliver "educational benefits." Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982); see Lt. T.B. v. Warwick Sch. Comm., 361 F.3d 80, 83 (1st Cir. 2004).

Individualized Education program

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living. *See id.* § 1400(d)(1)(A).

To ensure that each eligible student receives a FAPE, the IDEA requires that an IEP be developed to provide each disabled student with a plan for educational services tailored to that student's unique needs. See 20 U.S.C. § 1414 (d)(3).

The Student's most recent IEP is dated March 13, 2009 provides 25.5 hours per week of specialized instruction, 60 minutes weekly of speech language pathology and 60 minutes of

occupational therapy weekly. The Student's disability classification is Autism.[17] The Petitioner signed and agreed with the March 14, 2009 IEP. After the signing to the IEP the parent did not enroll the Student in any school to begin receiving the services as prescribed in the Student IEP.

Written Prior Notice of Placement

The Petitioner also claims that Respondent violated IDEIA procedural requirements by not properly explaining their decision to place the Student at [redacted]

The IDEIA and regulations require the LEA to provide written notice to parents before they initiate or refuse a change in a student's identification, evaluation, or educational placement.[18]. Specifically, the written notice must contain:

> (A) a description of the action proposed or refused by the agency;
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> (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
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> (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
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> (D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;
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> (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
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> (F) a description of the factors that are relevant to the agency's proposal or refusal.

The Respondent claimed the PNOP was issued however there was no evidence of the document in the record. The Petitioner asserted, therefore, that this procedural violation renders Respondents' placement of the Student at the location inappropriate.

The Respondent failed to prove that it complied with the required PNOP failing to provide a description of the setting, services to be received, and a statement that placement was being offered. It also failed to provide in writing an explanation of the action proposed or refused and a description of the documentary basis for that decision. These procedural failings, however, do not necessarily entitle the Petitioner to relief. The Petitioner must show that the procedural violations affected the Student's substantive rights. The record indicates that it has been difficult to have the parent participate in meetings. While the

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[17] DCPS-2 March 14, 2009 Individualized Education Program

[18] 20 U.S.C. § 1415(b)(3); §1415(c)(1); 34 C.F.R. § 300.503(a); §300.503(b).

PNOP was not provided to the parent, the parent was represented by her Educational Advocate at the IEP meeting. The evidence was that the Educational Advocate was to take the drafted IEP to the parent get her signature and the Respondent would then move forward with a placement decision. The Petitioner delayed an entire month prior to sending the signed IEP to the Respondent and the location initially identified for the Student was no longer available.

The Petitioner if unclear about the Student's placement, did not attempt to get any information about the appropriateness of the schools' services, the address or the telephone number so that she could visit the school and make an informed decision. The Petitioner chose not to visit any school, and never indicated her preference to the Respondent. She had every opportunity to do so, instead she relied on her Educational Advocate and did not get a response.

The Respondent did not meet its statutory obligation it failed to provide the Petitioner with a prior written notice of action.

Notwithstanding that the DCPS failed to perform a procedural requirement of the IDEA. The IDEIA provides at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer decisions on procedural issues, –[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

i. impeded the child's right to a free appropriate public education;

ii. significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or

iii. caused a deprivation of educational benefits.

The Petitioner did not demonstrate that the Student suffered an educational harm or was affected by any procedural violations Respondent committed. Section 300.513(a)(1) and section 615(f)(3)(E) of the IDEIA provide that, in general, a decision made by a hearing officer must be made on substantive grounds based on a determination of whether the child received FAPE. In this case, the record is void of evidence that the procedural failure impeded the Student right to a FAPE, caused a denial of an education benefit or that the parent was not allow an opportunity to participate in the decision. Again in the present matter, it is of particular significance the Student's Educational Advocate participated in the February 2009 MDT meeting; convened by the Respondent and did not raise any concerns, nor did the Petitioner make any efforts to request a meeting or a change to the IEP prior to filing a Complaint and after waiting a month to return the signed IEP.

While the Petitioner has established procedural violations of the IDEIA, the Petitioner has not established that that violation caused harm to the Student that the IDEIA is intended to address.

Moreover, the D.C. Circuit Court has held that: –only those procedural violations of the IDEIA which result in a loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *Lesesne v. District of Columbia, 447 F.3d 828, 834* (D.C. Cir. 2006) (citing *Kruvant v. District of Columbia, 99 F. App'x 232, 233* (D.C. Cir. 2004) (holding that although DCPS admits it failed to satisfy its responsibility to assesses the student within 120 days of the parents' request, the parents have not shown harm resulted from that error).

V. SUMMARY OF DECISION

The Petitioner agreed to the Student's IEP and was not able to provide evidence that she was denied participation in the placement decision making process or that the Student suffered an educational harm. The claim of an inappropriate placement was withdrawn at the Hearing.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has not denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, the Complaint is DISMISSED.

IT IS FURTHER ORDERED, this order resolves all issues raised in the Petitioner's April 6, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)

***/s/WIRestorres*- electronically signed** **Date: May 19, 2009**
Wanda Iris Resto - Hearing Officer