DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE
Student Hearing Office
August 12, 2013

Petitioners,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Hearing Officer: Kimm Massey, Esq.

Case No:

Room No.: 2003

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is an eighteen year old female, who requires a residential treatment facility but currently does not attend one. On May 28, 2013, Petitioners filed a complaint against respondent DCPS, alleging that DCPS refused to honor a power of attorney executed by the adult student at issue and refused to move forward with offering Student a placement at an appropriate residential school program unless Student participated in a meeting and served as her own educational decision maker. As relief for these alleged denials of FAPE, Petitioners requested a finding of a denial of FAPE, an Order requiring DCPS to honor Student's power of attorney and directing DCPS that it shall not require Student to participate in educational decision making so long as the power of attorney in effect, that DCPS be required to immediately convene a placement meeting with Student's attorneys-in-fact (hereinafter "Parents") and issue a prior notice placing Student in a specified residential treatment facility without requiring Student to attend if the power of attorney is in effect, and funding for Parents to transport Student to the school.

Respondent did not file a Response. However, on June 3, 2013, DCPS filed a Motion to Dismiss the Complaint, asserting therein that Parents lacked standing to bring a Complaint on behalf of Student, because Student is an adult who turned 18 years old prior to the filing of the Complaint, and Student has not been determined incompetent, with the result that the hearing officer lacked jurisdiction.

The parties participated in a Resolution Meeting on June 6, 2013. There was no agreement and no change to the timeline. Therefore, the 45-day timeline began on June 28, 2013 and will end on August 11, 2013, which is the HOD deadline.

Also on June 6, 2013, Petitioners filed an Opposition to the Motion to Dismiss, attaching thereto a notarized Durable Power of Attorney for Education and a notarized General Power of Attorney, both of which were executed by Student in favor of Petitioners in front of a Notary Public in the District of Columbia, as well as a hand-written letter from Student to a DCPS Program Manager stating that Student did not wish to meet with the Program Manager because it would not be in her best interest and asking DCPS to please proceed with the placement at the

specified residential treatment school using the power of attorney she had executed in favor of her parents.

On June 14, 2013, Petitioner filed a Motion to Invoke Stay-Put Rights, seeking an Order requiring DCPS to maintain Student's placement in a therapeutic residential school placement and immediately place and fund Student at the specified residential school.

On June 17, 2013, the undersigned hearing officer issued an Order Denying DCPS's Motion to Dismiss, concluding therein that the Generable Durable Power of Attorney, together with the Durable Power of Attorney for Education, conferred standing on Petitioners to act on Student's behalf in prosecuting the instant action.

On June 17, 2013, DCPS filed a Motion to Reconsider the Motion to Dismiss. On or about June 17, 2013, Petitioners filed an Opposition to DCPS's Motion to Reconsider. On June 18, 2013, the undersigned hearing officer issued an Order Denying DCPS's Motion to Reconsider for the reasons set forth in the original Order denying the Motion to Dismiss.

On or about June 19, 2013, DCPS filed an Opposition to Petitioner's Motion to Invoke Stay-Put Rights. Therein, DCPS acknowledged that Student's placement on her IEP is for full-time out of general education in a residential setting, that Student's previous residential school will not allow her to return, and that DCPS agreed to assign the specified residential school as Student's location of services.

On June 20, 2013, the undersigned hearing officer issued an Order Granting in Part Petitioner's Motion to Invoke Stay-Put Rights, to the extent of ordering DPS to assign, within five calendar days of the issuance of the Order, a full-time out of general education residential school for Student to attend during the pendency of this action, and denying the Motion in all other respects.

On June 21, 2013, DCPS filed a Second Motion to Reconsider. On June 25, 2013, Petitioners filed an Opposition to Respondent's Second Motion to Reconsider.

On June 27, 2013, the hearing officer conducted a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on July 3, 2013, and a revised Prehearing Order on July 15, 2013 at Petitioners' request.

On June 28, 2013, DCPS filed its Second Motion to Reconsider and Amended Motion to Dismiss the DPC, requesting dismissal either for lack of jurisdiction or on mootness grounds. On July 3, 2013, Petitioners filed an Opposition to Respondent's Third Motion to Reconsider and Amended Motion to Dismiss. On July 15, 2013, the undersigned hearing officer issued an Order Denying Respondent DCPS's Second Motion to Reconsider and Second Motion to Reconsider and Amended Motion to Dismiss, which also amended the hearing officer's June 20, 2013 Order Granting in Part Petitioner's Motion to Invoke Stay-Put Rights by allowing DCPS an additional three weeks from the date set in the Order to place Student in a full-time out of general education residential school during the pendency of this action. The Order further noted that the period could be further extended, if appropriate, for good cause shown by DCPS.

By their respective letters dated July 18, 2013, Petitioner disclosed twenty-three documents (Petitioner's Exhibits 1-23) and DCPS disclosed three documents (Respondent's Exhibits 1-3).

The hearing officer convened the due process hearing on July 25, 2013, as scheduled.[1] All documents disclosed by the parties were admitted into the record without objection. The hearing officer received the parties' opening statements, testimonial evidence, and closing statements, then the hearing officer brought the proceeding to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

1. Did DCPS deny Student a FAPE by failing to offer Student an educational placement in an appropriate residential school program unless Student participates in an MDT/IEP meeting and signs certain documentation, despite Student's execution of Power of attorney documentation?

2. Can Student, as an adult student, utilize a duly executed power of attorney and appoint a third party as her agent/attorney in fact to make educational decisions on her behalf?

FINDINGS OF FACT[2]

1. Prior to the initiation of the instant case, DCPS had assigned Student to attend an out-of-state residential treatment center ("RTC"). However, after an April 2013 incident at the RTC that led to Student's arrest on a Class C felony charge, Student spent a night in jail and approximately 15 days in a hospital's psychiatric ward, then Parents brought Student back to the District of Columbia area, where she was placed in a day treatment program.[3]

2. On May 15, 2013, DCPS convened a meeting to discuss potential residential locations of service for Student. Parent asked for the specified residential school and one of its locations in another state.[4]

3. On May 20, 2013, Student turned 18 years old and executed a Durable Power of Attorney and a General Durable Power of Attorney before a Notary Public in the District of Columbia. Both documents appointed Parents as Student's attorneys-in-fact/agents.[5]

4. On May 28, 2013, Petitioners filed the instant Complaint.

5. By Order dated June 17, 2013, the undersigned hearing officer determined that Student's power of attorney documents were sufficient to confer standing on Parents to act on Student's behalf in prosecuting the instant action.

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[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.
[2] To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.
[3] Testimony of Mother; *see* Respondent's Exhibit 1 at 1.
[4] Testimony of Mother.
[5] Petitioners' Exhibits 1-2.

6. On June 20, 2013, the undersigned hearing issued an Order requiring DPS to assign a full-time out of general education residential school for Student to attend during the pendency of this action.

7. On June 20, 2013, DCPS issued a Prior Written Notice ("PWN") stating that Student continued to require an out of general education residential setting.[6]

8. On July 9, 2013, DCPS issued a Notice of Location Assignment for Student to attend the specified residential school. This was the second such letter/Notice for Student, as DCPS sent a prior Notice for the specified residential school to Parents and Petitioners' counsel on or about June 21st.[7]

9. In the normal situation, DCPS's issuance of the PWN for an out-of-general education residential facility and the Notice of Location Assignment for Student to attend the specified residential school would be sufficient authorization of funding for Student to attend the school and sufficient to secure a bed for Student at the school. In the instant case, however, the specified residential school's contract for DCPS students has expired and the school has changed its rates from $256.29 per day to $340 day, so the school is unwilling to place Student in a bed until the amount of funding for DCPS students going forward has been agreed upon, and the Director of Admissions informed DCPS of the need to clarify the amount of funding for Student.[8]

10. DCPS does not negotiate the funding rates for DCPS students to attend out of state residential treatment schools. Such funding issues are handled by the Office of the State Superintendent of Education ("OSSE"). As a result, DCPS personnel referred the specified residential school to OSSE for all funding concerns, and DCPS has not taken any follow-up steps to address the issue of funding Student at the specified residential treatment school.[9]

11. The specified residential school has not had an available bed for Student since Parents have been asking DCPS to send her there, and as of the date of the due process hearing for this case, the school still did not have an available bed for Student. Hence, there has been no point during which Student was unable to obtain an available bed due to lack of paperwork from DCPS.[10]

12. Both parties to this action agree that Student needs a residential treatment school and that the specified residential school is appropriate for Student.

CONCLUSIONS OF LAW

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

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[6] Respondent's Exhibit 2 at 2-3.
[7] Testimony of DCPS Progress Monitor; *see* Respondent's Exhibit 2 at 1.
[8] Testimony of DCPS Progress Monitor; testimony of Director of Admissions; *see* Respondent's Exhibit 3.
[9] Testimony of DCPS Progress Monitor.
[10] Testimony of Director of Admissions.

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.; Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims, which will be addressed in reverse order.

Power of Attorney

By previous Order in this case and at the start of the due process hearing for this matter, the hearing officer ruled that the hearing officer lacks jurisdiction to determine the effectiveness of Student's power of attorney documents beyond the instant forum. More specifically, the hearing officer noted on the record that although the hearing officer had previously ruled that Parents may prosecute this action on Student's behalf in the instant proceeding, the hearing officer otherwise lacks authority to determine the effectiveness of the power of attorney documents because such a ruling extends beyond a determination of matters relating to the identification, evaluation, educational placement, or provision of a FAPE to a disabled child. *See* July 15, 2013, Order Denying Respondent DCPS's Second Motion to Reconsider and Second Motion to Reconsider and Amended Motion to Dismiss at 5-6, *citing* to 34 C.F.R. § 300.507(a). In light of this determination, the hearing officer will dismiss for lack of jurisdiction Petitioner's request for a ruling on whether Student may utilize a duly executed power of attorney and appoint a third party as her agents/attorneys in fact to make educational decisions on her behalf, as well as all requests for relief related to this issue.

Residential Treatment School

Under IDEIA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of disabled children for special education and related services. The continuum must include alternative placements such as instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and must make provision for supplementary services, such as resource room or itinerant instruction, to be provided in conjunction with regular class placement. 34 C.F.R. § 300.115.

In the instant case, Petitioner argues that DCPS denied Student a FAPE by: (1) refusing to recognize Student's power of attorney documents, and (2) failing to deal with the funding issue at the specified residential school. DCPS disagrees, arguing that there is no "funding issue" in this case and even if there is, the issue is not DCPS's concern and the hearing officer cannot bind a non-party to this action. DCPS also argues that there is no live issue because no one has refused to admit Student to the specified residential school.

The hearing officer has already determined there is lack of jurisdiction over issues concerning the effectiveness of the power of attorney documents outside of this forum. Therefore, the hearing officer will not address Petitioner's claim of a denial of FAPE in connection with DCPS's refusal to recognize those documents.

With respect to the "funding issue," the hearing officer notes that although funding was not initially raised as an issue in the Complaint, the issue of failure to assign Student to an appropriate residential school was raised as an issue in the Complaint, both parties agree that the specified residential school is appropriate for Student, and DCPS has taken all steps normally deemed sufficient to secure a place for Student at the specified residential school. However, due to the special circumstances involved in this case, the steps taken by DCPS are insufficient to fully authorize Student's placement and funding at the specified residential school, and DCPS was made aware of this fact but failed to take the additional necessary steps to secure a spot for Student, with the result that the specified residential school is not willing to assign Student the next available bed until the "funding issue" is resolved. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS denied Student a FAPE by failing to take all steps necessary to assign Student to an appropriate residential school program. Therefore, the hearing officer will require DCPS to fund Student at the specified residential school at the rate of $340 day, once a bed becomes available for Student and extending through school year 2013/14, until such time as OSSE has finalized its funding arrangement with the specified residential school for DCPS students. *See Letter to Armstrong*, 28 IDELR 303 (O.S.E.P. June 11, 1997) (due process system must give hearing officers authority to order any relief necessary to ensure a student receives a FAPE).

ORDER

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

1. DCPS shall fund Student at the specified residential school at the rate of $340 day, once a bed becomes available for Student and extending through school year 2013/14, until such time as OSSE has finalized its funding arrangement with the specified residential school for DCPS students.

2. Petitioner's request for a ruling on whether Student, as an adult student, may utilize a duly executed power of attorney and appoint a third party as her agent/attorney in fact to make educational decisions on her behalf, as well as all requests for relief related to this issue, are hereby **Dismissed for Lack of Jurisdiction**.

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).

Date: ____8/9/2013_____ ___/s/ *Kimm Massey*_____

Kimm Massey, Esq.
Hearing Officer