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

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Confidential

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STUDENT HEARING OFFICE
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STUDENT[1], by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.	**HEARING OFFICER DETERMINATION** **Date: August 27, 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 June 23, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "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 identify the Student as a child in need of special education services; failing to provide an appropriate educational plan, special education services and an appropriate placement.

The Petitioner requested the Respondent be deemed to have denied the Student a FAPE and ordered to convene a multidisciplinary team "(MDT") meeting to complete an appropriate individualized education plan ("IEP') for the Student and provide appropriate special education and related services. The Petitioner asked for the Respondent to be ordered to fund a full time special education private placement of her choice and provide the Student with to 2 years of compensatory education services.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on July 9, 2009 at 9:30 A.M. 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 Petitioner reiterated her claims and alleged that the Student's evaluations demonstrated that the Student is not progressing in Math and Reading; however the Respondent determined the Student not eligible for special education services. The Respondent presented an oral Motion to Dismiss the Complaint and asserted the issue of failure to evaluate and FAPE were litigated, and an IEP for the Student was crafted on December 2, 2008 and therefore the Petitioner is now prevented from re-litigating the same issues.

Counsel for the Petitioner alleged there was not an IEP and that neither she nor her client were aware of an IEP. They attended a meeting but did not receive a document.

A July 13, 2009 Order required the Respondent to file a written response by July 14, 2009. The Petitioner was ordered by July 15, 2009 to persuade the Hearing Officer that the claim raised in the June 23, 2009 Complaint should not be dismissed because the Student has not been identified and the allegations have not been addressed by the Respondent. The Petitioner was warned the failure to respond to the Order could cause the dismissal of the present Complaint. The Petitioner was also required to amend the Complaint.

The Order indicated that in the event a hearing was required it was scheduled for July 29, 2009 from 12:00 PM until 5:00 Pm to continue a second day of hearing on July 31, 2009 for 2 hours. At the hearing the Petitioner would have the burden of proof to demonstrate that the issues have not been resolved, how and when the Respondent was aware the Student should have been evaluated for special education services; how the educational placement is inappropriate and, how the Petitioner's choice of placement is appropriate. The Petitioner also had to demonstrate how the alleged failures have caused the Student or Petitioner harm.

The Respondent was advised that it would have to demonstrate that the Student was identified, the IEP is appropriate and that the MDT acted appropriately when it made its eligibility classification. The Respondent also had to provide evidence that FAPE has not been denied. A Status Conference to discuss the case was scheduled for July 16, 2009, at 9:30 AM.

On July 14, 2009, the Respondent filed a DCPS' Response and Motion for Summary Judgment. The Respondent asserted the Student was evaluated and found eligible for special education under IDEIA. The Respondent denied all allegations and claims and requested a summary dismissal of the Complaint.

On July 16, 2009 a Status Conference to discuss the case was held at 9:30 AM. The Respondent argued that the Complaint should be dismissed because the Student was identified. The Petitioner argued that the IEP was not providing an appropriate educational program, special education services and the educational placement for the Student was inappropriate. The parties agreed that the Complaint would be amended and possible hearing dates were discussed.

On July 16, 2009, the Petitioner filed a Motion in Opposition to the DCPS' Response and Motion to Dismiss and requested a Summary Judgment. Arguing the Student services as prescribed in the IEP are not being provided.[2]

On July 17, 2009, parent's counsel filed an Amended Due Process Complaint ("Amended Complaint") against the Respondent alleging it had denied the Student a FAPE by failing to identify the Student as a child in need of special education services; failing to provide an appropriate educational plan; failing to provide special education services and an appropriate educational placement for the Student. [3]

On July 23, 2009, the Respondent filed a Motion pursuant to 34 C.F. R. §300.510 agreeing to waive the resolution session and requesting that the case proceed to a due process hearing on the merits

On July 27, 2009, the Respondent filed DCPS' Response to the Amended Due Process Complaint and Motion for Summary Judgment. The Respondent asserted the Amended Complaint in this matter was served onto the Respondent on or about July 17, 2009. The Respondent denied all allegations and claims; the Respondent further asked for a summary dismissal.

The Respondent asserted that "the Amended Complaint is more confusing than the original Complaint. Not only does the Amended Complaint now includes three school years (2007, 2008 and 2009) but misidentifies meeting dates." The Respondent argued that the Amended Complaint identifies and refers to a meeting that occurred on March 17, 2007, however there was no evidence of that meeting nor was there any allegation relating to that

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[2] The Hearing Officer received many of the Motions presented many days after the filing date.

[3] For reasons unbeknown to the Hearing Officer the Amended Complaint did not appear in SHO electronic system until August 6, 2009.

school year. Lastly, any allegation relating to a finding on that date would fall outside the statute of limitations allowable under IDEA for a salient claim to be made.

The Respondent argued that the Amended Complaint, misrepresented, *again*, the fact that the Student was found eligible and an IEP was generated at the December 2, 2008 IEP meeting. The Respondent further argued the Student was found IDEIA eligible for special education, opposite to what the instant Complaint alleged. The Respondent pointed to the fact that the Amended Complaint alleged a December 2, 2009 meeting, which is calendar impossibility to assert there were various misstatements in the amended complaint. As a result of the misrepresentations made in the Amended Complaint, the Respondent requested it be dismissed.

Additionally, the Respondent alleged that in February 2008, a HOD ordered DCPS to fund independent evaluations: a Comprehensive Psychological and a Social History. The hearing officer in that matter also determined that it was impossible to determine an exact or approximate date of any evaluation request from Petitioner, as the testimony regarding such was unspecific.

The Respondent asserted an eligibility meeting was held on December 2, 2008, where both parent's counsel and parent were present and signed their names to the IEP generated at that meeting. It is also the Respondent's contention that at the November 2008 MDT meeting, the team ordered an independent speech and language evaluation to be conducted. This was not completed for the December 2, 2008 meeting so it went forward without the information available. The Respondent alleged that on or about March 17, 2009, there was another IEP meeting held where the mother attended by telephone. The purpose of the meeting was to review the DCPS-ordered independent Speech and Language Evaluation. As a result of the evaluations and extensive team meetings, the student was found eligible for special education under IDEIA. The IEP team classified the student as a Student with a Learning Disability. Further, the Student was given 15 hours a week of specialized instruction with the additional related services of occupational therapy ("OT") for 30 minutes a week, Behavioral Support for 30 minutes a week, and an additional consultation for OT at 30 minutes per month. The Student was also determined eligible for extended school year. Finally, the Respondent argued that the Student was given compensatory education services in the form of a laptop with Reading and Mathematics Software.

On July 28, 2009, Counsel for the Respondent inquired with the undersigned Hearing Officer about a prehearing date for the Amended Complaint. The Hearing Officer having not received any indication of an Amended Complaint, the undersigned required Counsel for the Petitioner to submit evidence that it had been timely filed, because there was no evidence of the document in i-sight nor was there a courtesy copy sent to the Hearing Officer.

The Hearing Officer inquired with the Student Hearing Office ("SHO") on the existence of an Amended Complaint. There was no evidence of the document at the SHO. The undersigned Hearing Officer requested Counsel for the Petitioner to submit a copy of the Amended Complaint with a receipt of filing at the SHO and Counsel provided the copy dated July 17, 2009. Consequently, the Complaint was scheduled for a hearing on August 21, 2009.

On August 17, 2009, the Petitioner filed a Response to DCPS' Response to the Amended Due Complaint and Motion for Summary Judgment. This time the Petitioner argued that on January 17, 2008, there was an SEP/MDT/IEP meeting held and there were determinations of evaluations to be completed by the Respondent; which the Respondent failed to perform. The Petitioner asserted that on November 18, 2008, an MDT/IEP team meeting was held, DCPS determined the Student ineligible to receive services as a child with disability. However because the team was split on the finding, and some members of team wanted more testing to be done tests were ordered. The team decided to reconvene once a psychological was performed by DCPS. The Petitioner argued that on December 2, 2008 the MDT/IEP team met and the Student was determined eligible to receive services as a child with disability. The team discussed goals and objectives. Speech and language was not discussed. The compliance person offered to provide the Student with compensatory award to close out the previous HOD. On March 17, 2008, the team again convened and discussed the speech and language evaluation. DCPS decided that it needed to do more observation before it would develop goals and objectives for the Student.

The Petitioner argued that as of the date of filing of the Complaint and the Amended Complaint and the drafting of the opposition, the Respondent has yet to provide the Student with speech and language goals or services. Counsel for the Petitioner requested the hearing officer to not credit Respondent's argument that the typographical error is sufficient reason for a summary judgment in her favor. Counsel for the Petitioner stated that the facts are accurate with the exception of the typographical errors on the date. Counsel asserted that had the Respondent read the Student's record as indicated in its Motion, it would have realized that the date of the meeting should be December 2, 2008 instead of December 2, 2009; and March 17, 2009 instead of March 17, 2007 because the facts shows that SEP did not take place until January 17, 2008 and the Respondent had documents that evidenced this fact. The Petitioner requested the hearing officer to deny Respondent's motion. Finally, the Petitioner argued that the issue whether or not the Respondent provided appropriate educational and related services to the Student is still in dispute.

The DCPS' Response to Parent's Administrative Due Process Complaint Notice and Motion for Summary Judgment was filed on July 27, 2009. The Respondent asserted that in the instant matter, it has properly identified and classified the Student as a student with a disability under IDEIA. There is no claim or allegation upon which Petitioner can allege relief.

A hearing was convened on August 21, 2009. Counsels for the parties were available, however the Petitioner did not appear for the hearing. As a consequence none of the disclosures were presented into evidence.

The hearing was convened 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. Has the Student been located, evaluated and identified pursuant to the IDEIA?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student is enrolled a DCPS during the 2008-2009 school year.[4]

2. The Petitioner admitted in its Amended Complaint that on December 2, 2008 the MDT/IEP team met and it was determined the Student required additional evaluations and later found eligible to receive services as a child with disability and an IEP developed.

3. The Student as a result of the evaluations and team meetings, the Student was found eligible for special education. The IEP team classified the student as a Student with a Learning Disability. The Student was given 15 hours a week of specialized instruction with the additional related services of occupational therapy ("OT") for 30 minutes a week, Behavioral Support for 30 minutes a week, and an additional consultation for OT at 30 minutes per month.[5]

4. The Petitioner failed to appear on the date and time the hearing was scheduled.

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 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)."

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:

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[4] Information provided by Counsel for the Respondent.

[5] Petitioner's Response to DCPS' Response to the Amended Due Complaint and Motion for Summary Judgment-August 17, 2009

Failure to identify the Student for special education needs

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the Respondent 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.[6]

The Respondent correctly asserted that the allegation of failure to identify the Student must be dismissed. The Student was found eligible for special education under IDEIA. Both Counsel and the Petitioner must have been aware of the fact, because by admission by Counsel the IEP is now being challenged for inappropriateness.

Res judicata helps "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and prevent serial forum-shopping and piecemeal litigation." *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980).The Complaint alleged that DCPS failed to timely develop an appropriate IEP and to provide an appropriate placement and it requested a remedy for the school year of 07- 08.

The Hearing Officer finds that in the June complaint, the thing sued for, among others, was the failure to identify, locate and evaluate the Student for special education services. In the Amended Complaint the Petitioner accepted that in 2008, an MDT/IEP team meeting was held, the Respondent determined the Student ineligible to receive services as a child with disability. She also admits that an HOD required testing of the Student and that on December 2, 2008 the MDT/IEP team met and the Student was determined eligible to receive services as a child with disability.

The Hearing Officer finds that initial evaluation for special education needs were conducted during the 2007-2008 school year. The issue was decided by a Hearing Officer in a prior proceeding, and a final judgment on the merits of the issue was rendered. Therefore, the claim is barred by application of the Doctrine of *res judicata*.[7]

The Petitioner failed to demonstrate that the issues and relief sought are different from those resolved by a prior HOD. In consideration of the evidence, the hearing officer finds that the issue of failing to identify the Student as a child in need of special education services; presented in the June 23, 2009 Complaint is barred by *res judicata*.

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[6] *See id.* § 1400(d)(1)(A).

[7] Under the doctrine of claim preclusion or *res judicata,* when a valid final judgment has been entered on the merits, the parties are barred, in a subsequent proceeding, from re-litigating the same claim or any claim that might have been raised in the first proceeding. The judgment embodies an adjudication of all the parties' rights arising out of the transaction involved. *Washington Medical Center, Inc. v. Holle,* 573 A.2d 1269, 1281 (D.C. 1990)(*citations omitted*).

V. SUMMARY OF DECISION

The Respondent's demonstrated that the issue of failing to identify the Student as a child in need of special education services; presented in the June 23, 2009 Complaint was already resolved and that the Student has an IEP.

The remaining issues were not pursued as a result of the Petitioner's failed to appear on for the hearing although required. The Respondent asked for a dismissal based on the failure to pursue the allegations in the Amended Complaint. Counsel for the Petitioner could not explain her clients' absence. The Petitioner's request for relief is denied.

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, the undersigned Hearing Officer determines that the Respondent has not denied the Student a FAPE and issues the following:

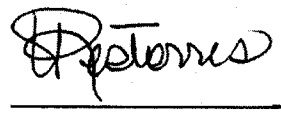
VI. ORDER

1. **ORDERED,** the Respondent Motion for Dismissal is granted on the allegation of failure to identify.
2. **IT IS FURTHER ORDERED,** the claim of failure to identify the Student is **DISMISSED WITH PREJUDICE.**
3. **IT IS FURTHER ORDERED,** the Petitioner's request for relief is **DENIED.**

This order resolves all matters presented in the Petitioner's June 23, 2009 and July 27, 2009 due process hearing complaints; 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)



Wanda Iris Resto - Hearing Officer **Signed: August 27, 2009**