DC Office of the State Superintendent of Education
Office of Review & Compliance
Student Hearing Office
1150 5th Street, SE
Washington, D.C. 20003
CONFIDENTIAL

[Parent], on behalf of [Student], Petitioner, v. District of Columbia Public Schools, Respondent.	Case HEARING OFFICER'S DETERMINATION January 25, 2010 Representatives: Donovan Anderson, Petitioner Kendra Berner, Respondent Independent Hearing Officer: Jim Mortenson

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STUDENT HEARING OFFICE

I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on January 20, 2010. The record closed on that date. The due date for the Hearing Officer's Determination (HOD) is January 28, 2010, pursuant to 34 C.F.R. § 300.515. This HOD is issued on January 25, 2010.

The hearing in this matter was conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

Present at the due process hearing were:

Donovan Anderson, Esq., Petitioner's Counsel

Kendra Berner, Esq., Respondent's Counsel

Petitioner, Student's Mother

Student

Harsharen Bhuller, Esq., Respondent Observer

Kendra Fitzgorden, Petitioner Observer

Six witnesses testified at the hearing:

Petitioner (P);

Student (S);

School Social Worker,

Special Education Coordinator,

Admissions Director,

Teacher,

The complaint in this matter was filed on December 2, 2009. A response to the complaint was filed by the Respondent on December 16, 2009. The resolution period ended December 14, 2009, according to statements by the Petitioner's Counsel at the prehearing conference. (The Respondent had signed a waiver of the resolution process on December 11, 2009, but it had not been signed by the Petitioner and no written confirmation of the waiver was ever provided.) A prehearing conference was held on December 17, 2009, and a prehearing order was issued on that date.

Three documents were disclosed and filed by the Respondent on January 12, 2010. (R 1 – R 3) All of the documents were admitted as exhibits into the record. Respondent's exhibits are as follows:

R 1 - Individual Education Program (IEP), July 7, 2009 (See P 4)

R 2 - Independent Comprehensive Psychological Evaluation Review, May 27, 2009 (See P 3)
R 3 - Attendance Summary, August 17, 2009 to January 12, 2010.

Five documents were disclosed and filed by the Petitioner on January 13, 2010. (P 1- P 5). An objection was raised to the admission of one document (P 5) and it was not admitted into the record. P 1 – P 4 were admitted and are as follows:

P 1 - Due Process Complaint Notice, December 2, 2009
P 2 - Confidential Comprehensive Psychological Evaluation, March 16, 2009
P 3 - Independent Comprehensive Psychological Evaluation Review, May 27, 2009[1] (See R 2)
P 4 - IEP, July 7, 2009[2] (See R 1)

The document not admitted into the record was:

P 5 - Petitioner's Counsel's notes from October 16, 2009, IEP team meeting

II. ISSUE

Whether the Respondent failed to propose an individualized education program (IEP) reasonably calculated to provide the Student with educational benefit when the IEP team determined the Student required a small therapeutic setting and then did not include such a setting in the IEP proposal?

[1] Petitioner did not actually submit this document, relying on the Respondent's copy admitted. Thus, only R 2 will be cited in this HOD.

[2] Petitioner did not actually submit this document, relying on the Respondent's copy admitted. Thus, only R 1 will be cited in this HOD.

III. FINDINGS OF FACT

1. The Student is a year old learner enrolled at The Student was determined eligible for special education and related services as a result of multiple disabilities including: attention deficit hyperactivity disorder, combined type; borderline intellectual functioning; and conduct disorder.[4] Of these conditions, her conduct disorder is the most significant in terms of its impact on her functioning in school, and is manifest through defiance and truancy, among other things.[5] The Student arrives at school but rarely attends classes because she feels uncomfortable there and has many negative interactions with other students.[6]

2. An IEP for the Student was written on July 7, 2009.[7] The statements of present levels of educational performance focus on her truancy and the impact that has on her academics.[8] The IEP was revised on October 16, 2009, to include a behavior intervention plan (BIP) designed to address the Student's attendance behavior which was not improving.[9] The BIP includes: a daily check-in list/attendance sheet for the Student and teacher; special seating provided by the teacher; modified classwork to meet her abilities; teacher contacts

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[3] Testimony (T) of P, T of S, R 1, R 2, R 3.

[4] R 2, P 2.

[5] R 2, P 2.

[6] T of S, T of P, T of , T of testified that a functional behavioral assessment (FBA) was conducted and failed to identify why the Student refuses to stay in class.), T of . P 2, R 3.

[7] R 1.

[8] R 1.

[9] R 1, R 3, T of T of S, T of

to her parent if she does not come to class; and allowing her to have her cell phone for each week she attends all of her classes.[10]

3. At the October 16, 2009, IEP team meeting it was determined that a smaller school with an intense therapeutic environment would help the Student.[11] The team did not identify a specific location and left that determination to the District Cluster Supervisor, who was not a participant in the meeting, to make the placement decision.[12] The Cluster Supervisor determined that the Student should stay at as a result of her attendance issues.[13] Although no written notice of the reasoning was provided at the time, the Respondent now asserts that it could not be determined what the ideal setting for the Student would be, and therefore the Student's placement would not be changed.[14]

4. The Respondent does not have a public location that can meet the Student's needs.[15]

5. No additional meetings were convened following the October 16, 2009, IEP team meeting to discuss the Student's program or placement.[16]

6. The Petitioner and Student visited in December 2009, and Student has been accepted to that school.[17] is a private

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[10] R 1.

[11] T of T of T of P.

[12] T of T of P.

[13] T of R 1.

[14] T of R 1. (D.R. testified that she did not know if a notice of the refusal was provided, and given that such a notice was not offered into evidence and the response to the complaint did not address the requirements of 34 C.F.R. § 300.508(e), it can only be determined that no notice exists.)

[15] T of

[16] T of

[17] T of P, T of S, T of

segregated facility for students with emotional disturbance and behavioral problems.[18] The School has a low student to adult ratio, is a therapeutic setting with related services provided on site, and includes close monitoring of student behavior.[19] There are progressive reactions to students leaving class or campus up to and including, after 30 absences, expulsion.[20] The District of Columbia education standards are used to measure academic performance at the School.[21]

IV. CONCLUSIONS OF LAW

1. Parents must be members of any group that makes decisions on the educational placement of their child. 34 C.F.R. § 300.327.
2. Removing a student from the mainstream environment (education with children who are not disabled) may only occur "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a).
3. The Student's IEP team, including the Petitioner, determined that the Student required a smaller, therapeutic setting in which the IEP was to be implemented. Such a setting, by its nature, would be a more restrictive environment than the mainstream. The IEP team

[18] T of

[19] T of

[20] T of

[21] T of

did not, however, identify a specific location.[22] It would have been permissible for the Respondent to determine the location for services since the assignment of a student to a particular school or building is within its authority, as long as it is consistent with the IEP, or IEP team decision.[23] "[A] public agency my have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement." 71 Fed. Reg. 46588 (2006) (discussion on comment requesting clarification between "placement" and "location"). In this case, the Respondent's Cluster Supervisor failed to select a location that was a small therapeutic setting consistent with the IEP team determination. The Cluster Supervisor effectively changed the decision of the group knowledgeable about the Student, including her Parent, and this was not permissible under 34 C.F.R. § 300.116. (See, e.g., Letter to Veazey, OSEP, November 26, 2001, 37 IDELR 10.)

4. Much of the Respondent's argument rests on the Student's failure to attend class. Because of the Student's attendance, the Respondent argues, the Student did not avail herself to a FAPE and the District is not accountable for that. This argument fails in this case because the Student's attendance was the primary manifestation of her disability. It is comparable to an argument that if the child had no legs and did not come to school, the

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[23] Generally, the placement must be consistent with the IEP. 34 C.F.R. § 300.116(b)(2). However, in this case the IEP team's determination was stymied after the IEP team meeting, but before what would have been the proposed change in the IEP and placement. Such a loophole in interpretation of the clear intent of the rule will not be acknowledged. Indeed, the rule requires the group to include someone knowledgeable about placement options (34 C.F.R. § 300.116(a). Had this rule been complied with there would not have been the need to "check with downtown" in any event.

District would not be accountable because the child did not avail herself to what was offered at school. In both cases, it is the disability that is causing the barrier, not willful disregard of the one's education. Here, the Student's failure to attend is a function of her conduct disorder and is a barrier the Respondent is charged with helping the Student overcome. (Indeed, the IEP team attempted to do so, only to be thwarted by a bureaucrat who did not participate in the team discussion.) Thus, the argument that the Student has failed to avail herself has no merit.

5. The Petitioner, subsequent to the IEP team's determination for a more restrictive environment in October, located a school that substantially complied with that determination. is a small, intense therapeutic setting that will closely monitor the Student and will provide the services necessary to permit her to be involved in and progress in the general education curriculum.

V. DECISION

The Petitioner prevails because Respondent failed to find a placement consisting of an intense therapeutic setting and interfered with the determination of the IEP team for same in order to provide the Student with a free appropriate public education.

VI. ORDER

1. The Student is to be placed at as soon as that School will permit her to attend. This placement is at the Respondent's expense, including transportation and related services.

2. The IEP team, including staff from the Respondent, and staff invited from shall review the IEP in May 2010, to determine whether adequate progress is being made toward the annual goals.

3. Nothing in this order is intended to prohibit the IEP team from changing the IEP or placement, as long as any change before the end of the 2009-2010 does not include a change in the Student's placement to an educational program that is substantially and materially different from the placement. At any meeting to discuss the Student's educational placement or location of services, the Respondent will include staff who are knowledgeable about placement options.

IT IS SO ORDERED.

Dated this 25th day of January, 2010.

Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).