

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

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STUDENT HEARING OFFICE
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<p>STUDENT¹, by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date: August , 2009</p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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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 22, 2009, the Petitioner, through 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 convene an Individualized Education Plan ("IEP") team meeting with an individual who can interpret the instructional implications of evaluation results, and failing to determine the eligible for special education services under the category of emotional disturbance during school year 2008-2009.

The Petitioner requested the Respondent be deemed to have denied the Student a free and appropriate public education and ordered to convene an IEP meeting with an individual who can interpret the instructional implications of the evaluation, determine the Student eligible for special education services as a student with emotional disturbance, and provide the appropriate special education and related services. The Petitioner further requested the Respondent fund a full time special education private placement of her choice. Additionally, the Petitioner requested that the Respondent provide a compensatory education plan for the Student; to redress the lack of appropriate special education and related services since December 3, 2008.

On June 29, 2009, the DCPS filed a Response and Motion to Dismiss and Notice of Insufficiency to the Complaint and asserted it is insufficient under 20 U.S.C §1415(b)(7)(A)(ii)(I) and 34 CFR 300.508(b), because the claims are equal in substance to those in a November 2008 Complaint. The issues, allegations and relief sought in this Complaint are barred by *res judicata*. It's the Respondent contention that all issues that could have been raised, including placement must be excluded from being raised in the current Complaint.

The Respondent argued that it convened a meeting on January 16, 2009, and, as per the Hearing Officer Determination ("HOD) dated May 6, 2009 it was a properly convened meeting, the Respondent's School Psychologist Ms. Rodgers was present and interpreted the results of the independent assessment for the team to consider, there is no evidence that the School Psychologist was not qualified. The Respondent further argued that the allegation it failed to have an appropriate individual at the meeting to interpret the evaluation is a rewording of the previous complaint allegations.

The Respondent further argued the Complaint should be dismissed because the issue of the appropriateness of the meeting and placement were litigated, and the HOD was issued on May 6, 2009 provided the Petitioner a remedy for the failures or issues now claimed. The Respondent asserted that the team appropriately determined the Student Other Health Impaired and that it has not denied the Student a FAPE.

After various attempts a telephonic pre-hearing conference call for the above reference matter was conducted with Counsel for both parties on July 10, 2009 at 2:00 P.M. 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.

A July 12, 2009 Order required the Petitioner by July 16, 2009 to persuade the Hearing Officer that the claim raised in the June 22, 2009 Complaint was not barred by the doctrine of *res judicata* or *collateral estoppel*, that the issues were not previously addressed and resolved in a prior hearing, nor did it conclude with a May 6, 2008 HOD providing a remedy.²

On July 14, 2009, the Respondent filed a Motion to Compel Amendment of the June 22, 2009 Due Process Complaint. The Respondent argued the IDEIA requires that a due process complaint contain, *inter alia*, a "description of the nature of the problem of the child relating to the proposed or refused action or change, including facts relating to the problem; and a proposed resolution of the problem to the extent known at the time."³ The Respondent also argued the *challenge* regarding the school psychologist's qualifications to review the clinical assessment had not been previously brought to its attention. It is the contention of the Respondent, the Complaint identifies instructional implications, unlikely to be found in a clinical evaluation; further, such recommendation would appropriately be addressed by teachers, not psychologists or psychiatrists.

On July 16, 2009, the Petitioner filed a Response to the Respondent's Motion to Dismiss. The Petitioner asserted the May 6, 2009 HOD addressed whether the DCPS failed to convene an IEP team meeting with the *parent* to review the Student's assessments, review and revise the Student's IEP based on the findings and recommendations of the comprehensive psychological assessment, develop an IEP that is reasonably calculated to provide a free and appropriate public education, provide a free and appropriate public education by failing to provide an appropriate placement and provide the student with appropriate special education and related services; thereby creating a right to compensatory education.

The Petitioner argued that the issues in this Complaint are whether "DCPS denied the student a free and appropriate public education by failing to convene an IEP team meeting with *an individual who can interpret the instructional implications of evaluation results*" [emphasis added] and whether the "IEP team erred by failing to determine the student is a student with an emotional disturbance under the IDEIA." In this case argued the Petitioner, the relevant nucleus of facts and issues in the present

² 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*).

³ Citing 34 CFR §300.508(b).

complaint arise from the May 21, 2009 IEP team meeting. There is no final judgment on the merits of the action in this case that precludes the parties or their privies from relitigating issue.

On July 23, 2009 the Hearing Officer requested and received a copy of the parties Motions and Responses. The Hearing Officer determined that the Respondent's request for an amendment of the Complaint is not required.

The IDEIA does not require a due process complaint to reach the level of specificity and detail of a complaint in a court of law. The purpose of the sufficiency requirement is to ensure that the other party will have an awareness and understanding of the issues forming the basis for the complaint. Due process complaints should be construed in light of Schaeffer v. Weast, 126St.Ct.528, 532 (2005) and Escambia County Board of Education v. Benton, 406 F. Supp. 2d 1248, 1259-1260 (2005) The standard set in Schaeffer and Escambia for reviewing the sufficiency of a due process request is a minimal pleading standard and is lower than the standard for reviewing complaints in court.⁴

The Complaint filed by the Parent in this matter, contains all the relevant information along with a description of the failure to convene an IEP team meeting with an individual who can interpret the instructional implications of evaluation results” and whether the “IEP team erred by failing to determine the student is a child with an emotional disturbance under the IDEIA.” The Complaint also contains proposed resolutions by the Parent. Making the Complaint sufficient, and in conformity with the IDEIA.⁵ The Hearing Officer determined that the May 6, 2009 HOD did not address a failure to review the evaluation with the appropriate personnel nor was there a determination on whether the Student also qualified for services under the category of emotional disturbance and therefore neither *res judicata* nor *estoppel defenses* were appropriate.⁶ A Hearing was scheduled for August 4, 2009 at 9:00 AM at 1150 5th St. SE, Washington, DC

A hearing was held August 4, 2009 at 9:00 AM. The Petitioner presented a disclosure letter dated July 28, 2009, to which twenty-one documents were attached, labeled P-1 through 21 and which listed four witnesses. Two witnesses testified –the Education Advocate and the Mother. The Respondent presented a disclosure letter dated July 28, 2009 identifying two witnesses and to which fourteen documents were attached, labeled DCPS 1 through 14. No witness testified. The documents were admitted without objections except Petitioner's document #2 is erroneously identified,

⁴ See: 20 U.S.C. 1415(b) (7)(A)(ii)

⁵ See 20 U.S.C. 1415(b)(7) and its regulations at 34 C.F.R. 300. § 508(b).

⁶ P # 18 HOD May 6, 2009 - Ordered the Respondent to convene an MDT meeting to discuss the psychological evaluations recommendations and if an occupational therapy assessment is warranted. At the MDT meeting, the parent and the Student will be invited to discuss the needs of this Student, including how to address her absences, safety concerns, and Math deficiencies. The MDT will make a determination if extended services are warranted and will make a decision on placement for the 2009-2010 school year

it should read the "*Petitioner's Response and Motion to Dismiss Parent's Administrative Due Process Complaint*", an additional adjustment was made to reflect the Student's correct date of birth, the correction were accepted.

The hearing was conducted in accordance with the rights established under the IDEA 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 find the Student eligible for special education services under the category of emotional disturbance under IDEA?
2. Was the Student denied a FAPE by the Respondent?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student was enrolled in a DCPS during the 2008-2009 school year.⁷
2. The Student is a student with disabilities under the IDEA. The Student's most recent IEP is dated January 16, 2009 and provides 10 hours of specialized instruction, and 30 minutes weekly Behavioral Support Services outside of the general education setting. The Student's primary disability category is identified as Other Health Impairment.⁸
3. The parties stipulated Ms. Rodgers is a certified DCPS School Psychologist and the Petitioner withdrew her claim that the Psychologist was not qualified to interpret evaluations.
4. The Petitioner requested the Education Advocate be accepted as a special education expert qualified to diagnosis Emotional Disturbance. After hearing from both parties the witness was not accepted as an expert witness. The Petitioner's witness does have an advance degree in Special Education, however, it was not demonstrated that she had an expertise to allow her to make a diagnosis of emotional disturbance under the IDEA. Additionally, the witness is the Student's Education Advocate and is employed by the law firm which represents the Petitioner, all elements which cause her testimony to be limited to the factual aspects of the MDT meeting.⁹

⁷ P# 1 Complaint filed June 19, 2009.

⁸ P#19 IEP January 16, 2009.

⁹ P# 21 Ida Jean Holman

5. During November 2008 a comprehensive psychological assessment was performed on the Student. The assessment states the Student is a student with post traumatic stress disorder, depressive disorder, attention deficit hyperactivity disorder and mathematics disorder. According to the Evaluator the Student should be placed in a school where her emotional, behavioral, academic difficulties could be adequately addressed. Given her symptoms of Attention Deficit Hyperactivity Disorder (“ADHD”), she would likely function best in a small student-to-teacher ratio classroom setting. The assessment report further stated the Student is in need of intensive support/tutoring to address her math difficulties and recommended an occupational therapy assessment. The Psychologist findings and recommendations, *inter alia*, include the following: The Student is eligible for special education under the educational handicap condition of multiple disable to include emotionally disturbed and learning disabled. The evaluator stated that the Student is showing symptoms of depression and that factors could include the recent death of her uncle and fights in school.¹⁰

6. At the May 2009 IEP meeting the DCPS psychologist discussed with the IEP team the independent comprehensive psychological evaluation.¹¹ The Student’s cognitive abilities as measured by the Wechsler Intelligence Scale for Children –Fourth Edition (“WISC –IV) placed her cognitive abilities within the low average range. Verbal Comprehension Index was in the average range. Academic skills demonstrated strengths in reading and spelling. Social emotional functioning show stress and fear of going to school. Axis-I diagnoses is Posttraumatic Stress Disorder, Depressive Disorder NOS, Attention Deficit Hyperactivity disorder, Mathematics Disorder. At the meeting the School psychologist stated that the Student did not show signs of fears and could express her concerns. The teacher indicated the Student had difficulty being bullied in school; however there were no recent incidents and it appears as if the Student had eased the tension with peers. The social worker indicated that if the Student could not come to school she could receive instruction at home. The Student attended 95 of the 164 days of classes thus far in the school year. Strategies to address the absences were discussed a check-in log was to be created by the psychologist, social worker, special education teacher and the counselor and sent home weekly. The staff was not aware of any new incidents of violence or other problems with the Student. The Student’s IEP was reviewed to address math deficiencies, the reading goals were deleted and the Student will continue to receive written expression services. The DCPS members of the team recommended that the Student attend a neighborhood school for the 2009-2010 school year; neither the parent nor the educational advocate agreed with the placement decision. The parent requested the placement at the School. Extended school year services were discussed and it was determined that ESY is not mandated because the Student does not meet the criteria for ESY. The IEP team maintained the Student’s disability category as Other Health Impaired (“OHI”). The Respondent agreed to conduct an occupational therapy evaluation¹²

¹⁰ P#11 November 2008 -Comprehensive psychological assessment

¹¹ DCPS #11 November 2008 -Comprehensive psychological assessment

¹² P19 IEP meeting notes May 21, 2009.

7. The Educational Advocate has known the Student since May 2009, she reviewed the Student's file and attended the May 21, 2009 IEP team meeting. She participated in an extensive discussion which lasted approximately two hours; the DCPS IEP team members did not change the Student's category of disability because the Student only met one condition for emotional disturbance and the School Psychologist did not provide the bases of her disagreement with the ED diagnosis. Based on the assessment reports and conversations with the Petitioner, the EA disagrees with the DCPS IEP team members' decision to maintain an OHI category, for the Student. The EA believes the Student meets more than one of the categories to receive a category of ED. According to the EA the Student has an inability to maintain a relationship; has Post Traumatic Stress Disorder ("PTSD") and is suffering bullying by peers. The EA sent a letter to the SEC challenging the School Psychologist's qualifications to review a clinical psychological report and requesting reconsideration of the team's decision not to include in the Student's IEP the emotional disturbance category. There were no programmatic concerns to the IEP.¹³
8. The mother is concerned that the Student suffers by bullying at school, has been punched and is having thoughts of hurting others. The Petitioner was called by the school personnel because the Student had "meltdown". After the May 2009 meeting there were no more fights or behavioral incidents for which she received calls. The Student during the school year 2009-2010 will attend a Middle School and the parent is concerned that there will be guns, drugs and the Student is not ready for that environment. There were no concerns with the services provided by the Counselor except for her failure to contact the Petitioner prior to offering the Student an opportunity for a weekend stay at her house.¹⁴

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

¹³ Testimony of Education Advocate.

¹⁴ Testimony of the Petitioner.

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.

Emotional Disturbance category

To be eligible for special education services pursuant to 34 C.F.R. 300§ 300.8 requires the child be evaluated in accordance with §§ 300.304 through 300.311 and the child must be designated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

Once a child has been referred to an IEP team for an eligibility determination, the IDEIA requires the local educational agency to:¹⁵

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parents, that may assist in determining -- whether the child is a child with a disability . . . ;

(B) not use any single procedure as the sole criterion for determining whether a child is a child with a disability . . . ; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

The Petitioner testified the Student had behavioral difficulties at school which after the May 2009 subsided. The evidence was that in making its determination as to the type of services the Student required the MDT reviewed the comprehensive psychological evaluation and discussed it for approximately two hours. The MDT noted that the evaluation made an observation that the Student’s academic skills had improve. Different service provider at the meeting indicated there was no problematic behavior at the school nor problems with peers and that the Student appeared happy.

No single procedure should be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.¹⁶ The results of the evaluations must be given considerable weight in determining the child’s eligibility for services and in the development of the child’s IEP.¹⁷ Here there was evidence that the team used various mechanisms including the independent evaluations submitted by the Petitioner.

¹⁵ See: 20 U.S.C. § 1414(a)(1)(C)(i).

¹⁶ 34 C.F.R. §300.304(b)(2).

¹⁷ 34 C.F.R. §300.305(a).

Consistent with the IDEIA regulations emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- ❖ An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- ❖ An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- ❖ Inappropriate types of behavior or feelings under normal circumstances.
- ❖ A general pervasive mood of unhappiness or depression.
- ❖ A tendency to develop physical symptoms or fears associated with personal or school problems.¹⁸

The diagnosis of ED must be done after a review and discussion of a variety of mechanisms, the evidence here was that the IEP team did just that. There is no evidence presented to the Hearing Officer to allow a conclusion different from the IEP team. The Student's IEP was reviewed and after an extensive discussion determine the Student's disability category should remain OHI. The Student has not been denied a FAPE.

Educational Placement

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.¹⁹

According to the IDEIA 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.²⁰ The IDEIA and its regulation at 34 C.F.R. § 300.17 requires 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.

The Petitioner alleged the School does not provide an appropriate placement but did not provide any evidence. Furthermore, the request is contrary to the IDEA 20 U.S.C. 1412(a)(5) and its regulation at Sections 300.114 through 300.118, consistent with implementing the Act's strong preference for educating children with disabilities in regular classes with appropriate aids and supports.

¹⁸ See: 34 C.F.R. Section 300.8(c)(4).

¹⁹ See 20 U.S.C. § 1400(d)(1)(A).

²⁰ See: 20 U.S.C. 1412(a)(5)

V. SUMMARY OF DECISION

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

Petitioner's request for relief is **DENIED**.

This order resolves all matters presented in the Petitioner's June 22, 2009, the 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)



Wanda Iris Resto - Hearing Officer

Date: August 14, 2009