

# ***DISTRICT OF COLUMBIA***

Office of the State Superintendent of Education  
Office of Review & Compliance  
Student Hearing Office

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**Confidential**

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STUDENT HEARING OFFICE

<p>STUDENT<sup>1</sup>, by and through parent,  Petitioner,  us.  District of Columbia Public Schools,  Respondent.</p>	<p><b><u>HEARING OFFICER'S DETERMINATION</u></b></p> <p>Educational Advocate: Pierre Bergeron, Esq.</p> <p>Asst. Attorney General for DCPS: Nia M. Fripp, Esq.</p> <p><b><u>Impartial Hearing Officer</u></b> H. St. Clair, Esq.</p>
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<sup>1</sup> Identifying personal information is attached to this decision as Appendices A & B and must be detached prior to public distribution.

## BACKGROUND

The -year-old Student was evaluated for special education services in 2003 and then found ineligible for services; the ineligibility decision was not taken to Due Process.

In 2008, the Student found his way into the District of Columbia juvenile justice system and, by Court order, was evaluated. With the Court ordered evaluations, DCPS convened an MDT meeting for the student at which the Student was found eligible for special education services. The April 2, 2009 IEP disability coded the Student Emotional Disturbed (ED)/Learning Disabled (LD) with 27.5 hours of special education services. DCPS placed the Student at the neighborhood school.

On June 3, 2009, the Educational Advocate filed the herein Complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), complaining the District of Columbia Public Schools (DCPS) denied the student a Free Appropriate Public Education (FAPE). With the Complaint, an expedited hearing was requested; the request was withdrawn on June 22, 2009. The Complaint essentially complained DCPS had failed "to find" the Student as early as 2003 and, for relief, requested a private placement, "wraparound" services and compensatory education.

A Pre-hearing Conference Order was issued in this matter on June 22, 2009. The Order determined the ISSUES as setout below.

A hearing in this matter was scheduled for 9:00 A.M., Wednesday, July 8, 2009 at the Student Hearing Office, OSSE, 1150 Fifth Street, SE - First Floor, Hearing Room 4B, Washington, D.C. 20003. The hearing could not concluded the time requested by the Educational Advocate and was continued to 9:00 A.M., Monday, July 13, 2009, Hearing Room 6B. During the July 13, 2009 continuation, the witness for the proposed private placement could not appear and the Educational Advocate requested a second continuance. The request was GRANTED and the hearing was continued to 9:00 A.M., Wednesday, August 5, 2009, Hearing Room 4B; supplemental disclosure was allowed until the close of business July 29, 2009. Both continuances were attributed to the Educational Advocate.

## JURISDICTION

The hearing convened under Public Law 108-446, The Individuals with Disabilities Education Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300, and Title V of the District of Columbia Municipal Regulations.

## ISSUES:

1. Did DCPS fail "to find" the Student as of 2003?

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2. **Was the current DCPS educational placement appropriate for the Student?**
3. **Did the Student need a full-time therapeutic educational placement?**
4. **Did the Student need “wraparound” services?**
5. **Should compensatory education have been awarded to the Student and, if so, should the award have been from 2003?**

## **MOTIONS**

DCPS filed a Motion to Dismiss on June 15, 2009 and two Motions to Dismiss on June 30, 2009; they were taken under advisement. The June 15, 2009 Motion to Dismiss essentially argued the *IDEIA 2004* two-year limitation on claims and that “wraparound” services are not authorized by *IDEIA 2004*. The first and second June 30, 2009 Motions to Dismiss argued the capacity of the Educational Advocate to file the herein Complaint and that, because the Parent did not sign the Complaint, the Complaint did not conform to the requirements of the SHO Standard Operating Procedures Manual.

As to the DCPS argument that claims prior to June 3, 2007 were barred by the two-year limitation at 34 CFR 300.511(e)(f), the motion was GRANTED. See CONCLUSION of LAW ONE, below.

As to the “wraparound” services, the DCPS argument was DENIED; see CONCLUSION of LAW FOUR, below.

As to the sufficiency of the Complaint, the Parent/mother appeared at the hearing and testified in support of the Complaint. While the SHO manual requires a parental signature, *IDEIA 2004* implementing regulation 34 CFR 300.508 does not. The DCPS motion as it pertained to compliance with the SHO manual was DENIED.

## **FINDINGS of FACT**

By facsimile dated June 29, 2009, the Educational Advocate disclosed 9 witnesses and 13 documents.

By facsimile dated June 30, 2009, DCPS disclosed 7 witnesses and 6 documents.

DCPS objected to a part of Parent Document No 2, notes of the April 2, 2009 MDT meeting; the objection was to that part of the notes prepared by the Educational Advocate who attended the meeting. DCPS argued it was testimony. The hearing officer struck the note until authenticated as a part of the April 2, 2009 MDT meeting notes by an MDT member. During her testimony, the Parent authenticated the Educational

Advocate's note; the note was placed into the record as a part of the April 2, 2009 MDT meeting notes.

DCPS objected Parent Document No 13, documentation to the effect DCPS had in the past agreed to "wraparound" services and, also in the past, had been ordered by Hearing Officer Determination/Decision (HOD) to provide "wraparound" services. The objection was taken under advisement. Here, the DCPS objection was OVERRULED. See CONCLUSION of LAW FOUR, below.

The Educational Advocate filed First, Second and Third Amended Disclosures; they were admitted to the record.

The documents were admitted into the record and are referenced/footnoted herein where relevant.

In consideration of the testimony, documents and arguments herein, the hearing officer found the following facts:

1. The Student was evaluated in 2003 and found ineligible for special education services; the ineligibility decision was not taken to Due Process.
2. No documentation concerning the 2003 ineligibility decision was in the record; the Parent testified that DCPS did not inform her of her rights at the time of the ineligibility decision.
3. At the time of the hearing, the Student lived at a group home by Court Order and had repeated the 8th grade three times. For the 2008-09 school Year, the Student was enrolled at his suspensions and absences during the school year were chronic to the point of truancy; he failed all of his classes.<sup>2</sup>
4. Sometime in 2008, the Student was arrested and placed in the District of Columbia juvenile justice system. The Court ordered the Student evaluated; psychiatric and psycho-educational evaluations were completed.<sup>3</sup>
5. The April 4, 2009 IEP disability coded the Student Emotionally Disturbed (ED)/Learning Disabled (LD) with 27.5 hours of specialized instruction and 30 minutes of counseling; the LRE section read, "Student requires complete removal from the general education in order to access the general education curriculum."<sup>4</sup>
6. The D.C. Department of Mental Health Psychiatrist testified via

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<sup>2</sup> Parent Documents Nos 7 & 11

<sup>3</sup> -testimony of Parent

<sup>4</sup> Par. Doc. No 2

telephone that he evaluated the student on September 7, 2008 and that he then diagnosed the Student with Impulse Control Disorder, NOS, Depression Disorder, NOS, Cannabis Abuse, Alcohol Abuse, Conduct Disorder, Adolescent Onset;<sup>5</sup> that these disorders affected the Student's behavior in school and created needs for psychological services including socialization and therapy. At page 8 of his evaluation and in response to questions posed by the Student's probation officer, the Psychiatrist recommended that the Student be placed in a therapeutic group home.<sup>6</sup> The Psychiatrist did not know the Student's cognitive ability nor level of achievement and thought that a psychologist with knowledge of these factors would be better qualified to recommend an educational setting for the Student. The Psychiatrist did not recommend a 100% Out of General Education or therapeutic educational setting for the Student and did not meet with the Student after September 7, 2008.<sup>7</sup>

7. The Special Education Expert qualified as an expert in educational placements for ED and LD disability coded students and had experience with "wraparound" services. She recommended the services for the Student and explained how the services would benefit him; that "wraparound" services were an anchor between home, school and community. The Expert did not observe the Student at his school nor at his living circumstance at the group home, but opined that since being in the group home the Student had become medication compliant; the Expert reviewed the herein disclosure and first had contact with the Student and the Parent on the day of the herein hearing. The Expert recommended "wraparound" services to include social/therapeutic recreation for the Student for a minimum of 25 hours a week.<sup>8</sup>

8. The Student testified that while he attended \_\_\_\_\_ he was suspended for most of the 2008-09 School Year. The Student was committed to the custody of District of Columbia Child and Family Services Agency (CFSA) and lived at a group home. The group home gave bus passes to the Student to take public transportation to and from school. At the group home the student was with two other committed youth and two adult resident supervisors; counselors and counseling were provided to the Student.

9. The Parent testified that the Student began to have tardiness and academic problems in the 3rd grade; severe behavioral problems began in

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<sup>5</sup> Par. Doc. No 4, the September 19, 2008 Psychiatric Evaluation

<sup>6</sup> *ibid*, page 8

<sup>7</sup> -testimony of the Psychiatrist

<sup>8</sup> -testimony of Private Special Education Expert

the 5th grade, and since then, both academic and behavior problems continued and intensified. The Student was enrolled in a 100% Out of General Education setting for ED students, but refused to attend beyond the first school day; the Student would not take his medication and would not attend scheduled counseling sessions. The Parent attended the March 12, 2009 and April 4, 2009 MDT meetings at which a staff stated the inappropriateness of the school as an educational placement for the Student; that since attending the Student's behavior and study habits worsened. The Parent could not remember to whom she gave the October 16, 2003 letter<sup>9</sup> and could not remember what she or anyone else said about the letter; the letter was not delivered to DCPS. The Student did not need a person to accompany him on the bus to and from school; a school bus would be enough to assure the Student arrived at school. The Student was committed until his 18th birthday. The Parent only met with the Expert during one of the recesses during the herein hearing.

10. The group home Counselor testified via telephone that he visited the Student at least once a month and thought the school was not an appropriate school for the Student; that the Student would not comply with the school routine and would leave school whenever he was of a mind to leave. The Counselor attended both the March 12, 2009 and April 2, 2009 MDT meetings where "wraparound" services for the Student were discussed; the Counselor could not describe "wraparound" services but thought the Student need social/emotional intervention when in crisis at school. The Counselor stated that the group home could provide needed services to the Student but did not provide some services to the Student because his Medicaid number was unavailable. The Counselor stated that the Student would not arise as early as 6:30 A.M. to go to school or to do anything else.

11. The Chief Psychologist, Child Guidance Clinic, D.C. Superior Court, testified via telephone that he supervised and participated in the evaluation of the Student that an intern in the clinic completed;<sup>10</sup> that the Student was diagnosed with Depressive Disorder NOS, Disruptive Behavior Disorder NOS, Cannabis Dependence with Early Partial Remission, R/O Alcohol Abuse and Parent-Child Relational Problems. The Student's FSIQ was 84 which placed him in the low average range; the Student was diagnosed with a reading problem but not with a Learning Disability. The

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<sup>9</sup> Par. Doc. No 1, the October 16, 2003 letter addressed to whom it may concern stated the Student had been diagnosed with Depression and Attention Deficit Hyper-activity Disorder by a child psychiatrist and a therapist.<sup>9</sup>

<sup>10</sup> Par. Doc. No 3, the October 23, 2008 Psycho-educational Evaluation

Psychiatrist recommended a small classroom setting with social/emotional services during the school day to address crises immediately. The Psychologist recommended a mentor and therapeutic recreation for the Student and opined that an appropriate school could deliver such therapy.<sup>11</sup>

12. Paragraph 2 of the psycho-educational evaluation read:

“[F]amily Therapy. Based on the level of discord at the home determined through testing and [the Student’s] limited disclosure, it is important that the family collaborates on healing through therapy. Intense family therapy is necessary to encourage expression of feelings of guilt and abandonment. In-home treatment maybe helpful for the family and could occur multiple times per week based on the family schedule. This can begin at the group home placement and gradually transfer to home on weekends. Upon his full return to the community, in-home services (as a Multi-systemic Therapy- MST) might be most helpful there.”<sup>12</sup>

13. The Admissions Director of \_\_\_\_\_ testified via telephone to the program, curriculum, classes, class sizes, teaching staff, related services provider staff and student body - 150 students, all DCPS; that the academy primarily serviced Emotionally Disturbed (ED) students. The Director reviewed the student’s file, evaluations and IEP and accepted the Student for immediate enrollment after an interview at the academy on July 21, 2009. The Student was schedule to be placed in a class with 7 other similarly disabled students, a certified special education teacher and a teacher assistant; the Student will be taught life skills and, depending on career interest, could opt for a vocational program. The academy developed a program to assist students arriving at and leaving school; academy procedures prevent students from leaving the academy during the school day. On an individual basis, the academy could deliver after school and weekend services of a “wraparound” nature. The Student could receive educational benefit at \_\_\_\_\_

14. The newly appointed Special Education Coordinator (SEC), \_\_\_\_\_ testified via telephone that she was familiar with the Student as she was his case-manager from February 2009; that the Student refused to attend school, refused to attend classes and refused to attend counseling sessions. The SEC testified that \_\_\_\_\_ was not an appropriate educational placement for the Student.<sup>14</sup>

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<sup>11</sup> -testimony of the Psychologist

<sup>12</sup> *ibid*, No 10, above, page 13

<sup>13</sup> -testimony of the Admissions Director,

<sup>14</sup> -testimony of SEC,

## CONCLUSIONS of LAW

**DCPS is required to make FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.** *IDEIA 2004* requires DCPS to locate, identify, evaluate and determine eligibility for special education services every child in the District of Columbia, ages 3 thru 21, who maybe in need of special education services, and for every child of a District of Columbia resident or resident child who is eligible for special education services, DCPS must make a Free Appropriate Public Education available.

The hearing in this matter was convened under *IDEIA 2004* implementing regulation 34 CFR 300.507(a).

District of Columbia Municipal Regulation 5 DCMR 3030.3 placed the burden of proof upon the petitioner/parent in this matter, and that burden was by preponderance.

### ONE

#### **DCPS did not fail “to find” the Student as of 2003.**

The record contained an allegation that DCPS evaluated the Student for special education services in 2003 and found him ineligible; further from the record, the ineligibility decision was not taken to Due Process. Other than the allegation itself, nothing was in the record concerning the alleged 2003 ineligibility decision. The parent disclosed a letter dated October 16, 2003 and claimed that she delivered it to DCPS; the letter indicated the Student had been diagnosed with ADHD. From the letter, however, it was unclear if the diagnosis had occurred before the 2003 DCPS evaluation or after the evaluation; DCPS could have been aware of the mental disorder mentioned in the letter and considered it at the alleged MDT/Eligibility meeting. Equally importantly, when referred to the letter, the parent could not recall to whom she gave the letter or what was said about the letter nor to whom.

At regulation 34 CFR 300.511(e), the two year time limitation is setout: a Due Process complaint must be filed within two years of the date the parent or agency should have known of the alleged action that forms the basis of the complaint. Two exceptions are setout at the next paragraph, paragraph (f): either the agency must have misrepresented that the problem had been resolved or the agency must have withheld from the parent information that Part II of the *IDEIA 2004* required be provided to the parent. The Parent established neither of these exceptions to the two-year limitation.

## TWO & THREE

### **The Student required a therapeutic educational placement; the present DCPS educational placement was inappropriate.**

At regulation 34 CFR 300.115, an LEA is required to ensure a continuum of alternative placements, placements that can deliver the special education services to a child with a disability as indicated on the child's IEP.

At regulation 34 CFR 300.116, the process for making placement decisions is set out. The process is to ensure that the placement decision for a child with a disability is based on the child's IEP, and that the parent of the child is included in the placement-decision making process.

The record demonstrated that the Student was not attending school to the point of truancy; that the Student's behavior had so spiraled out of control, the Court had placed him in a group home. It was clear from the record, that the educational placement did not provide any educational benefit to the Student. The DCPS response was that the Student chose not to attend school and that his truancy was his problem; this was rejected. Truancy was a reason for the MDT to reconvene and reconsider the educational placement for the student, not to permit the Student to languish as occurred. *See* Letter to Borucki, 16 IDELR 884 (April 11, 1990). The compulsory school attendance age in the District of Columbia is 5 through 17 or 18 years old. *See* D.C. Code 38-202.

The Special Education Coordinator testified that during the April 2, 2009 MDT/IEP meeting, it was determined that the Student's present educational placement was inappropriate.

From the testimonies of the Psychiatrist, Psychologist, Expert and group home Counselor, the hearing officer was persuaded that the Student required a therapeutic educational placement, in particular, one that could ensure that the Student would attend school and assigned classes.

**A private educational placement was indicated in this matter.**

## FOUR

### **The Student's present circumstance was beyond "wraparound" services.**

The Expert testified that "wraparound" services were to assist the Student in moving between home, school and the community, but the Court had already ordered the Student out of his home and community because of his misbehavior. The group home accounted for the Student's time and supervision when not in school, 24 hours a day, 7 days a week. Secondly, the related services, individual and family counseling, could be added to the Student's IEP; the future therapeutic educational placement indicated their capability to deliver counseling services after school and/or over the weekend, if added to

the Student's IEP. Further concerning "wraparound" services, the Psychologist who testified for the Student indicated the possible utility of such services if the Student, after a successful stay at the group home, was to return home from the group home. *See* Finding of Fact No 12, above. "Wraparound" services may well be appropriate for the Student in the future; they are not prohibited by *IDEIA 2004* and have been awarded by Hearing Officer Determination/Decision in this jurisdiction before.

## **FIVE**

### **The Student was awarded compensatory education, but not from 2003.**

The Student's lack of educational performance over more than the past two years should have put DCPS on notice to suspect the Student had a disability. Assuming DCPS appropriately evaluated the Student for special education services in 2003 and appropriately determined him ineligible, the legal obligation on the part of DCPS under regulation 34 CFR 300.111 "to find" children in need of special education services remained and remained for the Student. The fact that a student was once found ineligible for special education services does not preclude the student's eligibility for the services forever. Compensatory education is awarded to the Student for two years beginning June 3, 2007.

## **SUMMARY of the DECISION**

The Parent met her burden on issues 2, 3 and 5.

In consideration of the foregoing, the hearing officer made the following

## **ORDER**

1. On an interim basis and with transportation provided by DCPS bus, DCPS will place and fund the Student at the
  
2. Within 40 days of Student's matriculation at the academy, DCPS will convene an MDT meeting during which evaluations will be reviewed, the IEP reviewed and revised as appropriate and placement discussed and determined. If the student's attendance warrants, residential placement will be discussed and determined.

3. At the said MDT meeting, the form, amount and delivery of compensatory education for the period June 3, 2007 thru June 3, 2009, if any, will be discussed and determined. For disputes under this paragraph, either party may request a hearing.

4. For the said MDT meeting scheduling is to be through and notices are to be sent to the Educational Advocate except that, for everyday of unavailability of the Educational Advocate or parent, the deadline herein will be extended one day. For disputes under this paragraph, documentation of the parties will be relied upon to determine the good faith of each party.

Dated this *11th* day of *August*, 2009

*/s/ H. St. Clair*

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H. St. Clair, Esq., Hearing Officer

**This is THE FINAL ADMINISTRATIVE DECISION. Appeal can be made to a court of competent jurisdiction within ninety (90) days of the issue date of this decision.**

- g. the June 30, 2009 Respondent's Motion for Extension of Time to Oppose any Motions filed by DCPS;
- h. the June 30, 2009 DCPS Motion to Dismiss and Parent's Administrative Due Process Complaint Notice;
- i. the June 30, 2009 First Amended Disclosure;
- j. the July 10, 2009 Second Amended Disclosure; and,
- k. the July 31, 2009 Third Amended Disclosure.

This certification is that the above numbered administrative record in this matter was made before me and is true, correct and complete of date.