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**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
1150 5<sup>th</sup> Street, S.E.  
Washington, DC 20003

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PARENT, on behalf of  
[CHILD],<sup>1</sup>

Petitioner,

v

OFFICE OF THE STATE  
SUPERINTENDENT OF EDUCATION,

Respondent.

Date Issued: August 18, 2010

Hearing Officer: Peter B. Vaden

Case No:

Hearing Dates: August 4, 12, 2010

Room: 4-A

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**HEARING OFFICER DETERMINATION**

**BACKGROUND**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner PARENT (the "Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400 et seq., and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). This Due Process Complaint arises out of a June 14, 2010 Prior Written Notice issued by PUBLIC CHARTER SCHOOL ("PCS"), which proposed to move STUDENT from PCS to a more restrictive environment at SPECIAL EDUCATION SCHOOL ("SES"). The Parent agrees with the need for a more restrictive environment, but contends that SES is not an appropriate placement for the Student and that the

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<sup>1</sup> Personal identification information is provided in Appendix A.

Office of the State Superintendent of Education (“OSSE”) denied her the opportunity for meaningful participation in the decision making process which placed the Student at SES.

The Child, an AGE boy on the hearing date, was last found eligible for special education services on May 6, 2010 under the primary disability Multiple Disabilities.

The Parent’s Due Process Complaint, filed on June 16, 2010, named PCS and OSSE as respondents. The undersigned Hearing Officer was appointed the same day. The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

On July 12, 2010, OSSE filed a motion to dismiss the due process complaint on the grounds that its Notice of Placement Location, placing the Student at SES, was a site selection, not a placement, and that as a matter of law, there is no requirement in the IDEA that a parent be involved in the site selection. In a decision entered July 20, 2010, I denied OSSE’s motion. At the beginning of the due process hearing on August 4, 2010, on the motion of the Parent, PCS was dismissed from this proceeding.

The due process hearing was held before the undersigned impartial hearing officer on August 4 and August 12, 2010 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an audio electronic recording device. The Parent appeared for the first day of the hearing and was represented by counsel. The OSSE was represented by Change in Placement Specialist, and by counsel. was not present for the second day of the hearing.) Counsel for the Parent and for OSSE made opening and closing statements. Testifying for the Petitioner were the Parent, SOCIAL WORKER (“Social Worker”) and the Parent’s EDUCATIONAL ADVOCATE (“Advocate”). Testifying for OSSE were the PCS SPECIAL EDUCATION COORDINATOR (“PCS SEC”), the SES CLINICAL DIRECTOR OF EDUCATION (“SES Director”) and the SES CLINICAL

COORDINATOR ("SES Coordinator"). Petitioner Exhibits P-1 through P-6 and Respondent Exhibits R-1 through R-43 were admitted without objection. PCS Exhibits 1-13, which were exchanged in the pre-hearing disclosures, were not offered into evidence.

### ISSUES

The issues asserted by the Parent to be determined are as follows:

1. Whether OSSE's purported placement of the Student at SES is an inappropriate placement under the IDEA;
2. Whether OSSE has denied a free appropriate public education ("FAPE") to the Student by not affording the Parent an opportunity for meaningful participation in the decision to place the Student at SES.

### FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student was born on BIRTHDATE. He is a ward of the District of Columbia.
2. Student is eligible for special education and related services under the primary disability classification, Multiple Disabilities. Results from a May 2, 1010 Comprehensive Psychological Evaluation were reported to support classifications of Learning Disability ("LD"), Other Health Impaired - Attention Deficit Hyperactivity Disorder ("OHI-ADHD") and Emotional Disturbance ("ED"). The evaluator recommended that the Student's MDT team review the evaluations and information to confirm ED as the Student's primary disability.
3. Student has been placed in foster care at a home in Maryland. The Parent retains legal authority to make educational decisions for the Child.

4. PCS convened the Student's MDT/IEP team for an emergency Manifestation Determination Review meeting on April 16, 2010, following an incident the preceding day when Student hit another child in the back of her head. The team discussed the Student's increasing frequency of discipline occurrences. The team concluded that the latest incident was a manifestation of the Student's disability. The team then continued with an IEP meeting in which the team members concluded that PCS could no longer serve the Student, due to a lack of support services outside of the school which was having an impact on his in-school behavior. The team agreed to submit a packet to OSSE to request a more restrictive environment placement for the Student.

5. On April 21, 2010, the PCS Special Education Coordinator wrote an email to OSSE advising that the Student's MDT team had decided that due to "recent traumatic events and [Student's] level of crisis," that Student would benefit from a new placement. The email triggered OSSE's process for review of an MDT-LEA team's decision that a child needs a more restrictive environment than the LEA can provide. Upon receipt of such a notice, OSSE follows its *Policies and Procedures for Placement Review, Revised* (January 5, 2010) ("Placement Review Policy").

6. OSSE designated Change in Placement Coordinator, Avni Patel, to review the placement request and documentation.

7.                       convened a conference call meeting with PCS representatives on May 6, 2010. Participants from PCS included the Special Education Coordinator, a Special Education provider, the Student's behavior specialist, his regular education teacher, a school counselor and the elementary program leader.

8. On May 19, 2010, an MDT meeting was convened at PCS to review whether the Student needed a more restrictive environment than PCS could offer. Parent and Advocate attended the meeting. recommended, and all members of the MDT team agreed, that a more restrictive, therapeutic environment was warranted for the Student.

9. At the May 19, 2010 meeting, Advocate informed the team members that the a private school in Montgomery County, Maryland had accepted the Student and that Parent and Advocate supported his placement there. The Parent had also visited the but did not want the Student placed there because conducted on-site drug testing.

10. The Placement Review Policy provides that OSSE issue a Notice of Location Assignment within ten business days after the IEP team makes its placement decision. At the May 19, 2010 meeting, stated that OSSE would issue an assignment for a new school setting for the Student within 10 business days.

11. Following the May 19, 2010 meeting, made contact with six private day schools regarding admitting the Student. These included and SES.

12. Several schools, including responded with offers of conditional acceptance, subject to scheduling an interview with the Student and Parent.

13. The has since accepted the Student and OSSE stipulated on the first day of the due process hearing that would be an appropriate private placement for the Student.

14. judged that the distance from the Student's foster home to the Frost School made a less desirable placement location.

15. SES's policy is to make a final admissions determination following an intake interview with the parents and after the child attends its program for three days on a trial basis.

16. After receiving the contact from the SES Clinical Coordinator telephoned the Parent to set up an intake interview. The Parent agreed to call back to set up the interview, but did not call back.

17. On June 3, 2010, Ms. Patel issued OSSE's Notice of Location Assignment assigning the Student to SES. According to the notice, the next step would be for PCS to issue a prior written notice of placement. Then, SES was to begin serving the Student immediately. Neither PCS nor the Parent had any input into the specific selection of SES as the location assignment.

18. Upon receipt of the Notice of Location Assignment, the SES Clinical Coordinator sent a letter to clarifying that SES considered the Student to be a "potential candidate for our program" and clarifying that the Student was "in the midst of our intake process and it is our hope that once completed he will be given a letter of appropriateness for our school." The Student did not complete the intake process and he has not been admitted to SES.

19. After receiving the Notice of Location Assignment, the PCS Special Education Coordinator telephoned the Parent to tell her that OSSE had selected SES. The Parent told the Special Education Coordinator that her son was not going to SES and hung up on her.

20. The Special Education Coordinator set up an intake meeting for June 7, 2010 at SES. She asked the Student's PCS behavior specialist to accompany the Student. The behavior specialist appeared at SES for the interview, but the Student did not show up. The same day, Social Worker informed the SES Clinical Coordinator that Parent was not interested in SES.

21. On June 14, 2010, PCS issued a Prior Written Notice to the Parent stating that the Student would be placed at SES.

22. Several days before the due process hearing, the Parent took the Student to SES for an unscheduled visit. The SES Director conducted an intake interview and gave a tour of the

facility. She offered to set up a trial class visit for the Student, but he did not appear on the dates that were offered. During his visit to SES, the Student declared that he was not going to the school.

### 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:

1. OSSE and PCS have not complied with the requirements of the IDEA for private school placements.

Under the IDEA and the D.C. Regs., the Local Education Agency ("LEA") is responsible for making FAPE available to each eligible child with a disability. *See, e.g.*, D.C. Regs. tit. 5-E, § 3002.1(a). The LEA's responsibility continues when a child is moved to a private placement. *See, e.g., Letter to Reedy*, 16 E.H.L.R. 1364, at \*3 (1989) ("When a public agency places a child who is disabled in a private school or facility for the purposes of providing that child with FAPE, it does so as a means of providing that child with an educational program that it was unable to provide that child. *See* 20 U.S.C. 1412(2) and (6). Thus, the public school remains responsible for the education of the child and for ensuring that the child 'has all the rights of a handicapped child served by a public agency.' 34 CFR § 300.401(b)." *Id.*)

At all times concerned in this matter, PCS has been the Student's LEA. Therefore, after the MDT/IEP team decided on May 19, 2010 that the Student required a more restrictive, therapeutic environment, PCS continued to have responsibility for complying with the IDEA requirements for the Student's placement. Instead of placing the Student at an appropriate private placement, PCS, in effect, ceded that responsibility to OSSE's Change in Placement Coordinator, who purported to move the Student's location assignment to SES. Neither PCS nor the MDT/IEP Team had any input into the specific selection of SES for the Student's placement.

OSSE justifies its assumption of the placement decision by asserting that SES was not a placement, but rather a "site selection." Whether the Student's assignment to SES is considered a placement or a site selection, OSSE and PCS failed to comply with the private school placement requirements of the IDEA. The U.S. Department of Education regulations implementing the IDEA require that before a public agency may place a child with a disability in, or refer a child to, a private school, the agency must initiate and conduct a meeting to develop an IEP for the child. A representative of the private school must attend the IEP meeting. *See* 34 CFR § 300.325(a). Responsibility for compliance with this section remains with the LEA and the State Education Agency, OSSE. *See* 34 CFR § 300.325(c); D.C. Regs. *tit.* 5-E, § 3013.

In the present case, the requirements of 34 CFR § 300.325 were not followed. OSSE hurriedly assigned the Student to SES, before the Student had been accepted by the private school. PCS then implemented the OSSE decision by issuing a Prior Written Notice placing the Student at the SES. Neither OSSE nor PCS complied with the requirement of 34 CFR § 300.325(a) to convene a pre-placement IEP meeting with the private school representative (and the Parent) in attendance.<sup>2</sup> Although PCS is no longer a party to this proceeding, OSSE still has ultimate responsibility for assuring PCS's compliance with 34 CFR § 300.325. *See* 34 CFR § 300.146.

The failure of OSSE and PCS to convene an IEP meeting with an SES representative, before placing the Student at the private school, was a procedural violation of the IDEA. In the D.C. Circuit, a procedural violation does not, standing alone, establish a failure to provide a

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<sup>2</sup> Had PCS convened the required IEP meeting before placing the Student at SES there would have been several obvious benefits. First, SES could have confirmed whether it would enroll the Student. Second, the SES representative could have met with the PCS educators, who know the child, to develop an updated IEP for SES to implement. Finally, the meeting would have been an opportunity for SES to present its program to the Parent, and, perhaps, assuage the Parent's concerns over the appropriateness of the school.

FAPE. *See Lesesne v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C. Cir.2006). In the absence of a showing that the child's education was substantively affected, no relief may be awarded. *Id.* No evidence was adduced at the hearing to establish that the Student's education has been substantively affected by the failure to convene an IEP meeting with the private school representative. Nonetheless, as of the hearing date, SES had not accepted the Student, who remains, effectively, without a placement for the fast approaching 2010-11 school year.<sup>3</sup>

The Parent also contends that SES is not an appropriate placement for the Student. There was little evidence offered at the hearing on the appropriateness of SES. The SES Coordinator opined that, if the intake process worked out for the Student, SES could probably meet his education needs. The SES Director opined that if SES decided in the intake process that it could deal with the Student's behaviors, then SES could provide IEP services to the Student. However, until SES accepts the Student, and the IEP Team develops an IEP for the Student's placement at SES as required by 34 CFR § 300.325(a), the issue of the appropriateness of the SES placement is not ripe for decision.

2. Student not deprived of FAPE by denial of Parent's opportunity for meaningful participation in the placement decision making process

For her second issue, the Parent contends that the Student was denied FAPE because she was not afforded the opportunity to provide meaningful input into the selection of SES for the Student's placement. In its prehearing motion to dismiss, OSSE argued that its Notice of Placement Location, placing the Student at SES, was a site selection, not a placement, and that as a matter of law, there is no requirement in the IDEA that a parent be involved in the site selection. In denying OSSE's motion, I held that under the IDEA, a parent of a child with a

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<sup>3</sup> This was due primarily to the Parent's failure to participate in SES's intake procedure including not sending the student for the three-day classroom trial attendance and her delaying the intake interview to a few days before the hearing.

disability must be afforded the opportunity for meaningful input into placement decisions for her child, including input into the selection of the site that will implement the IEP. See Opinion and Order on Motion to Dismiss (July 20, 2010).

The evidence at the hearing establishes that the Parent did have the opportunity for input into the proposal to place the Student at SES. At the May 19, 2010 MDT meeting when the team concluded that the Student required a more restrictive/therapeutic environment, the Parent stated her view that Frost School would be an appropriate placement and that she objected to his placement at the Foundation School. In addition, before PCS issued its Prior Written Notice placing the Student at SES, the Parent communicated to the PCS Special Education Coordinator her objection to the placement. Lastly the Parent refused the opportunities offered to participate in an intake interview at SES and to learn more about the school's offerings. Under the IDEA and the D.C. Regulations, parents must be afforded the opportunity for meaningful input, but parents "cannot summarily determine a specific placement." See *K.L.A. v. Windham Southeast Supervisory Union*, 2010 WL 1193082, 54 IDELR 112 (2<sup>nd</sup> Cir.2010). In my order today, I will require that PCS convene another IEP meeting to develop an IEP for the Student's private school placement. The Parent will have the opportunity to provide additional input into the placement decision at that meeting.

### **ORDER**

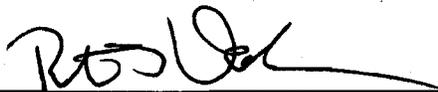
Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. OSSE shall take steps to assure that PCS convenes an MDT/IEP meeting, within 10 business days of this HOD, to determine a placement for the Student. If the Student is to be placed at a private school, the IEP team shall develop a private school IEP for the child conforming to the May 19, 2010 decisions of the of the Student's MDT team and with the requirements of 34 C.F.R. § 300.325. A

representative of any private school selected to implement the Student's IEP must attend the IEP meeting.

2. All other requests for relief made by the Parent herein are denied.

Date: August 18, 2010

  
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Hearing Officer

**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).