DECISION

IN THE MATTER OF THE REQUEST FOR DUE PROCESS

FOR

VS.

MISSISSIPPI SCHOOL FOR THE ARTS
AND
MISSISSIPPI DEPARTMENT OF EDUCATION

Case Number 01132014-42

Due Process Hearing Officer: Roger Clifford Clapp
P. O. Box 521
Florence, Mississippi 39073-0521
Telephone/fax 601-845-2521
lawmediator@earthlink.net

Note: In the following pages, the student named above and her parent will be referred to only in terms of "student" and "parent," to protect the privacy of the child in the event of publication of the content.

February 23, 2014

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## INTRODUCTION

Procedural History:

Parent filed a request for expedited due process on January 13, 2014. The Due Process Hearing Officer (HO) requested a telephone conference, which served in the nature of a Pre-Hearing Conference, to clarify the alleged basis for an expedited hearing. Hearing articulate argument of counsel for and against the same on January 21, 2014, the HO ruled that the expedited hearing request should be granted and all issues preserved for that hearing. The parties agreed to the location and earliest possible dates available for a hearing, which eventually was rescheduled by agreement of counsel for February 10, 2014. Mississippi School for the Arts (MSA) and Mississippi Department of Education (MDE) filed a Response on January 23, 2014 and a timely Objection to Sufficiency of Notice on January 28, 2014, but the Objection was not received by the HO until emailed on 2-10-14. Parent filed a Response to the MSA/MDE Objection on January 31, 2014, although no response is anticipated under IDEIA rules. Various communications among counsel and HO regarding subpoenas requested by MSA and issued by the HO and a Motion to Quash filed by parent's counsel culminated in an agreement between the parties limiting the subpoenas. Further communications among learned counsel and HO led to a sensible agreement to forego the predictably lengthy evidentiary hearing in favor of agreed stipulations of issues and facts and separate legal briefs without rebuttals, all of which was duly filed by email with voluminous attachments on the scheduled hearing date of February 10, 2014. On February 19, 2014 the HO published a decision formally overruling the Objection to Sufficiency, an objection ordinarily not well taken in any expedited hearing case.

Preliminary Observations:

I have considered MSA and its legal parent, MDE, to be one party defendant in this matter but generally have addressed MSA only in this document. This seems appropriate because the unilateral actions of MSA, before the January 23, 2014 action of MDE confirming the dismissal of the student, precipitated the problem for which relief is requested herein.

The IDEIA and rules of implementation are apparently void of any useful specific definition of the term "placement," and special education litigants, courts, and authors of commentary have perniciously confused the term with the term "location". In the case at bar, similar confusion may have led to the curious variance between use of this term of art before the filing of the Request for Due Process and the different application of the term urged by MSA/MDE in defense thereof. To date, in spite of admirable efforts by counsel for the parties, I have not found or been furnished with authority sufficiently defining the term for convincing application to the case at bar, leaving the job of HO more difficult that usual in my experience.

It is indeed fortunate and admirable that counsel wisely agreed that this dispute is a matter of law and that a voluminous record of testimony is made unnecessary by their exemplary professionalism in stipulating to the relevant facts. The judicial economy resulting from not having a hearing is obvious, although fair consideration of the voluminous stipulations of fact has proven laborious and time consuming for this HO.

As may become evident upon review of those stipulated facts, if the student's acceptance as a resident at or in MSA were found to not have been "placement" with or at or in MSA, and/or if dismissal from MSA itself did not constitute any change of placement, a finding urged by MSA, then the matter is easily resolved against the parent and child. However, the arguments for interpreting those facts in favor of the student's right to free appropriate public education (FAPE) in the least restrictive environment (LRE) after her enrollment at MSA and the subsequent deliberations by the student's IEP Committee make such resolution in favor of MSA appear problematic from the start, to say the least.

The facts could suggest (but the parties have not suggested) that the student's placement should be considered to have been always at BSD, literally the home school district for all students at MSA according to the inter-local agreement between MSA and BSD that purported to put BSD in charge of IDEIA education matters. Unilateral extended suspension or expulsion of the student from her resident status by MSA without recourse, then, might amount to a change of placement leaving the student without IDEIA services or dependent upon to take up the responsibility assuming she returned to her home residence and furnished notice of her predicament. Confirmation of this complex scenario restoring placement in is considered outside the jurisdiction of this HO, because of the issues agreed to by the parties and because the facts indicate that BSD continued to provide services pursuant to the student's IEP beyond the dates of her suspension, if not her expulsion. For what it is worth, I do not equate suspension from MSA with suspension from BSD, but expulsion from MSA must be equated with expulsion from BSD, which leaves more questions unresolved outside this case.

Regarding the issue of whether the student's educational placement was ever at MSA, it appears that if MSA was her placement it must have either resulted from a unilateral placement by the parent, accepted if not endorsed by MSA, or as discussed below, it somehow became a placement at MSA by default, leaving BSD contractually bound to provide Special Education services under IDEIA. Such a constructive placement could be seem to have been confirmed by IEP committee deliberations and the wording of the critical MSA letter of November 22, 2013. IDEIA rules are not helpful regarding the concept of constructive placement. The wording of 34 CFR 300.148 seems to anticipate parental placement will be invariably in a private school, leaving no guidance for the present situation involving a state supported statewide school. On the other hand, if placement was never at MSA by default, unilateral parental action, construction, or otherwise, because no formal change in placement is revealed by the facts placement must have remained at or have been accepted at BSD, neither of which has been

asserted by the parties and both of which seem problematic. I have resolved this primary issue according to the best of my ability to abide by the spirit of IDEIA.

Regarding the issue of whether or not the barring of the student's return to MSA pending compliance with the student handbook and/or the later dismissal of the student by MSA for failure to comply with school handbook requirements legally triggered any IDEIA requirements, such as the procedural safeguards generally mandated upon disciplinary suspensions over ten days, it must be said that if these administrative actions clearly were not related in any way to the earlier suspension, the question could be answered in the negative. The facts of the case at bar make close analysis of this relationship necessary, as discussed below. Again, I have resolved this second primary issue according to the best of my ability to abide by the spirit of IDEIA.

## ISSUES

1. Whether MSA can be an educational placement or is merely a location,

and

2. Whether the student was entitled to a manifestation determination review (MDR) prior to her dismissal from MSA.

## RELIEF REQUESTED

1. Immediately allow the student to resume enrollment in and residency at MSA pending an MDR,

and

2. If the conduct for which she was suspended is determined to have been caused by or had a direct and substantial relationship to her Emotional Disability, to remain at MSA (at least for the duration of a functional behavior assessment and full implementation of a behavioral intervention plan).

## FINDINGS OF FACT

The facts are limited to those statements and exhibits listed in and attached to the Agreed Stipulations entered into by the parties through counsel. These are to be made a part of the record herein as though all had been allowed into evidence without objection at an impartial due process hearing in this matter. Said stipulation with its exhibits is incorporated herein by reference.

All the facts were considered, but I find the following to be of particular significance in arriving at the difficult decision rendered herein:

1. The student resided in Mississippi, as an eleventh grader attending School District ), was receiving services pursuant to an IDEIA (Individuals with Disabilities Education Improvement Act) IEP (Individual Education Plan) based on Oral Expression and Learning Comprehension difficulties identified before her application to attend Mississippi for the Arts (MSA).
2. MSA, a state residential school for artistically gifted students, accepted her for the 2013-2014 school year.
3. The Mississippi Department of Education (MDE) and the Brookhaven School District (BSD) have an inter-local agreement under which BSD "will provide special education and related services to students with disabilities enrolled at MSA who are eligible for services under IDEIA."
4. After the student had enrolled and had begun classes on August 7, 2013, an IEP committee thereafter met five times (September 4, October 14, October 22, November14, and December 5) during 2013.
5. The IEPs mention the student's artistic talents and her learning difficulties in visual arts classroom as well as in regular curricula.
6. On November, the IEP committee determined that she had an Emotional Disability. Apparently only during the last two meetings, after the last incident involving the student, did the committee record any deliberation over making a change of placement of the student to a different LRE, but no consensus was reached on this change.
7. During the first three months enrolled in residence at MSA the student had five medical/psychological emergencies.
8. Following her out of school in-patient treatment from Tuesday, October 29 through Friday, November 8, 2013, she was then suspended by MSA for ten days from Monday, November 11 through Friday, November 22, 2013 for having allegedly threatened another student with scissors previously on October 28, 2013.
9. On November 22, 2013, in a letter clearly referencing the student's current "placement at MSA," the school specifically forbid the student's return to campus until receipt of clear medical documentation of fitness in accordance with specific provisions of the student handbook.
10. The November 22, 2013 letter from MSA promised homebound services "until this documentation is received or final placement is decided by the IEP committee."

11. On December 19, 2013 MSA notified the parent of its decision to dismiss the student for alleged failure to provide the requested medical documentation, which dismissal was confirmed by MDE on January 23, 2014.
12. There is no credible suggestion that remained the student's placement after enrollment at MSA or that BSD was the placement for the student or her LRE.
13. MSA considered the student's placement to have changed from residence at MSA and acted accordingly until responding through counsel to the parent's January 13, 2014 Request for Due Process.

## CONCLUSIONS OF LAW:

As usual, it is difficult to separate Findings of Fact from Conclusions of Law, but I find as a matter of law the following:

1. Delegation of special education authority to another school cannot relieve a public school of its duties under IDEIA.
2. The inter-local agreement that BSD will provide special education and related services did not say "all" such education and services, did not give BSD the exclusive responsibility for IDEIA compliance, and did not purport or imply that MSA retained no such parallel obligation.
3. The student's acceptance by and enrollment at MSA constituted placement at MSA as the LRE for her education pursuant to IDEIA, entitling her to all protections of the law and obligating MSA to comply therewith, both in its own right and via its inter-local agreement with BSD.
4. MSA was a placement, not merely a location for carrying out the provisions of the student's IEP.
5. Parent and student agreement to handbook provisions, purporting to bind them to certain duties and to give notice of certain consequences of violation, cannot function as a waiver of rights under IDEIA and cannot relieve a state supported school of its duties thereunder.
6. MSA's directive of November 22, 2013, temporarily forbidding the student's return to MSA, was clearly based upon student conduct that may have been related to her disability, and the letter effectively extended the student's involuntary absence beyond the ten-day suspension for that same conduct, notwithstanding the letter's reliance upon an alleged violation of the student handbook.
7. MSA's letter of December 19, 2013, reciting that the basis for MSA's administrative action of dismissal was alleged continued violation of the student handbook, does not change the legal effect of the constructive extension of disciplinary action beyond ten days but, to the contrary, further effectively extended the suspension without regard to the procedural safeguards to which the student was entitled.
8. The actions of MSA following the student's suspension period, including the dismissal of the student, constituted an attempted change of placement from that which had functioned by implied agreement as the LRE for her education, without a decision for any such change by the existing IEP committee.
9. MSA was obligated to conduct a Manifestation Determination Review (MDR) because of the extended duration of the suspension of the student effectuated by the letter forbidding her return after the ten-day suspension.
10. MSA's dismissal of the student violated her right to receive FAPE in the school where her placement had been accepted or determined as the LRE for her IEP.
11. The so-called Stay Put provisions of IDEIA do not apply to this matter of an expedited hearing.

Final comment:

It seems that MSA's legal position in this matter may mean that when any student is accepted, enrolls, and resides there, it is not a "placement" as anticipated under the rules of IDEIA, but instead the student's placement remains at his or her home school, or possibly at BSD, and MSA is merely a "location" under the law. This position could possibly prevail in some circumstances and has been skillfully adapted and asserted in good faith by learned counsel, citing authority in support thereof but without any precedent "on all fours" with the case at bar. I am more convinced by the strong arguments of counsel for the parent and student and my own analysis of the facts that such a position would deny the student's rights under IDEIA in this case because of the unusual sequence of events related in my findings of fact. Unfortunately, I have not found nor have I been furnished with legal authority based upon similar enough facts, so I rely on reasoning intended to comply with the spirit of the law as I have come to sense it during my years as a Due Process Hearing Officer. What I have termed a constructive suspension of the student for a period in excess of ten days by MSA serves as the seminal factual basis for my decision. I speculate that if BSD had taken the same disciplinary action suspending the student for ten days, it would not have been able to justify an extension beyond ten days based upon an alleged violation of its school handbook, but BSD, while supposedly in charge of IDEIA matters for MSA, apparently was not involved in the disciplinary action.

## DECISION AND ORDER

Based upon a preponderance of the evidence, and being fully advised in the premises, I find that the two stipulated issues in the case should be and are hereby resolved as follows:

1. Mississippi School for the Arts (MSA) can be and was in this case an educational placement and not merely a location,

and

2. The student was entitled to a Manifestation Determination Review (MDR) prior to her dismissal from MSA.

## IT IS, THEREFORE, ORDERED

A. That Mississippi School for the Arts should be and is hereby required to allow the student to resume enrollment in and residency at MSA pending an MDR,

and

B. If the conduct for which she was suspended is determined to have been caused by or had a direct and substantial relationship to her Emotional Disability, to remain at MSA at least for the duration of a Functional Behavior Assessment (FBA) and/or full implementation of a Behavioral Intervention Plan (BIP).

SO ORDERED ON THIS THE 24TH DAY OF 2014.

_____
ROGER CLIFFORD CLAPP
DUE PROCESS HEARING OFFICER

NOTE: The parties are advised that an appeal of this decision may be accomplished by filing a civil action with respect to the two issues and the above resolution of the same in the United States District Court for the Southern District of Mississippi within forty-five (45) days, pursuant to IDEIA.