

**District of Columbia  
Office of the State Superintendent of Education**

**Office of Review and Compliance  
Student Hearing Office**

**Terry Michael Banks, Due Process Hearing Officer  
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Washington, D.C. 20003  
(571) 437-7381  
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**Confidential**

<b>STUDENT, through the legal guardian<sup>1</sup></b>	)	Complaint Filed: March 23, 2009
	)	
<b>Petitioner,</b>	)	Docket No. 2009-481
	)	
<b>v.</b>	)	
	)	
<b>DISTRICT OF COLUMBIA</b>	)	
<b>PUBLIC SCHOOLS</b>	)	
	)	
<b>Respondent.</b>	)	
	)	
<b>Student Attending:</b>	)	
<b>Non-attending</b>	)	

OSSE  
STUDENT HEARING OFFICE  
2009 MAY 18 AM 8:24

**HEARING OFFICER'S DECISION**

**Counsel for Petitioner:** Leslie T. Jackson, Esquire  
235 Oglethorpe Street, N.W.  
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**Counsel for DCPS:** Quinne Harris-Lindsey, Esquire  
Office of the General Counsel, DCPS  
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<sup>1</sup> Personal identification information is provided in Attachment A.

## Jurisdiction

This hearing was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

## Introduction

Petitioner is a            year-old non-attending student. On January 26, 2009, Petitioner filed a Due Process Complaint Notice against the District of Columbia Public Schools ("DCPS") alleging that DCPS had failed to (1) develop annual Individualized Education Programs ("IEPs") since the 2004-2005 school year, (2) conduct triennial evaluations, (3) authorize independent evaluations, (4) compensate Petitioner's service provider, and (5) provide transportation services.<sup>2</sup>

On February 25, 2009, Petitioner filed a *Motion for Clarification of [Petitioner's] Stay Put Placement*. The motion, filed by Petitioner's mother, set forth Petitioner's position that he is entitled to remain in his "current private instruction school" during the pendency of these proceedings.

Petitioner's mother also filed a *Motion for Recusal of Hearing Officer on Grounds of Bias* ("Recusal Motion") on February 25, 2009. The Hearing Officer was unaware of both motions until March 16, 2009, because the Student Hearing Office filed both motions in Docket No. 2009-0334, a separate proceeding filed on behalf of Petitioner that was withdrawn on February 27, 2009. The Hearing Officer received an email message from Petitioner's mother on March 16<sup>th</sup> that alerted him to the existence of the motions. The *Recusal Motion* alleged, *inter alia*, that after she filed the *Complaint*,

The District of Columbia Public Schools immediately began emailing Mr. Banks alleging that the time frame for its answer was somehow stalled until Petitioner showed proof that he had served the DCPS office of the General Counsel (DCPSOGC). I explained to Mr. Banks that Student Hearing Complaint only referenced notice to the Student Hearing Office and not DCPSOGC. Mr. Banks immediately accepted the statements of DCPSOGC as factual without an opportunity to query the Student Hearing Office or review the complaint...

Immediately after the settlement conference meeting DCPS felt comfortable emailing Mr. Banks stating that Petitioner refused to sign the [registration] form and attached its resolution settlement discussion meeting notes as proof of its allegations. Mr. Banks accepted DCPS's

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<sup>2</sup> Docket No. 2009-155.

notes as factual without hearing from Petitioner. Mr. Banks sent an email to Petitioner stating he would not have jurisdiction to hear the dispute if Petitioner did not sign the form...

Pursuant to IDEA, the resolution meeting is between the parties and not the hearing officer. It is accepted law what happens in settlement discussions stay there and are not admissible or discoverable. Notwithstanding, Mr. Banks sent Petitioner an email indicating that he will accept DCPS resolution notes as factual without so much as a consideration of Petitioner's hearing notes...

Mr. Banks is bias because he has already determined that he will support any assertions made by DCPS, whether supported by the evidence or not. Mr. Banks could not possibly know what document was presented to Petitioner during the meeting or whether that document is the same as a document he may or may not be familiar with because he did not attend the meeting and did not ask Petitioner or DCPS for a copy of the document that was presented to him. Clearly, Mr. Banks adopted the statements of DCPS and its counsel without as much as a review of the documents in dispute.<sup>3</sup>

On March 17, 2009, the Hearing Officer issued an Interim Order denying the Recusal Motion and the Motion for Clarification. On March 18, 2009, Petitioner's mother filed a *Motion for Reconsideration of Hearing Officer's Interim Decision Regarding Bias and Stay Put* ("Reconsideration Motion"). On March 20, 2009, Petitioner's mother filed a *Line* withdrawing the Complaint. On March 23, 2009, the Hearing Officer issued a Hearing Officer's Decision ("HOD") dismissing the Complaint without prejudice. On April 13, 2009, the Hearing Officer issued an order denying the *Reconsideration Motion*.

On February 24, 2009, Petitioner filed a second Due Process Complaint Notice alleging that DCPS had failed to honor "stay-put" provisions of IDEIA. On February 27, 2009, Petitioner filed a *Line* withdrawing the February 24<sup>th</sup> Complaint.<sup>4</sup> On March 16, 2009, the Hearing Officer issued an HOD dismissing the February 24<sup>th</sup> Complaint without prejudice.

On March 23, 2009, Petitioner filed the instant Due Process Complaint Notice ("*Complaint*") alleging that DCPS failed to (1) develop IEPs since the 2004-2005 school year, (2) conduct triennial evaluations for the last five years, (3) authorize independent evaluations, (4) compensate Petitioner's service provider, and (5) provide transportation services. On March 30, 2009, DCPS filed *District of Columbia Public School's Motion to Dismiss Parent's Administrative Due Process Complaint Notice* ("*Motion to Dismiss*"). The gravamen of the *Motion to Dismiss* is that an order issued by United States District Judge Urbina on January 22, 2009 effectively resolved the issues in the *Complaint*. Petitioner filed *Petitioner's Opposition to Respondent's Answer and Motion to Dismiss*

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<sup>3</sup> Grammatical and other errors appear as typed in the *Recusal Motion*.

<sup>4</sup> Docket No. 2009-334.

*Petitioner's Due Process Complaint Notice ("Opposition")* on April 1, 2009. The gravamen of the *Opposition* is that Judge Urbina's order did not relieve DCPS of its continuing obligation to provide a free appropriate public education ("FAPE") to Petitioner.

## **Record**

*Due Process Complaint Notice* dated March 23, 2009  
*District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice* dated March 30, 2009  
*District of Columbia Public School's Motion to Dismiss Parent's Administrative Due Process Complaint Notice* dated March 30, 2009  
*Petitioner's Opposition to Respondent's Answer and Motion to Dismiss Petitioner's Due Process Complaint Notice* dated April 1, 2009  
*Request for Telephonic Prehearing Conference* dated April 20, 2009-05-18

## **Judge Urbina's Order**

Judge Urbina described the background of the proceeding that he adjudicated as follows:

In August 2004, Individualized Education Plan ("IEP")<sup>1</sup> for the 2004-2005 school year stated that he should attend the "inclusion nursery school program" at School. Compl. ¶ 27. School, however, no longer offers an inclusion program, and on August 10, 2005, DCPS issued a new IEP, placing in the citywide autism program at School. Compl. ¶ 30; Mem. Op. (Sept. 28, 2005) at 3. That IEP also changed classification from "developmentally delayed" to "autistic." Compl. ¶ 30. Because disputes the new IEP's change in classification and the School placement, *id.* ¶ 32, she filed an administrative due process complaint on September 13, 2005, Mem. Op. (Sept. 28, 2005).

On September 28, 2005, the court granted the plaintiff's motion for a stay put injunction,<sup>2</sup> requiring DCPS to comply with "the mandates of the 2004-2005 school year IEPs." Order (Sept. 26, 2005) at 1-2. After a meeting between the parties and the court on September 29, 2005, the court issued an order requiring that DCPS:

fund all related services and supplemental aids on the plaintiff April 9, 2004 Transition Plan and August 12, 2004 IEP, including speech therapy, occupational therapy, assistive technology, sign language instruction, behavioral management

services and a full-time, one-on-one dedicated aide, *until the plaintiff's administrative due process complaint is decided and any appeal therefrom is concluded*. . . . [And DCPS] shall pay the identified aides and service providers, within 15 days of receipt from each aide of his or her weekly invoice.<sup>5</sup>

In his Memorandum Opinion, Judge Urbina noted that Petitioner had not been reevaluated and that his IEP had not been updated:

Although the court expected a reevaluation of [redacted] to occur within 3 years of the 2004 IEP, when it issued the September 30, 2005 order, no such reevaluation has taken place and [redacted] has not received an updated IEP. Defs.' 60(b) Mot. at 4-7; Pl.'s 60(b) Opp'n at 5. It remains unclear why the defendants have not reevaluated [redacted] and updated his IEP,<sup>4</sup> just as it remains unclear why the defendants have not convened an administrative due process hearing, which the court specifically referenced in its September 30, 2005 order.<sup>6</sup> Regardless of why these proceedings and reevaluations have not occurred, the court agrees with the defendants that the post-judgment changes, including the fact that [redacted] is now [redacted] years old and the 2004 IEP is out of date, weigh in favor of setting aside the September 30, 2005 order.<sup>6</sup>

Judge Urbina issued an order on January 22, 2009 setting aside his September 30, 2005 order *nunc pro tunc* August 10, 2008.

## Discussion

Judge Urbina's January 22, 2009 order effectively terminated DCPS' obligation to fund related services and supplemental aides. He directed the parties to work together to develop a new IEP for Petitioner.<sup>7</sup> In light of Judge Urbina's Memorandum Opinion, the Hearing Officer concludes that the allegations in the *Complaint* are either premature or were specifically addressed in Judge Urbina's Memorandum Opinion and in his Order. Specifically, Judge Urbina's order relieved DCPS of the obligation to fund related services. Therefore, the allegations in the *Complaint* that DCPS failed to compensate Petitioner's service provider and provide transportation services relate directly to the services as to which Judge Urbina relieved DCPS of responsibility. Similarly, Petitioner's assertion that he is entitled to "stay put" protections due to his "enrollment" since 2005 has no continuing merit, because the only "placement" afforded to Petitioner was that afforded by Judge Urbina, which the judge has now rescinded.

This leaves only the allegations that DCPS has failed to reevaluate Petitioner and update his IEP. As noted above, Judge Urbina directed the parties as follows: "Finally,

<sup>5</sup> *Laster v. District of Columbia*, Civil Action No. 05-18175 (D.D.C. Jan. 22, 2009) at 2.

<sup>6</sup> *Id.* at 6-7.

<sup>7</sup> *Id.* at 7.

with the September 30, 2005 order set aside, the parties should work together to update IEP in accordance with the IDEA.” The dispute between Petitioner and DCPS was within Judge Urbina’s jurisdiction until his January 22, 2009 order. Petitioner filed his first of three complaints after the issuance of Judge Urbina’s order on January 26, 2009. All of the allegations in the three Complaints allege violations that occurred during the pendency of Judge Urbina’s jurisdiction. This Hearing Officer lacks the authority to adjudicate claims that were within the District Court’s purview. When Judge Urbina relinquished jurisdiction, he directed the parties to work together to update Petitioner’s IEP. The Hearing Officer will issue an order consistent with Judge Urbina’s direction.

### ORDER

Upon consideration of DCPS’ *Motion to Dismiss* and Petitioner’s *Opposition*, this 18<sup>th</sup> day of May 2009, it is hereby

**ORDERED**, that the *Motion to Dismiss* is **GRANTED**.

**IT IS FURTHER ORDERED**, that on or before June 1, 2009, DCPS shall contact Petitioner’s parent to arrange mutually convenient time for a Multidisciplinary Team (“MDT”) meeting. DCPS shall convene the MDT meeting before the end of the 2008-2009 school year. The MDT shall develop a Student Evaluation Plan for Petitioner. Once the plan has been developed, Petitioner is authorized to obtain the evaluations independently *and is not constrained by 5 D.C.M.R. Section 3027.5*. Petitioner’s parent shall provide copies of the completed evaluations to the DCPS Office of Special Education (“OSE”) Legal Unit<sup>8</sup> by facsimile transmission and first-class mail along with a written request to schedule the MDT meeting described below.

**IT IS FURTHER ORDERED**, that within fifteen (15) school days of its receipt of the independent evaluations, DCPS shall convene an MDT meeting.<sup>9</sup> DCPS shall coordinate scheduling the MDT meeting with Petitioner’s mother. The MDT shall review all current evaluations and assessments, update Petitioner’s IEP, and discuss placement alternatives.

**IT IS FURTHER ORDERED**, that DCPS shall afford Petitioner’s parent an opportunity to participate in any meeting in which Petitioner’s placement is discussed or determined. The DCPS representative shall advise Petitioner’s parent of the advantages and disadvantages for Petitioner with respect to each school that is discussed, including any schools proposed by the parent. DCPS shall provide Petitioner’s parent an explanation for the placement DCPS proposes, and the reasons for the proposal shall be provided in the Meeting Notes. DCPS shall issue a Prior Notice within seven days if Petitioner is placed in a public facility or within 30 days if Petitioner is placed in a private facility.

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<sup>8</sup> ose.legalunit@dc.gov; fax: (202) 645-8828.

<sup>9</sup> For purposes of this order a “school day” refers to days on which classes are held during the regular school year. It does not include summer school class days.

**IT IS FURTHER ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

**IT IS FURTHER ORDERED**, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's parent will contact the DCPS OSE Legal Unit to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS' failure to comply.<sup>10</sup>

**IT IS FURTHER ORDERED**, that this Order is effective immediately.

#### **Notice of Right to Appeal Hearing Officer's Decision and Order**

This order addresses only the reconsideration of a motion to recuse the Hearing Officer. The Interim Order denying the *Recusal Motion* was issued on March 17, 2009, and Petitioner's mother filed a *Line* withdrawing the *Complaint* on March 20, 2009. The final administrative decision in this matter, allowing the withdrawal and dismissing the *Complaint* without prejudice, was issued on March 23, 2009. Any party aggrieved by the findings and/or decision 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 of March 23, 2009, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

\_\_\_\_\_/s/\_\_\_\_\_  
Terry Michael Banks  
Hearing Officer

Date: May 18, 2009

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<sup>10</sup> If DCPS fails to contact Petitioner's counsel to coordinate scheduling either MDT meeting by a date that would make compliance with this Order feasible, Petitioner's parent shall initiate telephone calls and electronic correspondence to the OSE Legal Unit and to Ms. Harris-Lindsey to attempt to effect compliance within the timelines set out herein.