

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
State Enforcement and Investigation Division
Student Hearing Office
Van Ness Elementary School
1150 5th St., S.E., Washington, D.C. 20003
Phone: (202) 698-3819 Facsimile: (202) 442-5556

In Re the Matter of :)
))
Parent on behalf of Student,)
))
Petitioner,)
))
))
v.)
))
The District of Columbia Public Schools)
))
825 North Capitol Street, N.W.)
Washington, D.C. 20002)
("DCPS" or "District"))
))
Respondent.)
))

Date of Complaint: March 25, 2009
Date of Pre-hearing: April 6, 2009
Date of Hearing: April 29, 2009
Student Identification Number:

2009 MAY -6 AM 8:54
STUDENT HEARING OFFICE
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HEARING OFFICERS' DECISION (HOD)

Hearing Officer: Attorney Ramona M. Justice

Attorney for Petitioner: Attorney Roberta Gambale
James Brown and Associates, PLLC
1220 L Street, Suite 700
Washington, D.C. 20005

Attorney for Respondent: Daniel McCall, Assistant Attorney General
Office of the Attorney General
825 North Capitol St., N.E., 9th Floor
Washington, D.C. 20002

1 Personally identifiable information is provided in the "Record of Proceeding" which is located on the last page of this Order and must be removed for public distribution.

**INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004
(IDEIA), (Public Law 108-446)
DISTRICT OF COLUMBIA PUBLIC SCHOOLS
IMPARTIAL DUE PROCESS HEARING**

I. INTRODUCTION

The student is _____ years of age, and a _____ student, attending _____ a private school located in the District of Columbia. The student's tuition at _____ is funded by the D.C. Washington Scholarship Fund, entitling the student to general education services. The student's entitlement to special education and related services is made pursuant to the District of Columbia Public Schools, Office of Special Education, Individualized Services Plan for Parentally Placed Private/Religious School Students.

The student is a resident of the District of Columbia; however, the record is insufficient to determine whether the student is identified as disabled and eligible to receive special education services, in accordance with "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")".

On March 25, 2009, Petitioner's Attorney initiated an "Administrative Due Process Complaint" with the D.C. Public Schools ("DCPS"), Student Hearing Office (SHO), on behalf of parent and the student. The due process complaint alleged that DCPS denied the student a free appropriate public education (FAPE), by failing to provide Petitioner access to the student's educational records, in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")".

The due process hearing convened on April 29, 2009, at 12:30 p.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

This proceeding was invoked in accordance with the rights established pursuant to "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")", Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; the D.C. Appropriations Act, Section 145, effective October 21, 1998; and Title 38 of the District of Columbia Municipal Regulations ("DCMR"), Chapter 30, Subtitle VII, Chapter 25.

III. DUE PROCESS RIGHTS

Petitioner's Attorney waived a formal reading of parent's due process rights.

IV. ISSUE

The following issue is identified in the *March 25, 2009* due process complaint:

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide Petitioner access to the student's educational records?

V. RELIEF REQUESTED

- (1) A finding that DCPS denied the student a FAPE, by failing to provide records to the student.
- (2) DCPS shall immediately provide a comprehensive copy of the student's records to include recent evaluations and meeting notes conducted and/or developed by the public agency.
- (3) All meetings shall be scheduled through counsel for the parent, Roberta L. Gambale, Esquire, in writing, via facsimile, at 202-742-2097 or 202-742-2098.

VI. DISCLOSURES

The Hearing Officer inquired whether disclosures were made by the parties; and whether there were any objections. Respondent objected to Petitioner's Exhibit 9, which Petitioner withdrew. Receiving no further objections, the disclosures identified herein, were admitted into the record as evidence.

VII. DOCUMENTS SUBMITTED BY PARENT AS PETITIONER AND ADMITTED INTO THE RECORD AS EVIDENCE

Petitioner's Exhibits 01 through Petitioner's Exhibits 08; and a witness list dated April 21, 2009. Petitioner withdrew Exhibit 9.

VIII. DOCUMENTS SUBMITTED BY DCPS AS RESPONDENT AND ADMITTED INTO THE RECORD AS EVIDENCE

Respondent's submitted no disclosures.

IX. PROCEDURAL POSTURE

The due process complaint was filed on March 25, 2009. On April 1, 2009, the Hearing Officer issued a Notice of Pre-Hearing Conference, scheduling the pre-hearing conference for April 6, 2009, at 4:00 p.m.. The pre-hearing conference failed to proceed as scheduled, due to Respondent's failure to appear for the hearing. A Pre-hearing Conference Order was issued on April 6, 2009, confirming the due process hearing for April 29, 2009, at 11:00 a.m..

On April 21, 2009, Petitioner filed "Petitioner's Motion for Default Judgment and/or Judgment on Pleadings". Disclosures were filed by Petitioner on April 21, 2009; Respondent failed to submit disclosures; and on April 29, 2009, the due process hearing proceeded as scheduled.

X. PRELIMINARY ISSUES

The Hearing Officer denied Petitioner's Motion for Default Judgment, however, ruled that DCPS was precluded from offering any affirmative defenses on the issue of liability; or witnesses not previously disclosed. The court also deferred a ruling on Petitioner's Motion for Judgment on the Pleadings.

As a preliminary matter, Respondent advised the court that parent would be provided access to the student's educational records on May 1, 2009. Petitioner responded that during a telephone conversation with the DCPS representative on March 13, 2009, parent was advised that the records were not available and referred Petitioner's Attorney to DC Pro, who advised parent that the records would be made available by the end of that week, which failed to occur.

XI. STATEMENT OF CASE

1. The student is _____ years of age, and a _____ student, attending a private school located in the District of Columbia. The student's tuition at _____ is funded by the D.C. Washington Scholarship Fund, entitling the student to receive general education services. The student is entitled to receive special education and related services pursuant to the District of Columbia Public Schools, Office of Special Education, Individualized Services Plan for Parentally Placed Private/Religious School Students.

2. The student is a resident of the District of Columbia; and the record is insufficient to determine whether the student is identified as disabled and eligible to receive special education services, in accordance with "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

3. The student was referred for initial evaluations by parent and the _____ to the District of Columbia, Office of Special Education, _____ The _____ evaluated the student in October, 2008 and/or November, 2008.

4. On November 12, 2008, DCPS completed a "Speech and Language Evaluation Report". The report indicates that the student is repeating kindergarten, and was referred to the _____ for a speech and language evaluation as part of a multidisciplinary team evaluation to determine the student's eligibility for special education services. It was also noted that the student was demonstrating academic difficulties in addition to unclear speech and hyperactivity.

The results of the evaluation indicate that the student demonstrates an academically significant speech and language impairment; and is eligible for speech and language services.

5. On December 10, 2008, DCPS completed a "Psycho-educational Evaluation", and the evaluation provides that the student was referred for evaluation because of described concerns regarding speech difficulties and a suspected learning disability. The evaluation included in the disclosures is incomplete, therefore, information regarding findings and recommendations is unavailable.

6. On January 6, 2009, Petitioner's Attorney forwarded to the Acting Principal, a written request for the student's educational records, accompanied by an authorization for release of information. A copy of the request was reportedly forwarded to the D.C. Public Schools, Deputy Chancellor, Office of Special Education, and DCPS Office of General Counsel.

On January 6, 2009, Petitioner's Attorney forwarded to the Acting Principal, a written request for comprehensive reevaluations of the student, to include: psycho-educational, clinical psychological, speech and language, social history, formal classroom observation, vision and hearing screenings; and if warranted, a psychiatric, neuropsychological, occupational therapy, physical therapy, and medical assessment.

7. On January 9, 2009, DCPS convened an Individualized Education Program (IEP) team meeting, however, information regarding the IEP team meeting is not available.

8. On March 13, 2009, Petitioner's Attorney forwarded to DC Pro, a letter referencing a prior discussion wherein DCPS agreed to fax to Petitioner's Attorney copies of evaluations and meeting notes, by the week ending March 20, 2009. The letter was accompanied by a "General Authorization for Information" authorizing the release of records.

9. On March 25, 2009, Petitioner's Attorney initiated an "Administrative Due Process Complaint" with the D.C. Public Schools ("DCPS"), Student Hearing Office (SHO), on behalf of parent and the student. The due process complaint alleged that DCPS denied the student a free appropriate public education (FAPE), by failing to provide Petitioner access to the student's educational records, in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")".

XII. WITNESSES

Witnesses for Petitioner

Parent

Witnesses for Respondent

Respondent presented no witnesses.

Witness Testimony

Petitioner's Witness

Parent

Parent testified that the student attended the _____ for the past two (2) years; and was retained in the kindergarten last year. Parent testified that she participated in a meeting at the student's school, however, is uncertain regarding the date of the meeting, and the exact records received at the meeting, although she recalls receiving several documents.

Parent testified that a Speech and Language Evaluation was completed by DCPS and the evaluation recommended speech and language services; however, she is uncertain whether an IEP was developed at the January 6, 2009 IEP team meeting; although there are goals included in the IEP.

Parent testified that she was advised that evaluations would be completed at the school, however, is uncertain whether the evaluations were completed, and she failed to receive a copy of the evaluations. Parent also testified that she recalled participating in a telephone conference call with her Attorney and DCPS, however, is unable to recall the date DCPS indicated the information would be provided.

Parent testified that she was not satisfied with her prior Attorney, and retained another Attorney on March 11, 2009; and is unaware whether her former Attorney received documents from DCPS. Parent testified that she provided her current Attorney documents received from the _____ before providing the documents to the advocate at the _____ where she resides.

XIII. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE 1

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide parent access to the student's educational records?

Petitioner's Attorney represents that pursuant to 34 C.F.R. §99.10(a), "a parent... must be given the opportunity to inspect or review the student's educational records..." Pursuant to 5 DCMR 3021.1, "the parent of a child with a disability shall be given the opportunity to inspect and review and to copy at no cost to the parent all of the child's records relating to the identification, evaluation, and educational placement, and the provision of Free Appropriate Public Education (FAPE)."

Petitioner's Attorney also represents that parent through counsel, requested all of the student's records on January 6, 2009, and DCPS failed to respond to parent's request either by sending the student's records or by inviting parent's advocate, to review the records.

Petitioner's Attorney also represents that a second request for the student's educational records was made in March, 2009, and DCPS failed to respond to this request and/or failed to provide the records as agreed in a telephone conversation on March 13, 2009.

Petitioner's Attorney represents that a procedural violation amounts to a denial of FAPE if it: 1) impedes the child's right to a FAPE; 2) significantly impeded the parent's opportunity to participate in the decision making process of a FAPE to the parent's child; or 3) caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2). Petitioner also represents that in this matter, failure to provide the student's educational records has denied the parent's ability to participate in the decision making process because she has been denied access to the student's educational records and the ability to be informed regarding the student's educational needs.

Petitioner's Attorney represents that parent attended the January 6, 2009 IEP team meeting, and to the best of her recollection, an IEP was not developed at the meeting, and the IEP was not signed by parent. There were no additional preliminary matters discussed at the hearing.

DCPS represents that on January 6, 2009, parent received the student's educational records, and provided the information to her Attorney and Advocate; and that Petitioner's Attorney failed to disclose the information to the court.

DCPS also represents that Petitioner failed to present evidence of educational harm, and the only testimony presented was by parent, who was uncertain regarding the documents received, or whether she provided the document received at the meeting, to her former attorney. DCPS represents that an IEP was developed for the student and there is no evidence that the student failed to receive the services in his IEP.

DCPS also represents that parent may inspect and request copies of the student's educational records on May 1, 2009. DCPS concludes that parent is not entitled to a finding of denial of a FAPE.

DISCUSSION AND CONCLUSIONS OF LAW

IDEA, 34 C.F.R. Section 300.501 provides:

“The parents of a child with a disability *must* be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to *inspect and review* all educational records with respect to—

- (1) The identification, evaluation, and educational placement of the child; and
- (2) The provision of FAPE to the child.”

IDEA, 34 C.F.R. Section 300.613 provides in pertinent part:

“(a) Each participating agency *must* permit parents to *inspect and review* any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency *must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing* pursuant to Section 300.507 or Section 300.530 through 300.532, or resolution session pursuant to Section 300.510, *and in no case more than 45 days after the request has been made.*”

According to *34 C.F.R. §300.613*, the right to inspect and review education records under this section includes—

- (1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
- (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and
- (3) The right to have a representative of the parent inspect and review the records.

The record reflects that on January 6, 2009, Petitioner’s Attorney forwarded to the Acting Principal, a written request for the student’s educational records, accompanied by an authorization for release of information. A copy of the request was reportedly forwarded to the D.C. Public Schools, Deputy Chancellor, Office of Special Education, and DCPS Office of General Counsel. According to IDEA, DCPS was required to respond to parent’s request for the student’s educational records without unnecessary delay, and no later than February 21, 2009.

The record also reflects that on March 13, 2009, Petitioner’s Attorney forwarded to DC Pro, a letter referencing a telephone conversation held on this date, wherein DCPS agreed to fax to Petitioner’s Attorney copies of evaluations and meeting notes, by the week ending March 20, 2009. The letter was accompanied by a “General Authorization for Information” authorizing the release of records.

At the hearing, DCPS represented that parent received the student’s educational records at the January 6, 2009 IEP team meeting; and the student was not denied a FAPE. However, DCPS failed to present any evidence or witness testimony supporting the representations; or refuting allegations that it denied parent access to the student’s educational records.

DCPS also advised the court that during a court recess, it emailed to the Hearing Officer and Petitioner’s Attorney the January 6, 2009, MDT meeting notes, confirmation of the meeting notice, prior notice, level of service document, historical documentation, psychological evaluation, speech and language report, notice of initial placement, and request for consent. DCPS also represented that it would provide parent access to the documents on May 1, 2009.

The Hearing Officer finds that DCPS' representations that parent received the student's educational records at the January 6, 2009 IEP team meeting is unsubstantiated; and therefore, is without merit.

The record reflects that on January 6, 2009, parent, through her Attorney, submitted a written request for the student's educational records, however, as of the date of hearing, DCPS failed to provide parent access to the student's educational records, as contemplated, and consistent with the requirements of IDEA. Providing parent documentation at an IEP team meeting, fail to satisfy the requirements of IDEA, 34 C.F.R. §300.501 and §300.613, when responding to a parent's request for a student's educational records.

The Hearing Officer also finds that DCPS failed to present evidence that it responded to Petitioner's request for the student's educational records, *without unnecessary delay and prior to any meeting regarding an IEP, or the hearing* pursuant to §300.507 or §300.530 through 300.532, or resolution session pursuant to §300.510, *or within 45 days after the request was made*. DCPS failed to provide parent copies of requested documents, or access and the right to review and inspect the student's educational records, as required and in accordance with IDEA, 34 C.F.R. §300.501 and §300.613.

Based on the aforementioned, it is the Hearing Officer's decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to provide parent access to the student's educational records, in violation of IDEA, §§300.501 and 300.613.

Free and Appropriate Public Education (FAPE)

In regard to procedural violations, the 2004 amendments to IDEA, at Section 615(f)(ii) limits the jurisdiction of administrative hearing officers to make findings that a child did not receive FAPE due to *procedural violations*, if the inadequacies:

- (1) impedes the child's right to a FAPE; or
- (2) significantly impede the parent's opportunity to participate in the decision making process;
- (3) deprives the student educational benefit.

The Hearing Officer finds that Petitioner failed to present evidence of educational harm to the student, however, presented evidence sufficient for a finding that DCPS' failure to provide parent access to the student's educational records, significantly impedes the parent's opportunity to participate in the decision making process.

The Hearing Officer also finds that DCPS' failure to provide parent access to the student's educational records, represents a substantive violation of IDEA, because the procedural violation in question seriously infringes upon the parent's opportunity to participate in the IEP process; and deprives an eligible student of an individualized education program specifically designed to address his special education needs, resulting in loss of educational opportunity; and denial of a FAPE.

Motion for Judgment on Pleadings

A Motion for Judgment on the Pleadings, is a motion made after pleadings have been entered that requests the court to issue a judgment at that point. Under the Federal Rules of Civil Procedure, if matters outside of the pleadings are presented to the court when a motion for judgment on the pleadings is made, the motion will be treated as a motion for summary judgment; as in this case.

Motion for Summary Judgment

A motion for summary judgment in United States District Court is governed by Rule 56 of the Federal Rules of Civil Procedure. Other pretrial motions, such as a "motion for judgment on the pleadings" or a "motion to dismiss for failure to state a claim upon which relief may be granted," can be converted by the judge to motions for summary judgment, if matters outside the pleadings are presented to – and not excluded by – the trial-court judge. In this matter, the court allowed the parties to present matters beyond the scope of the pleadings, therefore, the Hearing Officer converts the Motion for Judgment on the Pleadings to a Motion for Summary Judgment.

In U.S. legal practice summary judgment can be awarded by the court prior to trial, effectively holding that no trial will be necessary. Issuance of summary judgment can be based only upon the court's finding that:

1. there are no issues of "material" fact requiring a trial for their resolution, *and*
2. in applying the law to the undisputed facts, one party is clearly entitled to judgment.

Summary judgment is awarded if the undisputed facts and the law make it clear that it would be impossible for one party to prevail if the matter were to proceed to trial; and the court must consider all materials in the light most favorable to the party opposing the motion for summary judgment. See Adickes v. S.H. Kress & Co., 398 U.S. 144, (1970), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Anderson v. Liberty Lobby enunciated the moving party's burden on summary judgment and for that reason it is so frequently cited by appellate courts when reviewing a trial court's grant of summary judgment that it is the most quoted Supreme Court case of all.

In reviewing the evidence, it is clear that DCPS had several opportunities to respond; and provide parent access to the student's educational records, however, failed in this regard. A significant period of time lapsed from January 6, 2009, the date of parent's request for the student's educational records; and the hearing, however, DCPS failed to satisfy IDEA's requirements in responding to parent's request for the student's educational records.

The Hearing Officer finds that DCPS failed to provide parent access to the student's educational records, without unnecessary delay, and no later than 45 days of the request; as required by IDEA. The Hearing Officer also considered the fact that DCPS failed to respond to the complaint; issue a Prior Notice, addressing allegations in the complaint; or present evidence or witnesses in its defense.

The Hearing Officer concludes that there are no genuine issues of material fact in this matter; and in applying the law to the undisputed facts, Petitioner is clearly entitled to judgment as a matter of law. In considering all materials in the light most favorable to DCPS; the court finds that it is impossible for Respondent to prevail in this matter; and a Motion for Summary Judgment is warranted in this matter.

XIV. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that Petitioner's Motion for Default Judgment is **DENIED**; and it is further
- (2) **ORDERED**, that Petitioner's Motion for Summary Judgment is **GRANTED**; and it is further
- (3) **ORDERED**, that no later than May 11, 2009, DCPS shall provide parent access to the student's educational records, consistent with IDEA, 34 C.F.R. §34 C.F.R. §300.501 and §300.613; and it is further
- (4) **ORDERED**, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's Counsel will contact the Special Education Coordinator at _____ and the DCPS Office of Mediation & Compliance to attempt to obtain compliance prior to filing a complaint, alleging DCPS' failure to comply with this decision and order; and it is further
- (5) **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; and it is further
- (6) **ORDERED**, that all meetings shall be scheduled through counsel or the parent, Roberta L. Gambale, Esquire, in writing, via facsimile, at 202-742-2097 or 202-742-2098; and it is further
- (7) **ORDERED**, that this decision and order are effective immediately.

XV. APPEAL RIGHTS

This is the **FINAL ADMINISTRATIVE DECISION**. Appeals may be made to a court of competent jurisdiction within ninety (90) days from the date this decision was issued.

Ramona M. Justice

5-5-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Assistant Attorney General, Daniel McCall
Attorney Roberta Gambale (202) 742-2098