

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) 698-3825

2009 JUN -3 PM 12: 12
 STUDENT HEARING OFFICE

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: April 20, 2009
Date of Pre-hearing: May 19, 2009
Date of Hearing: May 28, 2009

**Voluntary Withdrawal of Issues/
 and Joint Stipulation of Facts**

Student Case Number:

HEARING OFFICERS' DECISION (HOD)

Hearing Officer:

Attorney Ramona M. Justice

Counsel for Petitioner:

Attorney John Straus
 The Law Offices of James E. Brown and Associates
 1220 L Street, N.W., Suite 700
 Washington, D.C. 20005

Counsel for Respondent:

Assistant Attorney General Nia Fripp
 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 "Index" 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

On April 20, 2009, Petitioner filed a due process complaint, alleging that D.C. Public Schools, hereinafter referred to as "DCPS", denied the student a Free and Appropriate Public Education ("FAPE"), by failing to: (1) conduct an annual review of the student's Individualized Education Program (IEP); (2) review the student's independent evaluations; (3) review and revise the student's IEP; (4) provide an appropriate placement; and (4) provide the student appropriate special education and related services, thereby creating a right to compensatory education services; in violation of "The Individuals with Disabilities Education Act ("IDEA")"; reauthorized as the "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")."

The due process hearing convened on May 28, 2009, at 1:00 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

At the due process hearing, Petitioner's Counsel waived a formal reading of parent's due process rights.

IV. ISSUE(S)

The issues identified in the *April 20, 2009* due process complaint were clarified at the pre-hearing conference, as follows; and are before the court for decision:

- 1) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to conduct an annual review of the student's Individualized Education Program (IEP)?

- 2) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to convene an IEP team meeting to review the student's independent evaluations, and update the IEP, as appropriate?
- 3) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?
- 4) Whether the student is entitled to compensatory education services?

Summary of Relief Requested:

- (1) The Hearing Officer shall find that DCPS denied the student a free appropriate public education by failing to conduct an annual review of the student's IEP.
- (2) The Hearing Officer shall find that DCPS denied the student a free appropriate public education by failing to review the student's independent evaluation.
- (3) The Hearing Officer shall find that DCPS denied the student a free appropriate public education by failing to review and revise the student's IEP based on the findings and recommendations of the independent evaluations.
- (4) The Hearing Officer shall find that DCPS denied the student a free appropriate public education by failing to provide an appropriate placement.
- (5) The Hearing Officer shall find that DCPS denied the student a free appropriate public education by failing to provide the student with appropriate special education and related services; thereby creating a right to compensatory education,.
- (6) DCPS shall convene an IEP meeting to review the assessments, revise the IEP consistent with the assessments.
- (7) DCPS shall issue a notice of placement to a program of the parent's choice, thereby funding the student's placement and transportation.
- (8) DCPS agrees to pay counsel for the complainant reasonable attorney's fees and related costs incurred in this matter.
- (9) All meetings shall be scheduled through counsel for the complainant in writing, via facsimile at 202 742-2098.
- (10) DCPS shall send all notices to counsel for the parent with copies of such to the parent and in the parent's native language.

V. PROCEDURAL POSTURE

A due process complaint was filed on April 20, 2009; and the Student Hearing Officer scheduled the hearing for June 24, 2009; based on a 75 day time frame. However, on April 22, 2009, DCPS filed a waiver of the Resolution Meeting; resulting in rescheduling of the due process hearing, to ensure compliance with the 45 day time frame to complete the hearing and issue a decision. The Hearing Officer rescheduled the hearing for May 22, 2009, at 9:00 a.m.. On April 30, 2009, DCPS filed "District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice".

On May 19, 2009, a pre-hearing conference was held, at which time Petitioner advised the court that parent's witness was not available for the hearing scheduled for May 22, 2009, at 9:00 a.m., and requested a continuance of the hearing. The request for continuance was unopposed by DCPS, and the Hearing Officer granted Petitioner's motion for continuance.

On May 19, 2009, Petitioner filed a Motion for Continuance, requesting continuance of the hearing to May 28, 2009 at 1:00 p.m.. On May 22, 2009, the Hearing Officer issued an Interim Order on Continuance Motion granting Petitioner's motion to continue the hearing; rescheduling the hearing to May 28, 2009, at 1:00 p.m.. The due process hearing convened on May 28, 2009, at 1:00 p.m., at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003, as scheduled.

VI. PRELIMINARY ISSUES

As a preliminary matter, Petitioner requested to withdraw issued 3 and 4 of the complaint; and advised the court that the parties stipulated to Issues 1 and 2 of the complaint, as identified in the Pre-hearing Conference Order. Respondent advised the courts that that the parties agreed to convene a Multidisciplinary Development Team (MDT) meeting on the student's behalf, on June 12, 2009, at 1:00 p.m..

The parties also advised the court that the joint stipulation with regard to Issues 1 and 2; and withdrawal of Issues 3 and 4 of the complaint, resolved all issues in the complaint; and requested that said stipulations be incorporated into the Hearing Officers' Decision (HOD).

VII. DISCLOSURES

The disclosures identified herein were submitted by the parties, however, not admitted into the record due to the parties' resolution of the issues in the complaint, during the court's consideration of preliminary matters.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibit 21; and a witness list dated May 15, 2009. Petitioner's Supplemental Five-Day Disclosures, including Petitioner's Exhibits 22 through Petitioner's Exhibits 28; and a witness list dated May 22, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibit 02; and a witness list dated May 15, 2009.

VIII. ANALYSIS

Stipulations of Fact

Prior to proceeding with a hearing on the merits, the parties entered on the record joint stipulations of facts, requesting that the court render judgment based, in effect, upon the stipulated facts. Specifically, DCPS stipulated that it failed to conduct an annual review of the student's Individualized Education Program (IEP); and convene an IEP team meeting to review the student's independent evaluations, and update the IEP, as appropriate.

Standard for Decision

Where the parties have entered into stipulations of fact upon which they intend to rely, the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported by the moving party to be established except to the extent that such material facts are controverted by affidavit or other written or oral evidence.

By stipulating to these facts, the parties decided that this issue would be decided by the court, on the basis of the stipulated facts, and the record. The parties agree that it is appropriate for the court to treat the case as a trial on stipulated facts, [this court] of necessity draws – and bases legal conclusions on factual inferences.” *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1372 (Fed. Cir. 2006).

Motion to Dismiss/Withdraw a Complaint “with prejudice” or “without prejudice”

Generally, if a party fails or refuses to prosecute a complaint, there exist grounds for the court to dismiss the complaint, “with prejudice”. However, when a complaint is withdrawn voluntarily, the court has not ruled on the merits of “plaintiff's cause of action”, and is precluded from dismissing the complaint, “with prejudice”.

On May 28, 2009, at the due process hearing, Petitioner's Attorney, on behalf of parent and the student, advised the court that parent voluntarily withdrew Issues 3 and 4 of the due process complaint filed on April 20, 2009. The court has not ruled on the merits of the issues identified in the March 27, 2009 due process complaint, precluding dismissal of the complaint, “with prejudice”.

Standard Operating Procedures (SOP), Section 1002.3 provides:

“If the party requesting the hearing decides it does not want to proceed to hearing, that party shall inform the Student Hearing Office and the other party (ies) in writing of the decision to withdraw at the earliest opportunity. “...It is within the discretion of the Hearing Officer whether to grant the withdrawal with or without prejudice.”

IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the joint stipulation of the parties with regard to Issues 1 and 2 of the due process complaint, the Hearing Officer finds that DCPS failed to conduct an annual review of the student's Individualized Education Program (IEP); and convene an IEP team meeting to review the student's independent evaluations, and update the IEP, as appropriate; in violation of "The Individuals with Disabilities Education Act ("IDEA")"; reauthorized as the "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")."

The Hearing Officer also finds that failure to proceed with a hearing on the merits of the issues, precludes the court from rendering a determination of whether the violations denied the student a free appropriate public education, entitling the student to compensatory education services.

Additionally, it is the Hearing Officer's decision that Petitioner's voluntary request to withdraw Issues 3 and 4 of the April 20, 2009 due process complaint is granted; and these issues are dismissed "without" prejudice. Dismissal of issues 3 and 4 of the complaint "without prejudice" is not a final judgment from which an appeal may be taken; therefore, Petitioner is not precluded from refileing [the suit] in the same forum, with regard to said issues."

X. ORDER

Based on the aforementioned, it is on this 6th day of June, 2009, hereby:

(1) **ORDERED**, that that pursuant to request of the parties, the stipulated facts are incorporated herein; and it is further

(2) **ORDERED**, that on June 12, 2009, DCPS shall convene a Multidisciplinary Development Team (MDT)/Individualized Education Program (IEP) team meeting, to conduct an annual review of the student's IEP; and review the student's independent evaluations; and it is further

(3) **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 Spingarn High School, 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

(4) **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

(5) **ORDERED**, that DCPS shall send all notices and schedule all meetings through parent's counsel in writing, via facsimile, with copies to the parent in writing by first class mail; and it is further

(6) **ORDERED**, that this decision and order are effective immediately.

XI. 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 of this Decision and Order, in accordance with 20 U.S.C. 1415 (i)(1)(A) and 34 C.F.R. Section 516(b).

Ramona M. Justice

6-3-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Assistant Attorney General Nia Fripp
Attorney John Straus (202) 742-2098