

STUDENT¹, by and through Parent

Petitioners,

v.

District of Columbia Public Schools

Respondent.

HEARING OFFICER'S DETERMINATION

Date: July 29, 2009

Hearing Officer: Wanda I. Resto, Esquire

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STUDENT SERVICES OFFICE
2009 JUL 29 PM 3:41

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On June 23, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to identify the Student as a child in need of special education services; failing to provide an appropriate educational program, services and placement. The Petitioner requested the Respondent be deemed to have denied the Student a FAPE and ordered to convene an multidisciplinary team ("MDT") meeting to complete an appropriate individualized education plan ("IEP") for the Student and provide appropriate special education and related services. The Petitioner further requested the Respondent be ordered to fund a full time special education private placement of her choice. Additionally, the Petitioner asks that the Hearing Officer determine the Student is entitled to 2 years of a compensatory education services.

On June 25, 2009, the Respondent filed a Motion to Dismiss and Notice of Insufficiency to the Complaint and asserted it is insufficient under 20 USC 1415(b)(7)(A)(ii)(I) and 34 CFR 300.508(b), because it does not describe the nature of the problem of the child relating to the proposed or refused action, including facts relating to the problem. The Respondent alleged that the Complaint fails to provide sufficient facts to determine in what way the standard for FAPE has not been met.

The Respondent further alleged that the Complaint failed to provide facts on the nature of the alleged harm to the Student, and failed to include how the child find provisions have been violated. Additionally, the Respondent alleged that the statute of limitation of the IDEIA of two years is applicable in this case and that any claim prior to June 23, 2007 should be dismissed. The Respondent argued that the Complaint should be dismissed because the issue of failure to evaluate and FAPE were litigated and decided in a Hearing Officer Determination ("HOD") issued on March 24, 2008² where the Petitioner received independent evaluations at public expense and is now prevented from re-litigating the same issue during the time period of 2005-2006 and 2006-2007 school years. The Respondent's position is that all issues that could have been previously raised are barred from litigation again. The Respondent requests the Complaint be dismissed with prejudice. The Respondent further alleged that a June 9, 2009 invitation was sent for a MDT meeting and it is scheduled for June 25, 2009.

On June 30, 2009, the Respondent filed a Motion pursuant to 34 C.F. R. §300.510 agreeing to waive the resolution session and requesting that the case proceed to a due process hearing on the merits.

Counsel for the Petitioner's unavailability required that various attempts be made to convene a telephonic pre-hearing conference call for the above reference matter and it was conducted July 9, 2009 at 9:30 A.M. The parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session. The Petitioner reiterated her claims and her Counsels clarified the Petitioner had requested the Student be evaluated in the 2005/2006 and 2006/2007 school years. Counsel also added that the Petitioner received independent evaluations, submitted them to the Respondent and a meeting was not convened. Counsel indicated there were two occasions when recent meetings were not held because the Respondent was not available. The

² The HOD recognized the issues as failing to identify and to provide the Student with a comprehensive evaluation and concluded "the Petitioner established that the DCPS denied the Student a FAPE by failing to identify and evaluate the Student as a child potentially in need of special education services and Ordered evaluations. See: DCPS-1, HOD, March 24, 2008.

Respondent reiterated its position and requested the Complaint be dismissed with prejudice and asserted a meeting date was agreed and that neither the Petitioner nor her attorney appeared.

A July 11, 2009 Order, allowed the Petitioner until July 14, 2009 to persuade the Hearing Officer that the claim raised in the June 23, 2009 Complaint was not barred by the doctrine of *res judicata* or *collateral estoppel*, that the issues were not previously addressed and resolved in a prior HOD, nor did it conclude with the March 24, 2008 HOD.³ The Petitioner was cautioned that the failure to respond to the Order would cause the dismissal of the Complaint.

The Petitioner responded on July 16, 2009 asserting she signed a Student Evaluation Plan and consent to evaluate in January 2007, and the HOD issued on March 24, 2008 was not fulfill because the evaluations were completed and submitted to the Respondent and a meeting has not happened. Counsel did not articulate in her response why the current Complaint is not barred by the doctrine of *res judicata* or *collateral estoppel*, nor that it was not addressed with the March 24, 2008 HOD. To the contrary Counsel described in details about the Petitioner signed the Consent form and that the evaluations were to be completed on January 17, 2008 and a student evaluation plan was signed. Counsel alleged she provided dates of availability for consideration to hold the MDT eligibility meeting and alleged the IEP did not have measureable goals and nor objectives were provided.

Furthermore, the March 24, 2008, HOD recognized the issues as failing to identify the Student as a child in need of special education services and failing to provide the Student with a comprehensive evaluation. The HOD established that the Respondent denied the Student a FAPE by failing to identify and evaluate the Student as a child potentially in need of special education services and ordered evaluations. The claims are basically the same in both cases and a Hearing Officer already found in the Petitioner's favor and provided relief on the claims in this matter. The evidence in this matter demonstrated that the Petitioner previously presented the same claims contained in the June 24, 2009 Complaint.

Counsel knew or should have known a prior HOD resolved whether the Student was identified, located and evaluated because she was the attorney in the prior Complaint. Now in June 2009, she is presenting the same issues, already decided.

A hearing was held on July 23, 2009, to allow the parties oral arguments on their Motions neither the Petitioner nor her attorney appeared for the hearing. Counsel for the Respondent was present and requested the Complaint be Dismissed without prejudice for Petitioner's failure to pursue the Complaint. The Respondent presented a disclosure letter dated July 16, 2009 identifying 7 witnesses and sixteen documents labeled DCPS 1 through 16, all admitted.

The hearing was convened in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

³ Under the doctrine of claim preclusion or *res judicata*, when a valid final judgment has been entered on the merits, the parties are barred, in a subsequent proceeding, from re-litigating the same claim or any claim that might have been raised in the first proceeding. The judgment embodies an adjudication of all the parties' rights arising out of the transaction involved. *Washington Medical Center, Inc. v. Holle*, 573 A.2d 1269, 1281 (D.C. 1990)(citations omitted).

II. ISSUE(S)

1. Is the claim raised in the June 2, 2009 Complaint barred by the doctrine of res judicata?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student was enrolled in a DCPS during the 2008-2009 school year.⁴
2. There is March 24, 2008, HOD which made a determination involving the same parties of the current Complaint. The HOD recognized the issues as failing to identify and to provide the Student with a comprehensive evaluation and concluded "the Petitioner established that the DCPS denied the Student a FAPE by failing to identify and evaluate the Student *as a child potentially in need of special education services and Ordered evaluations*."⁵
3. On June 23, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), alleging the Respondent denied the Student a FAPE by failing to identify the Student as a child in need of special education services; failing to provide an appropriate educational program, services and placement
4. On June 25, 2009, the Respondent filed a Motion to Dismiss and argued that the Complaint should be dismissed because the issue of failure to evaluate and FAPE were litigated and decided in a Hearing Officer Determination ("HOD") issued on March 24, 2008 and the Petitioner received independent evaluations at public expense and is now prevented from re-litigating the same issue for the time period of 2005-2006 and 2006-2007 school years.
5. On July 9, 2009 at 9:30 A.M. a prehearing conference was held *inter alia* the Petitioner reiterated her claims and her Counsel clarified the Petitioner had requested the Student be evaluated in the 2005/2006 and 2006/2007 school years. Counsel also added that the Petitioner received independent evaluations, submitted them to the Respondent and a meeting was not convened. Counsel indicated there were two occasions when recent meetings were not held because the Respondent was not available.
6. On July 11, 2009, the Petitioner was allowed until July 14, 2009, to persuade the Hearing Officer by June 29, 2009, that the claim raised in the June 23, 2009 Complaint was not barred by the doctrine of res judicata and that it was not previously addressed in a prior hearing, nor did it end with a March 24, 2008 HOD providing a remedy for the Petitioner.
7. On July 16, 2009, the Petitioner filed a Memorandum in response to the July 11, 2009 Order. The Petitioner asserted that in this case there is no dispute that the parties are the same, and that there has been a final judgment, *but that the MDT eligibility meeting has not happened and the Respondent has not presented an appropriate IEP*.⁶

⁴ P# 2 Complaint file June 23, 2009

⁵ See: DCPS-1, March 24, 2008 dated HOD.

⁶ See: Petitioner's Answer to Respondent's Amended Response filed July 16, 2009.

8. A Hearing Officer Determination (“HOD”) issued on March 24, 2008 provided the Petitioner independent evaluations at public expense. The issues of failure to identify and to evaluate and the determination of denial of FAPE was litigated and decided previously.⁷

IV. CONCLUSIONS OF LAW

FAPE Determination

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEIA regulations at 34 C.F.R. § 300.17 define a FAPE as “special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP).”

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

The Respondent met its legal obligation under the IDEIA. Here is why.

The IDEIA at 20 U.S.C. 1412(a)(3), and its regulations at § 300.111 , require that the Respondent have in effect policies and procedures to ensure that, among other things, all children with disabilities residing in the District of Columbia, including children with disabilities who are homeless children or are wards of the state, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated.

An existing HOD recognized the issues as failing to identify and to provide the Student with a comprehensive evaluation and concluded “the Petitioner established that the DCPS denied the Student a FAPE by failing to identify and evaluate the Student *as a child potentially in need of special education services and Ordered evaluations*. The doctrine of *res judicata* is applicable.

Res judicata helps “conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and prevent serial forum-shopping and piecemeal litigation.” *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981); see also *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The Complaint alleged that DCPS failed to timely identify and evaluated and it requested a remedy for the school year of 2006-2007 and 2007- 2008.

⁷ See: DCPS-1, March 24, 2008 dated HOD.
HOD

The Hearing Officer finds that in the March Complaint, the thing sued for, among others, was the identification and evaluation of the Student for special education needs. In the Complaint filed on June 23, 2009 the thing sued for is for failing to identify and evaluate.

The Hearing Officer finds that a hearing on the merits was already held which determined the Respondent failed to identify and to provide the Student with a comprehensive evaluation and concluded "the Petitioner established that the DCPS denied the Student a FAPE". The identification of the Student as a child in need of special education was decided by the Hearing Officer in a prior proceeding, and a final judgment on the merits of the issue was rendered. Therefore, the claims are barred by application of the Doctrine of *res judicata*.⁸

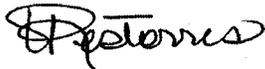
The Petitioner failed to demonstrate that the issues and relief sought are different from those resolved by a prior HOD. In consideration of the evidence, the hearing officer finds that the issues presented in the June 23, 2009 Complaint are barred by *res judicata* it is hereby:

VI. ORDER

1. **ORDERED**, the Complaint is **DISMISSED WITH PREJUDICE**.
2. This Order resolves all issues presented in the Petitioner's June 23, 2009 due process hearing Complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)



Wanda Iris Resto - Hearing Officer

Date: July 29, 2009

⁸ Under the doctrine of claim preclusion or *res judicata*, when a valid final judgment has been entered on the merits, the parties are barred, in a subsequent proceeding, from re-litigating the same claim or any claim that might have been raised in the first proceeding. The judgment embodies an adjudication of all the parties' rights arising out of the transaction involved. *Washington Medical Center, Inc. v. Holle*, 573 A.2d 1269, 1281 (D.C. 1990)(*citations omitted*).