

DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

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Confidential

OSSE
STUDENT HEARING OFFICE
2009 NOV -9 AM 10:13

<p>STUDENT¹, by and through Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DECISION</p> <p>Date: November 7, 2009</p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On August 27, 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 ("IDEIA"), alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE").²

The following issues were presented in the Complaint:

- A. Did the Respondent fail to convene a multidisciplinary team meeting after receiving the evaluation in July 2009; to discuss evaluations; and develop an individualized education plan ("IEP") for the student?
- B. Whether the Respondent failed to provide an appropriate placement for the 2009-2010SY?
- C. Did the DCPS fail to provide the student special education; related services during the 2008-09SY?

On September 3, 2009, Attorney Matthew Bogin sent a correspondence to the Student Hearing Office indicating that he represents [REDACTED] (" [REDACTED] ") the school the student is attending; and asserted it had not receive a copy of the Complaint nor a response to his inquiry from Attorney Chike Ijeabunwu.

The DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed on September 8, 2009. The Respondent asserted the Petitioner filed the Complaint three days after the commencement of the 2009-2010 school year. The Respondent alleged it authorized an independent speech and language evaluation on August 27, 2009 and once it receives the report for that evaluation; then the multidisciplinary team ("MDT") will convene to discuss all current evaluations. The Respondent also contends there has been no hardship to the student.

The Hearing Officer attempted to convene a telephonic pre-hearing conference call for the above reference matter on September 29, 2009, Counsel for the Petitioner was not available; various other attempts were made; the last on October 20th; Counsels did not agree on a date.

On October 22, 2009, the Hearing Officer sent an E-mail to Counsel for the Petitioner; asking what his response was to the assertion made by Counsel for the PCS.³⁴ Mr. [REDACTED] responded on, Oct 23, 2009 at 2:39 PM. "Our complaint has not alleged anything against the charter school. It is a follow-up to an earlier HOD which DCPS has failed to comply with. The charter school is mentioned only as a school of attendance for the student."

² 20 U.S.C. §1415(c)(2)(B)(i)(I)

³ Hearing Officer Exhibit-1 - On Oct 22, 2009 at 8:05 AM; Counsel for the PCS wrote "[REDACTED]" has not received a complaint concerning the Student since the one that was dismissed in January of 2009. We have never been served with any filings nor have we had the opportunity to attend a resolution meeting. We can only assume that although we are the school that the student attends the complaint does not concern us and we will not be participating in the hearing."

⁴ Hearing Officer Exhibit-2 - E-mail from: W. I. Resto restolaw@gmail.com Date: Thu, Oct 22, 2009 at 2:05 PM Subject: Re: the Student.

An October 23, 2009 Order, *granted* [REDACTED] request to dismiss any claims that may arise in the current complaint against it; and it further *ordered*, that all motions and disclosure were due by 4:30 PM on October 21, 2009.

A hearing was held on October 28, 2009, at 1 PM. The hearing was conducted in accordance with the rights established under the IDEIA and the implementing federal and local regulations, and the SOP.⁵

During the hearing the Respondent asserted that [REDACTED] elected to be an LEA Charter and has not made an appeal to DCPS or the Office of State Superintendent of Education ("OSSE") regarding this student or about an inability to implement the recommended educational program. The Respondent further asserted there were no facts alleged for which a remedy could be provided and requested the Complaint be dismissed.

Counsel for the Petitioner argued that the DCPS was the entity responsible for the evaluation of the student; the review of the evaluation and the implementation of any relief.

Counsel for the Respondent asserted that Counsel for the Petitioner acted in a frivolous manner in the filing of the present Complaint, when he knowingly made claims against the DCPS which he knew could not prevail. The Respondent requested the Complaint be found without merit and dismissed with prejudice.

II. ISSUE(S)

1. Should the Petitioner prevail in her claims; which entity has the responsibility for implementing the Order in the present matter?
2. Is [REDACTED] a necessary party to this litigation?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student is attending [REDACTED] since 2008.⁶
2. On October 23, 2009 Counsel for the Petitioner asserted the Complaint had not alleged anything against [REDACTED]
3. The Student has not been enrolled in a DCPS since 2008.⁷

⁵ 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").

⁶ Complaint filed September 3, 2009.

⁷ Representations made by both Counsels at the Hearing.

4. The Petitioner did not present evidence which shows the [REDACTED] made an appeal to DCPS or OSSE regarding the LEA's inability to implement the educational program for the student.
5. The Petitioner did not provide any evidence there was a remedy that the Hearing Officer could provide to be implemented by DCPS.
6. Counsel for the Petitioner- Chike Ijeabunwu failed to include an essential party in the Complaint.⁸

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 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)." ⁹

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.

Pursuant to D.C. Code § 38-1802.02(19), each public charter school shall elect to have the District of Columbia Public Schools (DCPS) serve as its Local Education Agency (LEA) for purposes of the Individuals with Disabilities Education Act (IDEIA), 20 USC § 1400 *et seq.*, (a District Charter), or shall be an independent Local Education Agency (an LEA Charter).

The student in the present case was and is enrolled in a public charter school which is its own LEA during the period of the alleged violations.

The LEA Charter are required to establish and implement policies and procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education (FAPE). An LEA Charter is responsible for responding

⁸ Counsel for the Respondent requested the Complaint be dismissed with prejudice. The Hearing Officer determined that while Mr. Ijeabunowu acted irresponsibly in representing his client; the student would not suffer the ultimate consequence of a dismissal with prejudice.

⁹ 34 C.F.R. § 300.17

to any due process complaint made in respect of a child enrolled in the LEA Charter, including any child who attends a nonpublic school. The Student Hearing Office, located within the OSSE, will continue to adjudicate due process complaints.¹⁰

Pursuant to DCMR .3019.3 Each LEA Charter is responsible for compliance with all requirements applicable to an LEA under the IDEA and its implementing regulations (34 C.F.R. Part 300), and local laws, regulations and policies, including, providing a FAPE.¹¹

The SEA is responsible for oversight, general supervision, and to ensure compliance with educational standards of the SEA. Here, OSSE is the SEA because CCPCS elected to be an LEA Charter. Pursuant to local law the "LEA Charters shall be responsible for ensuring that the requirements of Part B of the Act [IDEIA], including documentation of required policies and procedures, are met in regard to children enrolled in their schools, consistent with the requirements of Chapter 38."). The "LEA Charters are responsible for special education evaluations, and, if necessary, IEPs and placements for children with disabilities enrolled in their facilities." The SEA is only involved in traditional LEA functions on an ad-hoc basis. The LEA must make an appeal to the SEA when the LEA Charter concludes it cannot serve a student. Only if such an appeal is outstanding is the SEA required as a matter of law to step into the LEA Role. ¹²

When a Public Charter School elects to be its own LEA, District of Columbia Public Schools ("DCPS") fulfills the role of the State Education Agency ("SEA") under the IDEA. See D.C. Mun. Reg. § 5-3019.9. When an LEA Charter concludes that it cannot serve a child with a disability enrolled in its facility with the funds available to it, it must appeal to DCPS, in DCPS's role as the SEA, for assistance. *Id.* If DCPS agrees that the LEA Charter cannot serve the student, DCPS will assume responsibility for the child. *Id.* § 5-3019.11. ¹³

Counsel for the Petitioner's filed the due process complaint well aware that the student was and is enrolled in a PCS and failed to include it in the Complaint. It was *not* reasonable, or Petitioner to have proceeded through the hearing after the Attorney was notified of a missing party by the September 3, 2009 letter from Counsel for [REDACTED] and later he was offered an opportunity to explain or rectify the situation by the Hearing Officer on October 22, 2009.

The student has been enrolled in the PCS since July 2008 the PCS is an LEA Charter; there is no indication that the PCS is unable to provide the student services. If the Petitioner prevails on the merits of her Complaint, the PCS-- not DCPS -- will be required to provide the special services. The current scenario requires the involvement of the PCS, which Counsel for the Petitioner decided to relieve from participating in the due process hearing. Furthermore, during the Hearing; Counsel for the Petitioner

¹⁰ Chapter 30 of Title 5 of the (*District of Columbia Municipal Regulations* (DCMR) Section 3019.3 *Due Process Complaints*; and 20 U.S.C. § 1415(a).

¹¹ DCMR 3019.3

¹² 20 U.S.C. §1412 (a) (11); DCMR 3019.2; and 3019.9 (2003).

¹³ *IDEA PUBLIC CHARTER SCHOOL, Plaintiff, v. Crystal BELTON, et al., Defendants*
U.S. District Court, District of Columbia 05-467 (RMC) 106 LRP 17402 March 15, 2006

reasserted there were no claims in the present Complaint against CCPCS and that the ultimate responsible party was DCPS.

Under the circumstances in this Complaint, relief cannot be afforded to the Petitioner, without requiring the Petitioner to include the [REDACTED] as a party to the Complaint.

V. SUMMARY OF DECISION

The DCPS is not the LEA for the student. The student has been enrolled in a PCS since July 2008; the PCS is an LEA Charter; the Petitioner did not make any claims against the PCS. The Petitioner cannot be afforded relief against the party she chose to bring to this Complaint.

Counsel for the Petitioner acted in a frivolous manner in the filing the Complaint, when he knowingly made claims against the DCPS which he knew could not prevail. The Hearing Officer requested a response to the assertion made by the [REDACTED] of the failure to serve it with the Complaint; Counsel for the Petitioner failed to acknowledge; and failed to amend his error.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the DCPS has not denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, the Complaint is dismissed, and it is further;

ORDERED, that Counsel for the Petitioner-Chike Ijeabunwu, is hereby admonished for continuing to litigate after the Complaint and the proceedings clearly became unreasonable.

This order resolves all matters presented in the Petitioner's August 27, 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

Signed: _____, 2009

APPENDIX A
INDEX OF NAMES
In the MATTER OF "Student" V. DCPS
In the MATTER OF "Student" V. DCPS

Child and Child's SHO ID 2009-1234 Student ID 9102786	[REDACTED]
Child's Parent(s)	[REDACTED]
Child/Parent's Representative	[REDACTED]
School System's Representative	[REDACTED]
Attending School at time of filing DPC	[REDACTED]

Brown, Pamela M. (OSSE)

**** NOTE: Please do not modify subject line when replying ****
**** This email was sent by Wanda Resto-Torres <mailto: Wanda.Resto@dc.gov>**

Counsels,
Attached the HOD for RJ. WResto

OSSE
HEARING OFFICE
NOV -9 AM 10:13