



## 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.

## Discussion

Petitioner is the grandparent and next friend of a \_\_\_\_\_ year-old student ("Student") attending \_\_\_\_\_ a non-public school in Virginia. Both Petitioner and the Student reside in the District of Columbia. Thus, this Hearing Officer has jurisdiction over this matter.

Petitioner filed a Due Process Compliant Notice ("Complaint") on March 19, 2009. In the Complaint, Petitioner named three parties as respondents: the District of Columbia Public Schools ("DCPS"), which was named both as DCPS and as the Local Education Agency ("LEA"); the State Education Agency ("SEA"), which in Washington, D.C. is the Office of State Superintendent of Education (OSSE); and \_\_\_\_\_ a non-public school in Washington, D.C. The Complaint alleged only that \_\_\_\_\_ failed to provide the Student with speech therapy during the 2007-2008 school year and therefore "denied her accommodations that she required to benefit from her public education." The Complaint further alleged that \_\_\_\_\_ and, [sic] and the SEA have violated IDEA, as amended; Section 504 of the Rehabilitation Act, and D.C. Municipal Regulations promulgated at Title V." The Complaint made no allegations against DCPS, other than naming DCPS as a party.

Although the Student no longer attends \_\_\_\_\_ the Complaint sought the following relief: "An order requiring \_\_\_\_\_ and the SEA to provide [the Student] with compensatory Speech [sic] therapy, specialized reading instruction, and tutoring until such time as her reading skills are age and grade appropriate."

On March 30, 2009, counsel for Respondent OSSE filed OSSE's Response to the Petitioner's Complaint ("OSSE Response"). The OSSE Response requested that this Hearing Officer dismiss the Complaint against OSSE because the Complaint alleged no claims against OSSE that are legally cognizable in this forum.

This Hearing Officer subsequently requested that counsel for Petitioner file a memorandum explaining the claims in the Complaint and the alleged culpability of each respondent as the Complaint was poorly drafted and contained no section outlining Petitioner's legal claims. Counsel for Petitioner filed the memorandum on April 1, 2009. The memorandum was marginally helpful and still did not spell out the exact legal claims on which Petitioner planned to proceed, other than that \_\_\_\_\_ failed to provide the Student speech therapy and as a result cannot read on grade level. This Hearing Officer interpreted this claim as a claim against DCPS and not OSSE.

This Hearing Officer held a status conference with counsel for Petitioner and counsel for Respondent on April 1, 2009, to discuss whether Petitioner had alleged any cognizable claims against OSSE and whether this Hearing Officer had jurisdiction over the claims brought under § 504 of the Rehabilitation Act.<sup>2</sup> Further, this Hearing Officer wanted to clarify whether Petitioner actually intended to bring claims against \_\_\_\_\_ as a non-public school, or against DCPS as the LEA charged with providing services at non-public schools.

After extensive conversation in the 1.5 hour status conference, this Hearing Officer found that Petitioner had stated no legally cognizable claims against OSSE and informed counsel for OSSE that she planned to issue an order dismissing OSSE from the Complaint. Counsel for Petitioner then requested leave to file an amended complaint that did not include OSSE. This Hearing Officer issued an order granting Petitioner leave to amend the Complaint and instructed counsel for file a motion and attach the amended complaint.

Counsel for Petitioner filed Petitioner's Motion for Leave to Amend Due Process Complaint Notice, with the Amended Complaint attached, on April 2, 2009. The Amended Complaint made claims against DCPS, only. Like the original Complaint, the Amended Complaint lacked a section asserting Petitioner's legal claims against DCPS, other than to state that DCPS failed to provide the Student speech therapy during school year 2007-2008 and as a result, the Student is reading below grade level. The Amended Complaint requested as a remedy that this Hearing Officer order DCPS to provide the Student compensatory speech and language therapy, specialized reading instruction, and tutoring until such time as her reading skills are age and grade appropriate.

On April 24, 2009, counsel for DCPS filed DCPS's Response, Notice of Insufficiency, and Motion to Dismiss Petitioner's Due Process Complaint Notice ("Response"). The Response and Notice of Insufficiency was filed beyond the statutory deadline,<sup>3</sup> and thus this Hearing Officer did not rule on the sufficiency motion.

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<sup>2</sup> Section 504 of the Rehabilitation Act provides that:

"No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service...."

29 U.S.C. § 794(a). As applied to DCPS public and non-public schools, § 504 prohibits a school system from denying a student the right to participate in public education or enjoy the benefits offered by public school programs because of the student's disability.

<sup>3</sup> See 34 C.F.R. § 300.508 (d) (4) (respondent must file responsive pleading within ten days of receipt of the complaint unless LEA issued prior written notice regarding the subject matter contained in the due process complaint); 34 C.F.R. § 300.508 (d) (due process complaint must be deemed sufficient unless respondent notifies the hearing officer and opposing party within 15 days of the filing of the complaint that the respondent believes the due process complaint does not meet the pleading standards of the regulations implementing IDEIA.)

The Motion to Dismiss portion of the DCPS Response asserted that Petitioner had failed to provide sufficient notice for DCPS to be able to respond, resolve, or defend the issue raised regarding the ultimate issue of the Student's right to a free, appropriate, public education ("FAPE"). The Response asserted that the Amended Complaint failed to provide sufficient facts to determine in what way the standard for FAPE was not met, i.e., whether there had been procedural deficiency, and/or whether the IEP was reasonably calculated to provide the Student with educational benefit.<sup>4</sup> The Response further asserted that the Amended Complaint should be dismissed because it failed to state a claim for which relief may be granted, the doctrine of laches and the statute of limitations barred Petitioner's claims, and the Amended Complaint is frivolous and without foundation.

The due process hearing was scheduled for 9:00 a.m. on May 18, 2009. At the outset of the hearing, in an effort to establish a structure for the hearing and discuss the evidence that would be presented, counsel and this Hearing Officer attempted to discern from the Amended Complaint the nature of the claims Petitioner asserted against DCPS.

Counsel for Petitioner requested that this Hearing Officer extend the statute of limitations due to misrepresentations by DCPS. Counsel for Petitioner then explained in explicit detail a chain of events starting in December 2003 and culminating in the development of an IEP on September 20, 2007, as support for the misrepresentation allegation, which counsel failed to plead in either the initial Complaint or the Amended Complaint. Counsel for Petitioner identified the misrepresentations as (1) the MDT's 2003 determination that the Student no longer required speech and language therapy; (2) the representation by DCPS at a 2005 MDT meeting that speech therapy would be provided to the Student if Petitioner requested it; and (3) the misrepresentation in the September 20, 2007, IEP that the Student required only thirty (30) minutes of speech and language therapy.

Counsel for Petitioner added that, in 2006, \_\_\_\_\_ was required to conduct comprehensive re-evaluations of the Student but failed to include speech and language testing in the evaluations that were performed, and that no speech and language testing was conducted until August 2007. Counsel for Petitioner further added that the September 20, 2007, IEP was developed by a team that did not include a speech language therapist, and, the IEP lacked speech and language goals and objectives. As a result, the Student did not receive speech and language therapy in 2007, according to counsel for Petitioner.

None of the facts recited by counsel for Petitioner as support for extending the statute of limitations were alleged in the Complaint or Amended Complaint. Neither of these pleadings even mentioned that Petitioner was seeking to extend the statute of limitations. Nor were any of these facts alleged in either pleading as support for Petitioner's claim that DCPS denied the

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<sup>4</sup> See *Bd. of Education v. Rowley*, 458 U.S. 176, 188 (1982) (citation omitted) ((FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction"). FAPE is tailored to the unique needs of the handicapped child by means of an individualized educational program (IEP). *Id.* at 181.

Student a FAPE by failing to provide her speech and language services during the 2007-2008 school year.

When this Hearing Officer informed counsel for Petitioner that she had failed to plead these facts, failed to assert a denial of FAPE for 2003 to 2007, and failed to assert that the statute of limitations should be extended in either the initial Complaint or Amended Complaint, and thus failed to put DCPS on notice of these claims, counsel for Petitioner offered to withdraw those claims.

Counsel for Petitioner then informed counsel for DCPS and this Hearing Officer that she planned to present two expert witnesses who would testify that DCPS should have been on notice as of March 19, 2007, two years to the day from the date of the filing of the Complaint, that the Student should have been receiving speech and language services and that the failure to provide the speech and language therapy denied the Student a FAPE. This Hearing Officer informed counsel for Petitioner that she had not made these claims in either the Complaint or Amended Complaint.

Then, this Hearing Officer found that counsel for Petitioner failed to provide DCPS notice of the general nature of the claims regarding the alleged failure of DCPS to provide the Student speech and language services in the 2007-2008 school year. This Hearing Officer found that counsel for Petitioner failed to provide sufficient notice of Petitioner's claims for DCPS to be able to respond to and/or defend Petitioner's allegations. This Hearing Officer further found that Complaint and Amended Complaint failed to state any claims upon which relief may be granted.

The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Hinson v. Merritt Educational Center*, 512 F. Supp. 2d 22, 26 (D.D.C. 2007) (reciting pleading standard for due process hearings pursuant to the IDEIA and citing, e.g., *Conley v. Gibson*, 355 U.S. 41, 47, (1957)). Although "detailed factual allegations" are not necessary to withstand a *Rule 12 (b)(6)* motion to dismiss, to provide the grounds of entitlement to relief, a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.* (citing e.g., *Conley*, 355 U.S. at 47). A pleading "must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007).

Because counsel for Petitioner failed to meet the notice pleading standards of Fed. R. Civ. P. 12 (b)(6) and of this forum, as stated above, this Hearing Officer dismissed Petitioner's Amended Complaint without prejudice. This Hearing Officer then informed Petitioner that she would be free to file another complaint that complies with the rules of notice pleading the very next day, and that this Hearing Officer would attempt to expedite the hearing so that the Student would not be prejudiced by the failings of her counsel.

**ORDER**

Upon consideration of Petitioner's request for a due process hearing, the response thereto, and for the reasons stated above, on this 28th day of May 2009, it is hereby

**ORDERED** that the Complaint is **DISMISSED WITHOUT PREJUDICE**; and

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

/s/

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Frances Raskin  
Hearing Officer

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

This is the final administrative decision in this matter. 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 the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

Copies to:

Karen Alvarez, counsel for Petitioner  
Daniel McCall, counsel for Respondent  
Student Hearing Office