



Office of the



State Superintendent of Education

November 4, 2011



District of Columbia Public Schools



RE: State Complaint No. 011-003

LETTER OF DECISION

PROCEDURAL BACKGROUND

The State Complaint Office of the Office of the State Superintendent of Education (OSSE), Division of Special Education received a State Complaint on [REDACTED] from [REDACTED] (complainant) against the District of Columbia Public Schools (DCPS) on behalf of students and parents who have filed due process complaints against DCPS and attended resolution meeting sessions. The complainant alleges that DCPS violated certain provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and regulations promulgated at 34 CFR Part 300, specifically, failure to execute a legally binding agreement following the resolution of a dispute at a resolution meeting; and, interference with the right of any party to a due process hearing to be accompanied and advised by counsel.

According to 34 CFR §300.152, the State must issue a written decision that addresses each allegation in the complaint within sixty (60) days, unless exceptional circumstances exist with respect to a particular complaint. On [REDACTED], OSSE extended the timeline for the final decision of this complaint for 30 days due to the complexity of the issues and the number of student files under review. During the course of the investigation, it became apparent that a more in-depth look at a number of due process case files was necessary, and on [REDACTED], OSSE issued an additional 15 day extension of the timeline for the decision. Therefore, a letter of decision for this complaint is due by [REDACTED].

The State Complaint Office for OSSE has completed its investigation of the State Complaint. This Letter of Decision is the report of the final results of OSSE's investigation.

COMPLAINT ISSUES

The allegations raised in the complaint, further clarified by a review of documents and interviews or revealed in the course of the investigation, raised the following issues under the jurisdiction of the State Complaint Office:

1. Whether DCPS failed to execute a legally binding agreement following the resolution of a dispute at a resolution meeting, as required by 34 CFR §300.510(d)?
2. Whether DCPS used resolution disposition forms to improperly delay the timelines for resolution of a due process complaint detailed at 34 CFR §300.510(b) and (c)?
3. Whether DCPS failed to send a representative with decision-making authority on behalf of the LEA to resolution meetings, as required by 34 CFR §300.510(a)(1)(i)?
4. Whether DCPS interfered with the right of any party to a due process hearing to be accompanied and advised by counsel, detailed at 34 CFR §300.512(a)(1)?

INVESTIGATIVE PROCEDURE

This investigation included interviews with the following individuals:

1. Complainant
2. Parents' attorneys
3. DCPS [REDACTED], Office of Special Education
4. DCPS [REDACTED], Office of Special Education

The investigation also included review of the following documents which were either submitted by the complainant, submitted by DCPS, accessible via the Special Education Data System (SEDS) or accessible via the Blackman Jones Database:

[REDACTED]

GENERAL FINDINGS OF FACT

1. According to data compiled by the Student Hearing Office as of [REDACTED], 243 due process complaints filed against between [REDACTED] and [REDACTED] had not resulted in a hearing officer's determination or written agreement.

PRELIMINARY DISCUSSION AND DESCRIPTION OF INVESTIGATION

The complainant filed this complaint as a systemic challenge to DCPS's alleged practice of failing to execute a legally binding agreement if resolution is reached at a resolution meeting session, and the interference of that alleged practice with the parent's right to be accompanied and advised by

counsel. OSSE notes DCPS's contention in its response that, because no class was certified for representation and because the complainant only specifically named one student, that this complaint was filed only on behalf of the named student. However, as noted in the Comments to the Federal Regulations, a State educational agency (SEA) is required to resolve any complaint that meets the filing requirements, including complaints, like this one, that raise systemic issues, in addition to complaints filed on behalf of individual children. (71 Federal Register 46540:46605 (14 August 2006)) The broad scope of the State complaint procedures is critical to each State's exercise of its general supervision responsibilities and provides the SEA with a powerful tool to identify and correct noncompliance with the IDEA. The limitations suggested in DCPS's response do not apply to the State complaint procedures and would diminish the SEA's ability to ensure that LEAs are in compliance with the Act and its implementing regulations. (See 71 Federal Register 46540:46601 (14 August 2006))

In order to examine relevant due process complaint records, OSSE identified 243 due process complaints that did not result in a hearing officer's determination (HOD) or written settlement agreement (SA) during the period of investigation. Thirty-four (34) attorneys were responsible for filing these 243 due process complaints. OSSE provided these attorneys with access to a web-based survey in which they could indicate whether they had resolved a dispute at a resolution meeting without executing a written agreement. Following the survey, six attorneys, as well as the complainant, agreed to interview with OSSE's investigator and describe the circumstances under which their case did not result in a written agreement.

The attorneys alleged that DCPS attempted to resolve due process complaints through an offer of compensatory education or funding of an independent educational evaluation, but refused to execute written agreements that contained these offers. The attorneys indicated that although they would indicate that they would proceed to hearing without a written agreement, DCPS would not sign the resolution disposition form to indicate that no agreement could be reached and end the resolution period. At hearing, DCPS would argue that their offer had rendered the complaint moot and the hearing officer would dismiss the complaint. In addition, the attorneys indicated that the case managers who attended the resolution meetings did not have the authority to negotiate on behalf of DCPS, but could only make an offer to the complaining party.

In order to assess these allegations, OSSE reviewed the available resolution period disposition forms, resolution meeting notes, withdrawal orders and orders of dismissal for a sample of 50 of the 243 due process complaints that did not result in an HOD or SA during the period of investigation. OSSE's sample included both withdrawn and dismissed due process complaints, and complaints filed by 20 of the 34 attorneys who filed a due process complaint that did not result in an HOD or SA during the period of investigation.

ISSUE ONE: WRITTEN SETTLEMENT AGREEMENTS

Findings of Fact

1. OSSE reviewed resolution period disposition forms, resolution meeting notes, withdrawal orders and orders of dismissal for 50 of the 243 due process complaints that did not result in an HOD or SA during the period of investigation.

2. Of the 50 reviewed files, 11 contained documentation relevant to the attorneys' allegations that agreement was reached but not reduced to a written agreement.
3. Five of these 11 files included orders of withdrawal that indicate that the complaint was resolved or agreement was reached at the resolution meeting, but no written agreement was available in the file.
4. Four of these 11 files included documentation in the form of meeting notes or withdrawal orders that indicate that DCPS did not make an offer of written settlement but did offer substantive relief in the form of prior written notice of placement, authorization for independent evaluation, invitation to a meeting, or determination of eligibility.
5. Two of these 11 due process complaints resulted in a dismissal by the hearing officer following a ruling that DCPS's offer of substantive relief, although outside of a written agreement, rendered the complaint moot.
6. In the complainant's example case, a due process complaint was filed regarding DCPS's failure to identify the student as part of its child find obligation and failure, upon the parent's referral, to complete an initial evaluation.
7. The complainant requested completion of a comprehensive psychological evaluation, a meeting to review the evaluation results within 10 days of completion, and payment of reasonable attorney's fees.
8. The hearing officer stated in the order of dismissal that the petitioner had obtained the substantive relief sought in the filing in the form of DCPS's authorization of an independent comprehensive psycho-educational assessment and declared the complaint moot.
9. Five days after the submission of the independent assessment results, DCPS sent the parent a letter of invitation with a choice of meeting times either 41 or 42 days later.

Discussion/Conclusion

DCPS is out of compliance with 34 CFR §300.510(d).

Pursuant to 34 CFR §300.507(a), a parent or a public agency may file a due process complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of a free appropriate public education to the child. Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing, the local educational agency (LEA) must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint. (34 CFR §300.510(a)(1)) The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint. (34 CFR §300.510(a)(2)) If a resolution to the dispute is reached at this meeting, the parties must execute a legally binding agreement that is signed by both the parent and a representative of the agency who has the authority to bind the agency and is enforceable in any State court of competent jurisdiction or in a district court of the United States. (34 CFR §300.510(d))

OSSE reviewed the available resolution period disposition forms, resolution meeting notes, withdrawal orders and orders of dismissal for 50 of the 243 due process complaints that did not result in an HOD or SA during the period of investigation. Of the 50 reviewed files, 11 contained documentation relevant to the complainant's contention that DCPS has a practice of reaching

agreement but not reducing the agreement to writing. Five of these 11 files included orders of withdrawal that indicate that the complaint was resolved or agreement was reached at the resolution meeting, but no written agreement was available in the file. Four of these 11 files included documentation in the form of meeting notes or withdrawal orders that indicate that DCPS did not make an offer of written settlement but did offer substantive relief in the form of prior written notice of placement, authorization for independent evaluation, invitation to a meeting, or determination of eligibility. Two of these 11 due process complaints resulted in a dismissal by the hearing officer following a ruling that DCPS's offer of substantive relief, although outside of a written agreement, rendered the complaint moot.

OSSE concludes that the five files that indicated agreement was reached at the resolution meeting but for which no written agreement was available represent noncompliance with 34 CFR §300.510(d). Therefore, DCPS is out of compliance with 34 CFR §300.510(d). With respect to the four files including documentation indicating that DCPS did not make an offer of written settlement but did offer substantive relief, OSSE could not determine whether the offer of relief was acceptable to the parent and, if so, would have required a written agreement as required by 34 CFR §300.510(d). Therefore, OSSE makes no finding of noncompliance based on these four files. There also was insufficient information in the remaining two files from which OSSE could determine whether agreement was reached at the resolution meeting although the subsequent dismissal of the complaint based on DCPS's offer of substantive relief suggests that an agreement was or could have been reached during the resolution meeting and, consequently, should have been reduced to writing.

Even though the complainant's example due process complaint was not one of the five instances of noncompliance noted above, the circumstances of that case illustrate a potential problem with declaring a complaint moot following an offer of substantive relief. In the example case, a due process complaint was filed regarding DCPS's failure to identify the student as part of its child find obligation and failure, upon the parent's referral, to complete an initial evaluation. As relief, the complainant requested completion of a comprehensive psychological evaluation, a meeting to review the evaluation results within 10 days of completion, and payment of reasonable attorney's fees. In the order of dismissal of this complaint, the hearing officer found that the petitioner had obtained the substantive relief sought in the filing in the form of DCPS's authorization of an independent comprehensive psycho-educational assessment and declared the complaint moot. However, the relief sought by the original complaint included a request that evaluation results be reviewed within 10 days. The complainant asserts in [REDACTED] update to the State complaint that the results of this assessment were submitted to DCPS and five days later, the parent received a letter of invitation to review the assessment results. DCPS offered the parent a choice of meeting times either 41 or 42 days later which was considerably later than the 10 days that the parent sought during the resolution meeting.

ISSUE TWO: RESOLUTION DISPOSITION

Findings of Fact

1. OSSE reviewed resolution period disposition forms, resolution meeting notes, withdrawal orders and orders of dismissal for 50 of the 243 due process complaints that did not result in an HOD or SA during the period of investigation.
2. Fourteen of the 50 reviewed due process complaint files included a resolution meeting form that indicated that no agreement could be reached by the end of the 30-day resolution period, even though the form was signed and dated less than 30 days after the due process complaint was filed.
3. In four of these 14 cases, the hearing or prehearing conference was subsequently either scheduled or held when fewer than 30 days had passed since the filing of the due process complaint. The remaining 10 of 14 cases were subsequently withdrawn by the petitioner in greater than 30 days after the complaint was filed.
4. One of these fourteen forms included a handwritten note from the parent stating that [REDACTED] wanted to select the option to end the 30-day resolution period and start the 45-day timeline for decision because the option indicating no agreement could be reached at the end of the 30-day resolution period was “not factually accurate, and the parties agree that no agreement is possible.”
5. One of these fourteen forms corresponded with resolution meeting notes that indicated that the parent’s attorney wanted to select the option to end the 30-day resolution period and start the 45-day timeline for decision but that DCPS was choosing the option indicating that agreement could not be reached at the end of the 30-day resolution period.

Discussion/Conclusion

DCPS is in compliance with 34 CFR §300.510(b) and (c).

The IDEA at 34 CFR §300.510(b)(1) provides that if the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur. The timeline for issuing a final decision begins at the expiration of this 30-day period. (34 CFR §300.510(b)(2)) The 45-day timeline for the due process hearing starts the day after one of the following events: both parties agree in writing to waive the resolution meeting; after either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process. (34 CFR §300.510(c)) Some of the attorneys OSSE interviewed during the course of the investigation indicated that DCPS would not agree to end the 30-day resolution period even when it became clear that resolution was not possible.

The resolution period disposition forms under review in these due process complaints include three possible outcomes. First, the parties can indicate that a resolution agreement was reached that satisfies all issues in the complaint. Second, the parties can indicate that no agreement was reached at the end of the 30-day resolution period and the case should proceed to a due process hearing. Third, the parties can indicate that although the 30-day resolution period has not yet expired, they agree that no agreement is possible and the 45-day timeline for the decision should commence the day after the resolution period disposition form is signed.

OSSE's review of the due process complaint records sampled for review revealed some confusion about accurately completing the resolution period disposition forms. Fourteen of the 50 due process complaint files included a resolution meeting form that indicated that no agreement could be reached by the end of the 30-day resolution period, even though each of these forms was signed and dated less than 30 days after the due process complaint was filed. One of these fourteen forms included a handwritten note from the parent stating that [REDACTED] wanted to select the option to end the 30-day resolution period and start the 45-day timeline for decision because the option indicating no agreement could be reached at the end of the 30-day resolution period was "not factually accurate, and the parties agree that no agreement is possible." Another of the fourteen forms corresponded with resolution meeting notes that indicated that the parent's attorney made a similar request for the same reason.

In four of these 14 cases, the hearing or prehearing conference was either scheduled or held when fewer than 30 days had passed since the filing of the due process complaint. The remaining 10 of 14 cases were subsequently withdrawn by the petitioner and it is not clear what if any impact the selection on the resolution period disposition form had on the outcome of the complaint. OSSE did not find evidence of bad faith or intent to delay on the part of DCPS in completing the resolution period disposition forms in the manner described. OSSE encourages DCPS to ensure that DCPS attorneys and case managers are familiar with the meaning of the options available on the resolution period disposition form. DCPS attorneys and case managers should only indicate that agreement could not be reached by the end of the 30-day resolution period if they have reached the end of the 30-day resolution period. If DCPS intends to agree that resolution is not possible and the 30-day resolution period has not yet concluded, the LEA should use the resolution period disposition form to indicate that no agreement could be reached and the 45-day timeline for a final decision should commence, otherwise DCPS should continue efforts to reach resolution during the 30-day period until it becomes clear that no agreement is possible.

ISSUE THREE: RESOLUTION DISPOSITION

Findings of Fact

1. OSSE reviewed resolution period disposition forms, resolution meeting notes, withdrawal orders and orders of dismissal for 50 of the 243 due process complaints that did not result in an HOD or SA during the period of investigation.
2. Of the 50 reviewed files, none included evidence that DCPS is sending representatives to the resolution meetings who do not have decision-making authority.
3. Five of the six attorneys who provided interviews to OSSE indicated that the case managers who attended resolution meetings on behalf of DCPS did not have the authority to negotiate on behalf of DCPS or make commitments about the use of resources, but could only make a pre-determined singular offer to the complaining party.
4. The DCPS program director and DCPS program manager stated that case managers have the authority to make decisions about resources and settlement at resolution meetings.

Discussion/Conclusion

DCPS is in compliance with 34 CFR §300.510(a)(1)(i).

The IDEA at 34 CFR §300.510(a)(1)(i) requires an LEA to include in the resolution meeting a representative of the public agency who has decision-making authority on behalf of that agency. Five out of the six attorneys interviewed by OSSE's investigator maintained that the DCPS case managers who represented the LEA at resolution meetings did not have authority to negotiate or commit DCPS to the use of specific resources. Rather, the attorneys alleged that the DCPS case managers had the authority only to make a pre-determined singular offer to the complaining party. The DCPS program director and DCPS program manager stated that DCPS case managers do have the authority to negotiate on behalf of the LEA. OSSE found nothing in the review of these 50 cases to support the conclusion that DCPS was not sending an appropriate representative to resolution meetings. However, OSSE reminds DCPS that the concept of "decision-making authority" contemplates more than the ability to make a single offer. The "decision-making authority" described in the IDEA includes the ability to engage in meaningful negotiation.

ISSUE FOUR: RIGHT TO COUNSEL

Findings of Fact

1. OSSE reviewed resolution period disposition forms, resolution meeting notes, withdrawal orders and orders of dismissal for 50 of the 243 due process complaints that did not result in an HOD or SA during the period of investigation.
2. Five of these 50 files included orders of withdrawal that indicate that the complaint was resolved or agreement was reached at the resolution meeting, but no written agreement was available in the file.
3. Four of these 50 files included documentation in the form of meeting notes or withdrawal orders that indicate that DCPS did not make an offer of written settlement but did offer substantive relief in the form of prior written notice of placement, authorization for independent evaluation, invitation to a meeting, or determination of eligibility.
4. Two of these 50 complaints resulted in a dismissal by the hearing officer following a ruling that DCPS's offer of substantive relief, although outside of a written agreement, rendered the complaint moot.

Discussion/Conclusion

DCPS is in compliance with 34 CFR §300.512(a)(1).

The IDEA at 34 CFR §300.512(a)(1) requires that any party to a hearing conducted as part of a due process complaint has the right to be accompanied and advised by counsel. Reasonable attorneys' fees may be awarded to the prevailing party who is the parent of a child with a disability; to a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or to a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. (34 CFR §300.517(a))

“Prevailing party” is a legal term of art under the IDEA defined in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). In *Buckhannon*, the Court rejected the notion that a prevailing party need only achieve their desired outcome; rather, the party seeking fees must also have “been awarded some relief by the court.” (532 U.S. at 603, *cited in* *District of Columbia v. Straus*, 590 F.3d 898 (2010)) The Court rejected the theory under which some courts had awarded fees to plaintiffs’ lawyers who had secured favorable out-of-court settlements because the settlements lack “the necessary judicial imprimatur.” (*Buckhannon*, 532 U.S. at 605, *cited in* *Straus*, 590 F.3d at 901) After *Buckhannon*, the District of Columbia Circuit Court developed a three-part test for determining prevailing party status: (1) there must be a “court-ordered change in the legal relationship” of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief. (See *Thomas v. Nat’l Sci. Found.*, 330 F.3d 486, 492-93 (D.C.Cir. 2003), *cited in* *Straus*, 590 F.3d at 901) As a result, in the District, plaintiffs’ attorneys have sought to ensure their right to fees through a clause in a written settlement agreement, and if possible, through incorporation of a written agreement into an order signed by the hearing officer.

The complainant argues that DCPS’s refusal to memorialize offers of relief in written settlement agreements has the effect of undermining parents’ right to counsel because it prevents the attorney from recovering fees from the LEA. The complainant cites to dicta in a recent District of Columbia Circuit Court case, *District of Columbia v. Ijeabuonwu*, 56 IDELR 281, no. 1:09-cv-00249 (June 28, 2011). In *Ijeabuonwu*, an attorney filed a due process complaint on behalf of a parent and proceeded to hearing after DCPS offered substantive relief in the form of authorization for an independent evaluation. (*Ijeabuonwu* at 3) The independent hearing officer found that the complaint had been rendered moot by DCPS’s offer. The District of Columbia sued for and recovered attorneys’ fees at the district court level. (*Ijeabuonwu* at 4) The circuit court overturned that ruling and held that the District was not a “prevailing party” because the hearing officer had dismissed the case not on the merits but on the fact that the complaint had been rendered moot. (See *Ijeabuonwu* at 4-6) The dicta cited by the complainant appears in the Opinion for the Court. The court noted that deeming an LEA a prevailing party where a complaint has been dismissed as moot following the provision or first step in provision of substantive relief “would deter lawyers from taking IDEA cases and thereby deprive parents of their most effective means of enforcing the statute.” (*Ijeabuonwu* at 9-10) By contrast, the concurring opinion in *Ijeabuonwu* disagrees and argues that granting attorneys’ fees to an LEA under such circumstances would “deter only attorneys who sought to prolong the case after litigation became ‘frivolous, unreasonable, or without foundation.’” (*Ijeabuonwu*, Concurring opinion by Senior Circuit Judge Randolph) However, the question in *Ijeabuonwu* was not whether an LEA’s refusal to memorialize offers of relief in written settlement agreements, or an LEA’s proffer of substantive relief outside of a written agreement interfered with a parent’s right to counsel. The court in *Ijeabuonwu* was not offering dicta on whether such practices would deter attorneys from taking IDEA cases; it was opining on the effect of allowing an LEA to collect attorneys’ fees from plaintiffs’ attorneys where the attorney proceeded to hearing following an offer of unwritten substantive relief.

In the example case cited by the complainant, the parent had legal representation and the attorney was not precluded from participating in the hearing or prehearing conference. On these

facts, OSSE cannot find that the complainant's client was deprived of the right to be accompanied and advised by counsel guaranteed by 34 CFR §300.512(a)(1).

Although OSSE's review of a sample of due process complaint cases revealed noncompliance with the requirement to enter into written agreements following resolution of a complaint at a resolution meeting, the results of this review do not support a conclusion that DCPS *consistently* refuses to execute such written agreements. In addition, OSSE did not find evidence that attorneys are actually deterred from accepting IDEA cases by these circumstances. Accordingly, OSSE does not conclude that DCPS utilizes a systemic practice that has the effect of depriving parents of their right to be accompanied and advised by counsel.

CORRECTIVE ACTION

DCPS is required to take the following actions:

1. In order to correct the noncompliance with 34 CFR §300.510(d):
 - a. DCPS must develop a corrective action plan to ensure that if an agreement is reached at a resolution meeting, the parties execute a written agreement. DCPS is encouraged to consider the development of written policies and case manager training to further this objective. DCPS must provide a copy of this corrective action plan to OSSE by [REDACTED]. DCPS must provide proof that the plan has been implemented by [REDACTED].
 - b. DCPS must conduct a quality assurance check of the disposition of all DCPS due process complaints for the six months following the date of this report. By [REDACTED], DCPS must provide OSSE with the results of this quality assurance check. DCPS is required to ensure that, for cases that reach resolution at the resolution meeting, a written settlement agreement is uploaded into the Blackman Jones database. DCPS must review the data within the Blackman Jones database and certify that complaints are correctly categorized as withdrawn, dismissed, settled or that an HOD was issued. OSSE will review DCPS's report and audit the data, including orders of withdrawal and dismissal, to ensure that the LEA is executing written agreements following resolution at resolution meetings.

If you have any questions regarding this report, please contact Mary Boatright, State Complaints Manager, at mary.boatright@dc.gov or 202-741-0264.

Sincerely,

Amy Maisterra, Ed.D., MSW
Assistant Superintendent for Special Education

cc: [REDACTED], Complainant
[REDACTED], DCPS [REDACTED]
[REDACTED], Student Hearing Office
[REDACTED]