

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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OSSE
STUDENT HEARING OFFICE

Confidential

<p>STUDENT¹, by and through her Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>March 20, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Olekanma Ekekwe, Esq.</p> <p>Counsel for DCPS: Kendra Berner, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</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. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

II. PROCEDURAL BACKGROUND

On February 6, 2009, counsel for Parent and Student (“Petitioner’s counsel”) filed a Due Process Complaint Notice (“Complaint”) against the District of Columbia Public Schools (“DCPS”), alleging that DCPS (1) denied Student a free appropriate public education (“FAPE”) by failing to provide her with appropriate services; (2) failed to identify Student; (3) denied Student a FAPE by failing to complete a comprehensive evaluation of Student as requested by Parent; and (4) denied Parent the right to inspect, review, and receive copies of Student’s educational records.

The Student Hearing Office (“SHO”) set February 20, 2009 as the prehearing conference date and provisionally scheduled the due process hearing for March 10, 2009 at 11:00 a.m. The hearing officer attempted to reschedule the prehearing conference for a date and time convenient for all concerned but was unable to do so due to Petitioner’s counsel’s extremely limited availability.

On February 25, 2009, DCPS filed District of Columbia Public School’s Notice of Insufficiency and Response to Petitioner’s Due Process Complaint. With respect to insufficiency, DCPS asserted that the Complaint was insufficient because Student, who is years old, failed to sign the Complaint, as required by the SHO’s Standard Operating Procedures. As a Response, DCPS asserted that it has no obligation to provide Student with special education services because she has not been identified as a Student with a disability, that it did not and does not suspect Student has a disability necessitating special education services, that it has not received any requests to evaluate Student, and that Petitioner’s counsel obtained Student’s records by fax on January 16, 2009, and upon visiting the school on February 5, 2009.

By their respective disclosure statements dated March 3, 2009, DCPS disclosed six potential witnesses and two documents labeled DCPS-1 and DCPS-2, and Petitioner disclosed three potential witnesses and four documents (hereinafter Petitioner’s Exhibits 1 through 4).

The hearing officer convened the due process hearing on March 10, 2009, as scheduled, and the parties’ documents were admitted into evidence without objection. As an initial matter, Petitioner’s counsel stated that the week before the due process hearing was to be held, Student’s school disenrolled Student, and Petitioner’s counsel made a motion to have Student reenrolled and to allow Student to remain in her current setting until completion of the Complaint process. DCPS conceded the issue and counsel for DCPS stated that the social worker at Student’s school had been instructed that Student had to be re-enrolled.

DCPS initially made a motion to dismiss or continue the matter because Parent was not present at the hearing, but Petitioner's counsel was able to secure the testimony of both Parent and Student by telephone, which eliminated the need for the hearing officer to rule on the motion. After Parent and Student testified, and based on the substance of the testimony, DCPS made a motion for directed verdict, on the ground that Student's rights have transferred to Student because she is now eighteen years old, and Student testified that she does not want special education services. Petitioner's counsel opposed the motion, arguing that Student should have been identified before she turned eighteen, and that there was testimony by Parent of a request for evaluations before Student turned . The hearing officer acknowledged DCPS's point that Student did not sign the Complaint, but the hearing officer denied the motion for directed verdict so as to have additional time to consider the legal and practical ramifications of the testimony and argument.

III. ISSUE(S)

1. Did DCPS fail to provide Student with appropriate services?
2. Did DCPS fail to identify Student?
3. Did DCPS fail to complete a comprehensive evaluation pursuant to Parent's request?
4. Did DCPS deny Parent the right to inspect, review, and receive copies of Student's educational records?

IV. FINDINGS OF FACT

1. Student turned years old in August 2008, well before the February 6, 2009 filing of the Complaint in the instant matter.
2. Student became pregnant during the summer of 2008, so she has not really attended school during the current school year. Student asked for a tutor because a friend told her that she could have a tutor come to her home to provide tutoring services.²
3. Student had her baby on and has not been back to school since the baby's birth.³
4. Student is of the opinion that she does not need special education. She has not asked to be tested because, according to Student, she knows she does not need special education. In fact, Student does not know why Petitioner's counsel is asking for special education services for Student.⁴

² Testimony of Student.

³ Testimony of Student.

⁴ Testimony of Student.

5. Parent is aware that she is trying to obtain special education services for Student, even though Student does not want the services. In Parent's opinion, Student will not accept any special education classes and services unless they are called something other than special education.⁵

V. CONCLUSIONS OF LAW

Petitioner has alleged several claims against DCPS. As the party seeking relief, Petitioner bears the burden of proof. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). During the due process hearing for this case, DCPS made a motion for a directed verdict. As the ruling on that motion potentially could dispose of the entire action, the hearing officer will address the motion prior to addressing any of Petitioner's substantive claims.

1. DCPS Motion for Directed Verdict

"A directed verdict may be granted only if there can be but one reasonable conclusion drawn from the evidence viewed in the light most favorable to the nonmoving party, giving it the advantage of every fair and reasonable inference that the evidence may justify." *Do Van Nguyen v. Tricon Chemical Corp.*, Civil Action No. 87-3413 (D.C. 1988) (citations and internal quotations omitted). "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *William C. Barwick v. United States of America*, Civil Action No. 89-5478 (DC 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986)).

In the instant case, DCPS contends that it is entitled to a directed verdict because, as Student is [REDACTED] years old, she is the only person with the authority to file a due process Complaint, but Student has clearly testified that she does not need and does not wish to receive special education services. On the other hand, Petitioner's counsel maintains that Parent requested evaluations for Student before Student turned eighteen, Child Find applied before Student turned eighteen, and DCPS failed to inform Parent and/or Student about the transfer of rights.

Under IDEIA, either 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 FAPE to the child. See 34 C.F.R. § 300.507; 20 U.S.C. § 1415(b)(6)(A). However, under District of Columbia law, when a child with a disability, who is not incompetent, reaches the age of eighteen, the local educational agency shall provide any notice required by Part B of IDEIA to both the child and his parents, and all other rights accorded to parents under Part B of IDEIA transfer to the child.⁶ 5 DCMR § 3023.1. Whenever the LEA transfers rights under § 3023.1, the LEA shall notify the child and his or her parents of the transfer of rights. 5 DCMR § 3023.2. See also 20 U.S.C. § 1415(m)(1); 34 C.F.R. § 300.520(a)

⁵ Testimony of Parent.

⁶ Part B of IDEIA essentially provides that a State qualifies for financial assistance under the Act if the State has necessary policies and procedures regarding matters such as FAPE requirements, least restrictive environments, eligibility requirements, and complaint procedures. See 34 C.F.R. §§ 300.100 – 300.176.

(IDEIA statutory and regulatory provisions permissively authorizing State legislation that transfers a child's IDEIA rights from the parent to the child when the child reaches the age of majority under State law, and requiring the State to provide notice of such transfer to both the child and the parent).

In this case, there is no dispute that Student has reached the age of majority under 5 DCMR § 3023.1. As a result, under 5 DCMR § 3023.1, all rights accorded to parents under Part B of IDEIA have transferred to Student, although DCPS is now required to send any notices required under Part B to both Parent and Student. While there is no evidence in this case tending to prove that DCPS provided Parent and Student with notice of the transfer of rights, as required by 5 DCMR § 3023.2, there is also no indication in the regulation that such notice is a condition precedent to the transfer of rights. Hence, the hearing officer concludes that under 5 DCMR § 3023.1, the authority to file a Complaint seeking special education services for Student automatically transferred from Parent to Student on Student's birthday in August 2008. As the Complaint in this case was not filed until February 6, 2009, and the evidence in this case proves that Student did not authorize the Complaint, did not sign the Complaint, and does not wish to receive special education services, the hearing officer further concludes that the Complaint is invalid because it was not filed on Student's behalf, and Parent lacked authority to authorize the filing of the Complaint by Petitioner's counsel.⁷ Under these circumstances, DCPS is entitled to a directed verdict and the dismissal of the instant Complaint.

VI. SUMMARY OF DECISION

The hearing officer granted a directed verdict in DCPS's favor.

VII. ORDER

1. DCPS's motion for a directed verdict is hereby **GRANTED**.
2. Petitioner's February 6, 2009 Complaint is hereby **DISMISSED** and all requests for relief therein are hereby **DENIED**.

/s/ Kimm H. Massey, Esq.

Kimm H. Massey, Esq.

Impartial Due Process Hearing Officer

Dated this 20th day of March, 2009.

⁷ Although Petitioner's counsel argued at the due process hearing that some of the claims alleged extended to the period preceding Student's birthday, the fact remains that Parent presently lacks authority to file a Complaint concerning those claims. Moreover, as a practical matter, since Student has indicated that she does not want or need special education services, and DCPS would be required under 34 C.F.R. § 300.300(b) to obtain Student's consent prior to the initial provision of any special education and related services, it would be a waste of resources to attempt to determine whether and to what extent Student may be eligible for special education and related services.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).