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Student Hearing Office
February 28, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

Date Issued: February 27, 2013

Student,[1] by and through the
Petitioner,

Hearing Officer: Michael Lazan

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") received by Respondent on December 14, 2012. This IHO was appointed to hear this matter on December 14, 2012. Respondent filed a Response to the Complaint on December 22, 2012, denying the allegations.

The Complaint indicates that DCPS failed to evaluate the Student under Child Find and failed to provide the Student with equitable services through an ISP/IEP and a location of services/placement.

A resolution meeting was held in this case on December 28, 2012. The parties did not agree in writing to waive the resolution period or resolve the Complaint. The parties did not

[1] Personal identification information is provided in Appendix A.

agree to shorten the resolution period, which ended on January 13, 2013. The HOD was due on February 27, 2013.

A Prehearing Conference was held on January 23, 2013. A Revised Prehearing Conference Summary and Order was issued on January 28, 2013.

Respondent filed a motion to dismiss on January 31, 2013. This motion was based on res judicata and jurisdictional grounds, in particular pointing to an earlier Order of Withdrawal by IHO Raskin involving the same student. Petitioner filed opposition papers on February 5, 2012. Oral argument was held on the motion on February 7, 2012. During oral argument, this IHO indicated that it would be appropriate to address issues relating to res judicata in the HOD. There was no objection from the parties. Respondent withdrew the equitable services claim on February 8, 2013.

A hearing date was held on February 12, 2013. This was a closed proceeding. Petitioner was represented by Joy Freeman-Coulbary, Esq and Miguel Hull, Esq. Respondent was represented by Daniel McCall, Esq. Petitioner entered into evidence exhibits 1-32; Respondent entered into evidence exhibits 1-4. Petitioner presented as witnesses: Petitioner. Respondent presented as witnesses: [redacted] PPO Representative; [redacted] a case manager; [redacted] PRO Representative. At the end of the hearing day, the parties presented oral arguments. The parties were provided one week to supplement their closing statements. Petitioner provided a supplemental memorandum. Respondent did not provide a memorandum.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 CFR Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

ISSUES

As identified in the Prehearing Conference Summary and Order, the issue to be determined is as follows:

1. Did DCPS fail to assess the parentally-placed Student in all areas of suspected disability from June, 2011 to present? If so, did DCPS violate the Child Find provisions of the IDEA and the accompanying regulations, which require school districts to locate, identify and evaluate students in parental placements?

As relief, Petitioner seeks an order that DCPS fund independent testing and convene a follow up meeting within a set time frame of receiving the completed testing, or an order that DCPS complete the testing that is underway ands convene a follow up meeting within two weeks to review that testing.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is a [redacted] who attends School C, a private school, in Washington, D.C. (P-1-1)

2. The Student struggles behaviorally, academically. The Student has difficulty with focus. (Testimony of parent; P-5-5; P-7-1)

3. The Student's cognitive ability has been determined to be above average. (P-23-6)

4. The Student has been diagnosed with Attention Deficit Disorder, with combined type "hyperactivity." (P-22-1)

5. In particular, Petitioner has been seeking support for the Student because the Student has engaged in behavioral incidents. (P-5-3)

6. The Student had an IEP dated October 8, 2009, when he was in or about the 7th grade. The IEP recommended 5 hours per week of specialized instruction in the general education setting and contained math goals. The IEP also contained classroom accommodations including small group work, assignments broken into segments, praise for effort, visual stimuli reduced, location with minimal distractions. (Testimony of Petitioner; P-11-1, 11-5)

7. An IEP for the Student dated June 9, 2010 recommended 5 hours of math services in the general education setting and contained math goals. The IEP also contained classroom accommodations of repetition of directions, preferential seating, small group testing, location with minimal distractions. (P-12-3-7)

8. For ninth grade, in the 2010-2011 school year, the Student went to School A, a private school. (Testimony of Petitioner)

9. For tenth grade, in the 2011-2012 school year, the Student went to School B, a private school. The Student's grades ranged from C to F in all academic subjects for the first three terms. (Testimony of Petitioner; P-17-1)

10. The Student attends School C for the 2012-2013 school year. (Testimony of Petitioner; P-18-1)

11. The Student has had disciplinary problems at School C, including use of profanity, a cell phone violation. (P-18-1)

12. Petitioner contacted the DCPS Private-Religious Office ("PRO office") in December, 2010, after a mass mailing to determine the status of the Student's with PRO. The PRO office provides for services for students in Washington, D.C. who attend private schools. (Testimony of [redacted]; P-9-1; P-8-2)

13. On January 10, 2011, Petitioner provided information to the PRO office about the Student. Petitioner indicated that she was seeking accommodations that would help the Student academically. She indicated that the Student has a short attention span, has temper tantrums, frequently tells lies, avoids homework, lacks motivation, doesn't seem to understand questions or directions, lacks self-control, has frequent sudden changes in mood, has difficulty with organization. (P-13-1-3)

14. In March, 2011, Petitioner met with [redacted] from the PRO Office and provided documents to the PRO office in furtherance of the Student's eligibility for services. (P-5-8-10)

15. One document was not provided by Petitioner in such package. As a result, in April, 2011, [redacted] contacted the Student's then school, School A, to obtain the document. (P-5-10-11)

16. In May, 2011, Petitioner and [redacted] spoke. [redacted] gave the Petitioner information about how to register for PRO. [redacted] provided the Petitioner with a PRO registration form. (P-6-2)

17. In May, 2011, [redacted] advised the parent that a [redacted] of DCPS would be analyzing the content of the Student's referral package. (P-6-2)

18. On July, 18, 2011, Petitioner signed a consent to evaluate with the PRO office. (P-14-1)

19. Thereafter, Petitioner was in contact with a [redacted] from DCPS.

20. [redacted] then tested the student at Roosevelt High School. Testing was conducted by [redacted] on or about October 5, 2011. (P-5-15; Testimony of Petitioner)

21. [redacted] asked Petitioner to bring the Student back for testing on October 28, 2011 or November 4, 2011. (P-5-21)

22. No test results from [redacted] were ever provided to the Petitioner or the Student. (Testimony of Petitioner; P-5-22-23)

23. Petitioner was never provided with a meeting with DCPS to review the assessments by [redacted] (Testimony of Petitioner)

24. DCPS never had a meeting to determine the Student's eligibility for equitable services. (Testimony of Petitioner)

25. In or about November, 2012, Petitioner's counsel indicated that Petitioner wanted to re-register with the PRO office. The PRO office then sent the Petitioner a packet of information. (P-28-1)

26. In or about January, 2013, a meeting was held with the parent and DCPS staff to go over the Student's status. Questions were asked of the parent. (Testimony of Petitioner)

27. Petitioner signed a consent for services in January, 2013. (Testimony of [redacted]-[redacted]; R-1-1-2)

28. On January 22, 2013, the parent was sent Prior Written Notice that a psychological evaluation, a vocational evaluation, an FBA and a comprehensive social history would be conducted of the Student. (R-2-1-2)

29. The parent then met a DCPS psychologist to review the Student's issues. (Testimony of Petitioner)

30. A psychologist then met the Student to assess the Student. (Testimony of Petitioner)

31. Another meeting between the psychologist and the Student was scheduled for February 12, 2013. (Testimony of Petitioner)

32. There is an upcoming meeting for the Student on the date of March 5, 2013. This meeting is to determine eligibility for equitable services. (Testimony of Petitioner; Testimony of [redacted] R-3-1)

33. The DC PRO Office could only provide speech and language therapy and occupational therapy for the Student. The DC PRO office could not provide assistance for the Student's behavioral issues. (Testimony of [redacted])

34. The DC PRO Office has not been subject to other complaints by parents alleging that the PRO office has not followed through with eligibility determinations. (Testimony of [redacted] Testimony of [redacted])

35. An earlier Due Process Complaint was filed on similar issues with IHO Frances Raskin. This Complaint was dated October 18, 2012. IHO Raskin dismissed this case through an Order of Withdrawal. The Order of Withdrawal by IHO Raskin addressed Petitioner's contentions as they relate to FAPE denial and the failure to revise and revise an IEP. Such Order of Withdrawal contains language in regard to "Child Find" claims. The order indicates that Child Find is "not an issue in this case" and that the dismissal with prejudice "does not foreclose Petitioner from pursuing a Child Find claim as this issue was not raised in the Complaint." The Order of Withdrawal also indicates that "(e)ven if this Hearing Officer were to

interpret Petitioner's claim that Respondent denied the Student a FAPE by failing to evaluate him as a child find claim, Respondent has agreed to evaluate the Student. Now that Petitioner has returned the consent forms, the evaluation process should begin." (R-4-8-10)

36. I found all the witnesses credible in this matter.

CONCLUSIONS OF LAW

School Districts receiving money pursuant to Part B under the IDEA are required to provide special education and related services to children with disabilities who are enrolled in private schools, with certain exceptions. 34 CFR Sect. 300.132(a). Districts are required to develop a services plan for each private school child with a disability "who has been designated by the LEA in which the private school is located to receive special education and related services. . . ." 34 CFR Sect. 300.132(b)

An LEA, or if appropriate, an SEA, must consult with private school representatives and representatives of parents of parentally-placed students regarding the "child find" process, including how parentally-placed children can participate equitably. 34 CFR Sect. 300.134(a).

Parentally-placed students have no individual right to some or all of the special education or related services that the child would have received if enrolled in public school. 34 CFR Sect. 300.137(a). Parentally placed students may receive a different amount of services than children with disabilities in public schools. 34 CFR Sect. 300.138(a)(b).

Due process is "not applicable" to equitable services claims with one exception. 34 CFR Sect. 300.140(a). The only possible claim in this connection is a Child Find claim, which alleges that the LEA has not located, identified and evaluated all children with disabilities who are enrolled by their parents in private schools located in the district. 34 CFR Sect. 300.131(a); 34 CFR Sect. 300.140(b). Where districts do not meet the "consent and evaluation

requirements" of the aforementioned sections, Due Process Complaints may be filed. 71 Fed. Reg., No. 156 at 46597 (August 14, 2006) The obligation to conduct Child Find is independent of the services provision. 71 Fed. Reg., No. 156 at 46592 (August 14, 2006). Under 34 CFR Sect. 300.131(b), the District's Child Find process is designed to ensure that there is "equitable participation" of parentally-placed children and an accurate count of these children. 34 CFR Sect. 300.131(b)(1)(2).

LEAs must conduct Child Find activities, including individual evaluations, within a reasonable period of time. 71 Fed. Reg., No. 156 at 46593 (August 14, 2006); 34 CFR Sect. 300.301(b); 5 DCMR Sect. 3005.2. Child Find activities must be conducted in accord with the requirements of 34 CFR Sect. 300.300 through 300.311. Id.

The record indicates, and I find, that Respondent began to evaluate the Student, pursuant to 34 CFR 300.301, through an assessment by [redacted] in or about October, 2011. This assessment followed the Petitioner's signed consent in July, 2011. However, [redacted] did not follow up with Petitioner after meeting the Student. Respondent ended up not completing the evaluation of the Student. Respondent also did not determine whether the Student was eligible for equitable services.

Pointing to hearsay, Respondent contends that the Petitioner and the Student did not cooperate with the evaluation process. I credit the Petitioner's live testimony over this hearsay testimony. Accordingly, I find that Respondent did not comply with Child Find requirements in connection to this Student's evaluation for equitable services.

Respondent offers two defenses to its failure to meet Child Find requirements. First, Respondent indicates that this claim should be dismissed on res judicata grounds, pointing to

IHO Raskin's Order of Withdrawal. Second, Respondent indicates that Petitioner's claim is moot.

Under the doctrine of res judicata, or claim preclusion, a final judgment on the merits precludes parties from relitigating issues that were or could have been raised in the prior proceeding. Friendship Edison Pub. Charter Sch. v. Suggs, 562 F. Supp.2d 141, 148 (D.D.C. 2008); see also Theodore v. District of Columbia, 772 F. Supp.2d 287, 292-293 (D.D.C. 2011) Claim preclusion seeks to protect litigants from the burden of re-litigating an issue twice. Claim preclusion requires a showing of three elements: 1) the presence of the same parties or privies to the two suits; 2) claims arising from the same cause of action in both suits; 3) a final judgment on the merits in the previous suit. Friendship Edison, 562 F. Supp.2d at 148.

In administrative litigation involving special education, it has been held that a failure to allege a particular cause of action in the first proceeding should not bar a Petitioner from bringing a second proceeding where Petitioner has conscientiously asserted her rights in the first proceeding. Serpas v. District of Columbia, 2005 WL 3211604 at *4 (D.D.C. 2005) The touchstone is whether the application of the doctrine effectuates the policy considerations underlying the doctrine, i.e., the danger of inconsistent judgments. Id.

In the action before IHO Raskin, Child Find issues were not raised. Accordingly, IHO Raskin did not rule on Child Find issues. On the contrary, IHO Raskin's order indicates, in footnote 34, that "(t)he dismissal with prejudice does not foreclose Petitioner from pursuing a child find claim as this issue was not raised in the Complaint." IHO Raskin's order underscores that "child find is not an issue in this case." There is language relating to Child Find in IHO Raskin's decision. However, this language was not "necessary" for the decision. A judicial comment that is not “necessary” for a decision is deemed dictum. As noted by the court in

California Public Employees Retirement System v. Worldcom, Inc., 368 F.3d 86 n. 19 (2d Cir. 2003), citing to Black's Law Dictionary 1100 (7th Ed. 1999), "obiter dictum" is "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)").

Parenthetically, the record supports the notion that Petitioner litigated the claim before IHO Raskin in good faith in this infrequently litigated area of special education law. Given the language of courts in cases such as Serpas, this IHO is not persuaded that application of the claim preclusion doctrine is appropriate in this instance.

Respondent also contends that this claim is moot, again citing to the obiter dictum in IHO Raskin's decision. Respondent contends that the Child Find claim is not appropriately brought because the process to evaluate the child is ongoing and that the parties are set to meet next week to determine the Student's eligibility for equitable services.

Mootness arises when issues are no longer live and where the parties lack a cognizable interest in the outcome. United States Parole Comm. v. Geraghty, 445 U.S. 388, 395 (1980) If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot. McBryde v. Committe to Review Circuit Counsel Conduct and Disability Orders of the Judicial Conference of the U.S., 264 F.3d 52, 55 (D.C. Cir. 2001).

In LeSesne ex rel. B.F. v. District of Columbia, 2005 WL 3276295, Petitioner was contending that the student in question needed an IEP. Upon the filing of the Due Process Complaint, DCPS set up a meeting for the Student to receive an IEP. Judge Kollar-Kottely found that the case was moot, indicating that "DCPS was already setting up the very type of meeting that Plaintiff was asking the HO to order." Id. at *7. In regard to this particular

mootness issue, Judge Kollar-Kottelly's decision was affirmed by the D.C. Circuit. LeSesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 832-833 (D.C. Cir. 2006)

Petitioner is seeking an end to the evaluation process and a meeting to determine that the Student is eligible for equitable services. However, this meeting is already scheduled. The process of evaluating the Student has proceeded at a reasonable pace since the decision issued by IHO Raskin. There is evidence that Respondent has scheduled assessments of the Student in numerous areas, including a psychological evaluation, a vocational evaluation, an FBA and a comprehensive social history. There is nothing in the record to indicate that any further assessments are needed to complete the evaluation of the Student at this point.

Petitioner posits that the mootness doctrine should not apply here because an exception to the doctrine applies. An action is not deemed subject to the mootness doctrine if the challenged action is too short in its duration to be fully litigated prior to its cessation or expiration and if there is a reasonable expectation that the same complaining party will be subject to this action again. Zearley v. Ackerman, 116 F.Supp.2d 109 (D.D.C. 2000).

In this connection, courts have held that it is incumbent on Petitioner to show that the conduct in question is capable of repetition. Theodore ex rel. A.G. v. District of Columbia, 655 F. Supp.2d 136, 144-145 (D.D.C. 2009)(IDEA action; issue involved Student's initial eligibility for special education, which was not likely to recur; claim found moot) Petitioner has not shown that the DCPS actions here have any chance of recurring. On the contrary, there is testimony in the record from DCPS to the effect that the problem here was a one time problem and that no other such complaints have been lodged by other parents.

In sum, the record indicates that DCPS will meet next week to complete its evaluation and determine the Student's eligibility for equitable services. Further, like in Theodore, this matter involves a claim relating to an initial determination of eligibility. Petitioner has not explained how a Child Find claim such as the instant claim could recur for this Student. Accordingly, I agree with Respondent that this case should be dismissed on mootness grounds.