District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
State Enforcement and Investigation Division
Student Hearing Office
Van Ness Elementary School
1150 5th St., S.E., Washington, D.C. 20003
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OSSE
STUDENT HEARING OFFICE
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In Re the Matter of :	
Parent on behalf of Student,[1]	
Petitioner,	
v.	**Date of Complaint:** January 4, 2010 **Date of Pre-hearing:** January 25, 2010 **Date of Hearing:** February 12, 2010
The District of Columbia Public Schools **825 North Capitol Street, N.W.** **Washington, D.C. 20002** **("DCPS" or "District")** **Respondent.**	**Student's Case Number:** **Student Identification Number:** **Failure to Prosecute Complaint**

HEARING OFFICERS' DECISION ("HOD")

Hearing Officer: Attorney Ramona M. Justice

Attorney for Petitioner: Attorney Marlon Charles
716 Rhode Island Avenue, N.W.
Washington, D.C. 20001

Attorney for Respondent: Attorney Daniel Kim
Assistant Attorney General
Office of the Attorney General
825 North Capitol St., N.E., 9th Floor
Washington, D.C. 20002

1 Personally identifiable information is provided in the "Index" which is located on the last page of this Order and must be removed prior to public distribution. *This decision is amended to accurately reflect that it is an "Order" and not a final Hearing Officers' Decision.

INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004 (IDEIA), (Public Law 108-446)
DISTRICT OF COLUMBIA PUBLIC SCHOOLS
IMPARTIAL DUE PROCESS HEARING

I. INTRODUCTION

On January 4, 2010, Petitioner, through her Attorney, initiated a due process complaint alleging that District of Columbia Public Schools ("DCPS"), denied the student a Free Appropriate Public Education ("FAPE"), by failing to develop and fund an appropriate compensatory education plan for the student, consistent with the March 20, 2009 Hearing Officers' Decision; in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")".

The due process hearing convened on February 12, 2010, at approximately 9:20 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

This proceeding was invoked in accordance with the rights established pursuant to "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")", Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; the D.C. Appropriations Act, Section 145, effective October 21, 1998; and Title 38 of the District of Columbia Municipal Regulations ("DCMR"), Chapter 30, Subtitle VII, Chapter 25.

III. ISSUE

The following issue is identified in the January 4, 2010 due process complaint:

Whether the District of Columbia Public Schools denied the student a free appropriate public education (FAPE), by failing to develop and fund an appropriate compensatory education plan for the student, consistent with the March 20, 2009 Hearing Officers' Decision ("HOD") and Order?

IV. PROCEDURAL POSTURE

On January 4, 2010, Petitioner, through her Attorney, initiated a due process complaint alleging that District of Columbia Public Schools ("DCPS"), denied the student a Free Appropriate Public Education ("FAPE"), by failing to develop and fund an appropriate compensatory education plan for the student, consistent with the March 20, 2009 Hearing Officers' Decision;

On January 5, 2010, the Hearing Officer issued a prehearing notice scheduling the prehearing conference for January 15, 2010 at 3:00 p.m.. On January 13, 2010, Petitioner's Attorney notified the Hearing Officer that DCPS submitted a revised compensatory education plan, parent agreed with the plan, and the complaint would be withdrawn within three (3) days, upon parent signing the plan. Receiving no letter of withdrawal, on January 22, 2010, the Hearing Officer forwarded an email to the parties inquiring regarding the status of the complaint and letter of withdrawal. The Hearing Officer was advised that settlement discussions failed, and the parties would proceed to hearing. On January 22, 2010, Respondent filed " District of Columbia Public Schools' Response to Parent's Administrative Due Process Complaint".

The prehearing conference was rescheduled, convening on January 25, 2010 at 4:30 p.m.. At the prehearing conference, the parties requested and the Hearing Officer granted a joint motion for continuance of the hearing from February 8, 2010 to February 12, 2010. On January 25, 2010, the Hearing Officer issued a prehearing conference Order. On January 27, 2010 a "Consent Motion for Continuance" was filed; and on January 28, 2010, an "Interim Order of Continuance Motion" was issued by the Hearing Officer confirming the hearing for February 12, 2010 at 9:0 a.m.; and requiring the parties to submit motions and disclosures no later than 4:30 p.m., on February 5, 2010.

On February 5, 2010, Respondent filed with the Student Hearing Office and Hearing Officer, disclosures and a witness list. On February 10, 2010, the Hearing Officer forwarded an email to the Attorneys in this matter, indicating that in view of the inclement weather, it was requested that the parties confirm their preparedness to proceed with the due process hearing scheduled for February 12, 2010, at 9:00 a.m.; however, receiving no response. On February 11, 2010, the Hearing Officer attempted to contact the Attorneys via telephone to confirm the hearing, to no avail. On February 11, 2010 the Hearing Officer forwarded an email to the Attorneys in this matter, referencing prior emails and failed attempts to confirm the hearing; and indicating that the due process hearing would proceed as scheduled on February 12, 1010, at 9:00 a.m..

The due process hearing convened on February 12, 2010, at approximately 9:20 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003. The parties appearing for the hearing included Attorney Daniel Kim on behalf of Respondent. Neither Petitioner nor Petitioner's Attorney appeared for the hearing.

During discussion of preliminary matters, and prior to proceeding with a hearing on the merits of the issue in the complaint, Respondent requested and the Hearing Officer granted a request that its disclosures be entered into the record as evidence. Receiving no objections, the Hearing Officer admitted into the record as evidence, Respondent's exhibits 1-5, and a witness list dated February 5, 2010.

Respondent further represented that three (3) complaints were filed in this matter, specifically, June 14, 2009, February 4, 2009, and January 4, 2010; wherein Petitioner requested compensatory education services, however failed to present evidence at the prior hearings or this hearing, supporting its claim.

Respondent represented that although it submitted disclosures in this complaint, and convened at least two (2) Individualized Education Program (IEP) team meetings on October 7, 2009 and January 15, 2010, to discuss compensatory education services, and presented Petitioner with proposed compensatory education plans; Petitioner rejected the proposed plans.

Respondent represented that although it submitted disclosures in the instant complaint, Petitioner failed to submit disclosures; failed to request an extension of time for submitting disclosures, and failed to request a continuance of the hearing.

Respondent concluded that the student is placed in an out of general education, full-time special education program, and receives a FAPE; and entered on the record a motion to dismiss with prejudice. In consideration of the evidence of record, and receiving no objections, the Hearing Officer granted Respondent's Motion to Dismiss.

V. DISCUSSION

Motion to Dismiss the Administrative Due Process Complaint

(1) Standard Operating Procedures (SOP), §1002.2 provide:

"The Hearing Officer shall dismiss the case if he/she determines that a hearing has been initiated for reasons other than those under the Hearing Officer's jurisdiction or authority to resolve under IDEA. The Hearing Officer will have a maximum of 10 days from the date of the hearing to issue an Order of Dismissal, noting the reason for dismissal of the hearing."

(2) Motion to Dismiss: Federal Rules of Civil Procedure, Rule 12(b)

A ***"motion to dismiss"*** requests that the court decide that a claim, even if true as stated, is not one for which the law offers a legal remedy. The possible bases of the motion are laid out in Rule 12(b) of the Federal Rules of Civil Procedure. As of 2004, Rule 12(b) lists seven possibilities:

1. **Lack of** subject matter jurisdiction.
2. **Lack of jurisdiction over the person.**
3. Improper venue.
4. **Insufficiency of** process.
5. **Insufficiency of** service of process.
6. **Failure to** join **a party**
7. **Failure to state a claim upon which relief can be granted.**

(3) Failure to Appear/Failure to Prosecute

Generally, if a party fails or refuses to prosecute a complaint, there exist grounds for the court to dismiss the complaint, "with prejudice". Additionally, according to the Standard Operating Procedures (SOP), §700.3 provides, in pertinent part: "If the party who requested the hearing (complainant) does not appear at the hearing, the hearing ***may*** be dismissed by the Hearing Officer..."

Finally, although it is within this court's discretion to dismiss a complaint "with" or "without" prejudice; in so doing, the court must consider all information available, the circumstances in each case, and resulting impact, if the complaint is dismissed.

VI. FINDINGS OF FACT

In applying the standards for a motion for dismiss as set forth in the Standard Operating Procedures (SOP), §1002.2, the Hearing Officer finds that there is no evidence that Petitioner may have initiated the due process complaint for reasons other than those under the Hearing Officer's jurisdiction, or authority to resolve under IDEA, which would serve as grounds for granting the Motion to Dismiss the complaint, pursuant §1002.2 of the Standard Operating Procedures (SOP).

In applying the standard for a motion to dismiss as set forth at Rule 12(b) of the Federal Rules of Civil Procedure (F.R.C.P.), the Hearing Officer finds that there is no evidence that the claim, even if true as stated, is not one for which the law offers a legal remedy; or it appears beyond doubt that no set of facts support Petitioner's claim, entitling it to the relief requested in the complaint. Therefore, Respondent failed to satisfy the standard for a motion to dismiss, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure (F.R.C.P.).

The record reflects that on October 7, 2009 a Multidisciplinary Development Team ("MDT") meeting convened with parent, the Program Coordinator, Educational Advocate, Shepherd Special Education Coordinator, School Psychologist, Occupational Therapist, Special Education Teacher, Speech and Language Pathologist, Social Worker, and DCPS-OSRE Compliance Officer, to address the complaint filed on March 20, 2009. The team discussed funding independent evaluations, convening an IEP meeting, develop an IEP, and Issue a Prior Notice of Placement, once a placement is identified; reconvening the MDT upon receipt of the independent evaluations; discussion, development and funding of a compensatory education plan for the student. At the meeting, Respondent proposed a compensatory education plan which Petitioner rejected. The record also reflects that on January 15, 2010, Respondent proposed another Compensatory Education Plan, also rejected by Petitioner.

The Hearing Officer finds that Respondent proposed two (2) compensatory education plans that were rejected by Petitioner; and that although Petitioner rejected the plans representing that the plans are inappropriate to meet the needs of the student, it failed to submit disclosures or present evidence at the hearing, regarding the inappropriateness of the plans or submit to the Hearing Officer, an alternate compensatory education plan for the student.

The Hearing Officer finds that Petitioner appeared for the prehearing conference, however, failed to comply with the Hearing Officers' prehearing conference order, which required filing of disclosures and motions no later than 4:30 p.m., on February 5, 2010, and convening of the due process hearing on February 12, 2010, at 9:00 a.m.. Petitioner failed to respond to the Hearing Officers' written inquiries regarding the status of the complaint and preparedness to proceed with the hearing as scheduled; and failed to request a continuance of the hearing, to preserve the interests and rights of the student. Additionally, Petitioner failed to appear for the due process hearing, as scheduled.

VII. CONCLUSION OF LAW

It is the Hearing Officers' decision that the evidence of record supports a finding that a motion to dismiss the January 4, 2010 due process complaint due to Petitioner's failure to prosecute the complaint is warranted in this matter.

VIII. ORDER

Based on the aforementioned, it is hereby:

(1) **ORDERED**, that Respondent's Motion to Dismiss the January 4, 2010 due process complaint "with" prejudice, is **GRANTED**; and it is further

(2) **ORDERED**, that the court hereby adopts the January 15, 2010 compensatory education plan proposed by Respondent, and identified as DCPS-04, as the compensatory education plan for the student; and it is further

(3) **ORDERED**, that the January 15, 2010 compensatory education plan shall become effective, and shall be fully implemented and funded by Respondent, as of the date of this decision; and it is further

(4) **ORDERED**, that consistent with the January 15, 2010 compensatory education plan, DCPS shall fund an initial assessment, not to exceed one and a half hours of tutoring per week, not to exceed for up to 75 hours of total services, to be completed by June 1, 2011; and it is further

(5) **ORDERED**, that consistent with the January 15, 2010 compensatory education plan, DCPS shall fund four weeks of intensive tutoring over winter, spring, or summer break, not to exceed a cost of per week, to be completed by June 1, 2011; and it is further

(6) **ORDERED**, that consistent with the January 15, 2010 compensatory education plan, DCPS shall fund two weeks of an academic enrichment camp, not to exceed a cost of per week, to be completed by June 1, 2011; and it is further

(7) **ORDERED**, that consistent with the January 15, 2010 compensatory education plan, DCPS shall fund 1 hour/week of counseling for 10 months, at a rate not to exceed $90/hour, to be provided by an independent provider of the parent's choice, and to be completed by January 1, 2011; and it is further

(8) **ORDERED**, that this decision and order are effective immediately.

IX. APPEAL PROCESS

This is the **FINAL ADMINISTRATIVE DECISION**. Appeals may be made to a court of competent jurisdiction within ninety (90) days from the date of this Decision and Order, in accordance with 20 U.S.C. 1415 (i)(1)(A) and 34 C.F.R. Section 516(b).

Ramona M. Justice Date Filed: *2-12-10*

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Daniel Kim
Attorney Marlon Charles: Fax: (240) 205-8680