

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
Phone: (202) 698-3819 Facsimile: (202) 442-5556

OSSE
 STUDENT HEARING OFFICE
 2009 APR 23 AM 9:25

In Re the Matter of :)
)
 Parent on behalf of Student,¹)
)
Petitioner,)
)
)
v.)
)
The District of Columbia)
)
)
Respondent.)
)
)

Date of Complaint: March 18, 2009
Date of Pre-hearing: March 31, 2009
Date of Hearing: April 22, 2009

Voluntary Withdrawal of Complaint

HEARING OFFICERS' DECISION (HOD)

Hearing Officer: Attorney Ramona M. Justice

Counsel for Petitioner: Attorney Olekanma A. Ekekwe
 2426 L'Enfant Square S.E., Suite 100
 Washington, D.C. 20018

Counsel for Respondent: Assistant Attorney General, Tanya J. Chor
 D.C. Office of the Attorney General
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 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.

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

I. INTRODUCTION

The student is _____ years of age, and attends _____ located in the District of Columbia. The student is a resident of the District of Columbia, and not identified as disabled and eligible to receive special education services, pursuant to “The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)”.

On March 18, 2009, Counsel, on behalf of parent and the student, initiated a due process complaint alleging that the District of Columbia Public Schools , hereinafter referred to as “DCPS”, denied the student a Free Appropriate Public Education (“FAPE”), by failing to: (1) provide appropriate services; and (2) provide an appropriate placement.

The due process hearing convened on April 22, 2009, at 11:00 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. DUE PROCESS RIGHTS

The hearing was dismissed during preliminary matters, therefore, a reading and/or waiver of parent’s due process rights was not entered on the record.

IV. ISSUES

The following issue is identified in the *March 18, 2009* due process complaint:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate services?
- (2) Whether DCPS denied the student a free appropriate public education, by failing to provide the student an appropriate placement?

V. DISCLOSURES

The Hearing Officer inquired of the parties whether all disclosures were submitted; and whether there were any objections to the disclosures submitted. Receiving no objections, the disclosures identified herein were admitted into the record as evidence.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

Petitioner's Exhibits 01 through Petitioner's Exhibits 12, and a witness list dated April 14, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

Respondent's Exhibits 01 through Respondent's Exhibits 30, and a witness list dated April 14, 2009.

VI. PRELIMINARY ISSUES

A due process complaint was filed on March 18, 2009. On March 23, 2009, the Hearing Officer issued a Notice of Pre-hearing Conference scheduling the pre-hearing conference for March 31, 2009, at 4:00 p.m.. The pre-hearing conference failed to convene as scheduled, due to Petitioner's failure to appear; and March 31, 2009, a Pre-hearing Conference Order was issued.

On March 30, 2009, Respondent filed "District of Columbia Public Schools' Response and Motion to Dismiss Petitioner's Administrative Due Process Complaint", pursuant to the Doctrine of Res Judicata and Collateral Estoppel. Petitioner failed to file a written response to Respondent's the motion to dismiss.

At the due process hearing, Petitioner's Counsel requested to withdraw the due process complaint, without prejudice; or a continuance. Petitioner allege that the issues in the instant matter are new issues, that subsequent to the December 18, 2008 Hearing Officer's Decision, DCPS rendered a determination that the student is ineligible for special education services, and therefore, the issues in the complaint should not be barred from resolution.

Respondent objected to the continuance, and entered on the record a Motion for Directed Verdict, that Petitioner is precluded from any consideration regarding issues of eligibility or ineligibility, occurring prior to the December 18, 2008 HOD; or in the alternative dismissal of the complaint "without" prejudice.

VII. DISCUSSION AND CONCLUSIONS OF LAW

Motion for Directed Verdict

In law, a **directed verdict** is a ruling by a judge presiding over a jury trial typically made *after* the prosecution or *plaintiff has presented all of their evidence* but before the defendant puts on their case, that awards judgment to the defendant.

A directed verdict is usually made because the judge concludes the plaintiff has failed to offer the minimum amount of evidence to prove their case even if there were no opposition. Typically, the judge orders a directed verdict after finding that no reasonable jury could reach a decision to the contrary. After a directed verdict, there is no longer any need for the jury to decide the case. In other words, the judge rules that, as a matter of law, no reasonable jury could decide in the plaintiff's favor.

A judge may order a directed verdict as to an entire case or only to certain issues. While the motion is not often granted, it is routinely made as a means of preserving appeal rights later.

The court finds that Respondent's Motion for Directed Verdict is misplaced, and is inappropriate because a hearing on the merits of the issues in the complaint was not held, thus, Petitioner presented no evidence on the issues, upon which a Motion for Directed Verdict could be entered.

Motion to Dismiss

Standard Operating Procedures (SOP), Section 1002.2 provides:

"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."

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.

First, the court is not convinced 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, under SOP, Section 1002.2. *Second*, the court is not convinced that there exist sufficient grounds for dismissal of the complaint pursuant to Rule 12(b) of the F.R.C.P.. Therefore, Respondent's Motion to Dismiss the complaint is denied.

Motion to Dismiss/Withdraw a Complaint “with prejudice” or “without prejudice”

Generally, if a party fails or refuses to prosecute a complaint, there exist grounds for the court to dismiss the complaint, “with prejudice”. However, when a complaint is withdrawn voluntarily, the court has not ruled on the merits of “plaintiff’s cause of action”, and is precluded from dismissing the complaint, “with prejudice”.

At the hearing Petitioner’s Counsel, on behalf of parent and the student, entered on the record a request to continue the hearing, or in the alternative be granted leave to voluntarily withdraw the complaint. The court denied Petitioner’s request for a continuance of the hearing. In addition, the court had not ruled on the merits of Petitioner’s cause of action, precluding dismissal of the due process complaint, “with prejudice”.

Based on the aforementioned, and representations of the parties, the court grants Petitioner’s voluntary request to withdraw the March 18, 2009 due process complaint; and the complaint is dismissed “without” prejudice. Dismissal of the complaint “without prejudice” is not a final judgment from which an appeal may be taken; therefore, Petitioner is not precluded from refile [the suit] in the same forum.”

VIII. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that Respondent’s Motion to Dismiss Petitioner’s due process complaint with prejudice is denied; and it is further
- (2) **ORDERED**, that Respondent’s Motion for Directed Verdict is denied; and it is further
- (3) **ORDERED**, that Petitioner’s Motion for Continuance is denied; and it is further
- (4) **ORDERED**, that the due process complaint filed on March 18, 2008, is dismissed “without” prejudice; and it is further
- (5) **ORDERED**, that any future complaints filed by Petitioner must pertain to allegations which have not been previously decided or dismissed by the court; and must include new issues, and issues that are not identical or collaterally related to issues previously decided by the court; and it is further
- (6) **ORDERED**, that this decision and order are effective immediately.

IX. APPEAL RIGHTS

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

4-22-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Olekanma Ekekwe.: Fax: (800) 524-2370
Attorney Tanya J. Chor: