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) 698-3825

2009 JUL -6 AM 9:10
STUDENT HEARING OFFICE

In Re the Matter of :	
Parent on behalf of Student,[1]	
Petitioner,	
	Date of Complaint: June 1, 2009
	Date of Hearing: July 6, 2009
v.	
	Student Case Number:
The District of Columbia Public Schools **825 North Capitol Street, N.W.** **Washington, D.C. 20002** **(DCPS" or "District")**	**Motion to Dismiss Complaint**
Respondent.	

HEARING OFFICERS' DECISION (HOD)

Hearing Officer: Attorney Ramona M. Justice

Counsel for Parent: Attorney Domiento Hill
The Law Offices of James E. Brown and Associates
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Counsel for DCPS: Blair Matsumoto, 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.

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 the located in the District of Columbia. The student is a resident of the District of Columbia, and identified as disabled and eligible to receive special education and related services; 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")". The student's disability classification is emotionally disturbed (ED).

On June 1, 2009, Petitioner 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) review the student's independent Comprehensive Psychological Evaluation; and (2) provide the student an Individualized Education Program (IEP), that is reasonably calculated to provide a FAPE.

The due process hearing is scheduled to convene on July 6, 2009, at 9:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

The due process complaint proceedings; and the Motion to Dismiss the "Administrative Due Process Complaint" are governed by 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; Title 38 of the District of Columbia Municipal Regulations ("DCMR"), Chapter 30, Subtitle VII, Chapter 25; Federal Rules of Civil Procedure, Rule 12(b)(6); and Standard Operating Procedures, §1002.2.

III. ISSUE

(1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to review the student's independent Comprehensive Psychological Evaluation?

(2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an Individualized Education Program (IEP), that is reasonably calculated to provide a FAPE?

IV. RELIEF REQUESTED

(1) A finding that DCPS denied the student a FAPE by failing to review the parent's independent Psycho-educational Evaluation.
(2) A finding that DCPS denied the student a FAPE by failing to develop an appropriate IEP for the student.
(3) DCPS shall, within five (5) school days, shall reconvene the student's IEP meeting to review all current evaluation/assessment data on the student and update the student's IEP to reflect the recommendations provided for in the April 2009 comprehensive psychological evaluation.
(4) DCPS shall fund the compensatory education plan presented by the parent.
(5) DCPS shall schedule all meetings through the parent's counsel, Domiento C.R. Hill, Esquire, in writing, via facsimile, at 202-742-2098.
(6) DCPS agrees to pay counsel for the parent's reasonable attorney's fees and related costs incurred in this matter.
(7) DCPS shall provide counsel for the parent with copies, pursuant to D.C. MUN. REGS. Tit. 3021.8(2003), of all evaluation reports and all educational records on the student no later than sixteen (16) business hours prior to the convening of any meeting.'
(8) DCPS shall send all notices to counsel for the parent with copies of such to the parent and in the parent's native language.

V. PROCEDURAL POSTURE

On June 12, 2009, Respondent filed "District of Columbia Public School's Response and Motion to Dismiss to Petitioner's Due Process Complaint"; representing that the student is in a full-time special education program chosen by Petitioner and funded by DCPS; the student receives services recommended in his IEP; and the initial relief requested (independent evaluations) was granted; and a meeting proposed to review the evaluation. Respondent concludes that Petitioner fail to present a claim upon which relief can be granted; and all other claims and possible relief is speculative until the evaluation results can be reviewed by all parties.

On June 15, 2009, Petitioner filed "Petitioner's Opposition to the Respondent's Motion to Dismiss the Petitioner's Administrative Due Process Complaint Notice", representing that the relief requested in the complaint is not granted in its entirety; Respondent's motion fail to satisfy the standards necessary for a motion to dismiss; and is contingent upon the speculative acts of its clients and therefore, not mooting Petitioner's claims.

VI. DISCUSSION AND CONCLUSIONS OF LAW

Motion to Dismiss the Administrative Due Process Complaint

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."

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.**

In this matter, Respondent requests that the court dismiss the complaint, for failure to state a claim upon which relief can be granted, representing that the relief requested by Petitioner in the due process complaint has been granted, therefore, the issues are "moot", and no longer ripe for review by the court.

Based on the pleadings presented, 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 to Standard Operating Procedures (SOP), §1002.2.

"Mootness"

In United States law, a matter is **moot** if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic.

Exceptions to "mootness"

There are three major exceptions to this mootness rule. These are cases of "voluntary cessation" on the part of the defendant; questions that are "capable of repetition, yet evading review"; and questions involving class actions where the named party ceases to represent the class.

Voluntary Cessation

Where a defendant is acting wrongfully, but ceases to engage in such conduct once litigation has been threatened or commenced, the court will still not deem this correction to moot the case. Obviously, a party could stop acting improperly just long enough for the case to be dismissed and then resume the improper conduct. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), the Supreme Court held that an industrial polluter, against whom various deterrent civil penalties were being pursued, could not claim that the case was moot, even though the polluter had ceased polluting and had closed the-factory responsible for the pollution. The court noted that so long as the polluter still retained its license to operate such a factory, it could open similar operations elsewhere if not deterred by the penalties sought.

Capable of repetition, yet evading review

A court will allow a case to go forward if it is the type for which persons will frequently be faced with a particular situation, but will likely cease to be in a position where the court can provide a remedy for them in the time that it takes for the justice system to address their situation. The most frequently cited example is the 1973 United States Supreme Court case of *Roe v. Wade*, 410 U.S. 113 (1973), which challenged a Texas law forbidding abortion in most circumstances. The state argued that the case was moot because plaintiff Roe was no longer pregnant by the time the case was heard. As Justice Blackmun wrote in the majority opinion:

> The normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.

The Court cited *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), which had held that a case was not moot when it presented an issue that was "capable of repetition, yet evading review". Perhaps in response to increasing workloads at all levels of the judiciary, the recent trend in the Supreme Court and other U.S. courts has been to construe this exception rather narrowly.

The Hearing Officer finds that the issues in the instant complaint are not "moot" because there is no evidence that further legal proceedings with regard to the issues can have no effect, or events have placed it beyond the reach of the law; and as a result, the matter has been deprived of practical significance or rendered purely academic.

The Hearing Officer also finds that the exceptions to the doctrine of "mootness" are applicable in this matter, particularly, voluntary cessation; and capable of repetition, yet evading review. It remains undisputed that DCPS authorized the independent Comprehensive Psychological Evaluation, and proposed to reconvene the MDT to review the evaluation. However, the court will not deem this correction of proposing a date and time to reconvene the MDT meeting, after filing of the complaint, to moot the case, particularly when the MDT has not been held, which is a primary issue in the complaint.

In addition, it is obvious that DCPS could propose dates and times to reconvene the MDT to review the independent evaluation, just long enough for the case to be dismissed and then fail to reconvene the MDT meeting, review the evaluation, or develop an IEP, as appropriate, resulting in filing of a subsequent complaint. The issue is also the type for which Petitioner will frequently be faced with a situation where the student will require review of evaluations; as well as, review and revision of the student's IEP, as appropriate, however, will likely cease to be in a position where the court can provide a remedy for them in the time that it takes for the justice system to address the situation.

The court also finds that the issues in the complaint are not "moot", because although DCPS may have authorized the independent Comprehensive Psychological Evaluation, the issues which remain outstanding are its alleged failure to reconvene the MDT to review the independent evaluation; failure to develop an IEP, as appropriate; and funding of a compensatory education plan.

Federal Rules of Civil Procedure, Rule 12(b)(6)

Finally, Respondent failed to satisfy the standard for a Rule 12(b)(6) motion to dismiss, by demonstrating that Petitioner failed to state a claim upon which relief can be granted; or that it appears beyond doubt that no set of facts support Petitioner's claim, entitling it to the relief requested in the complaint. Therefore, there fail to exist sufficient grounds for dismissal of the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure (F.R.C.P.).

Based on the aforementioned, the court must allow the hearing to proceed; and denies Respondent's motion to dismiss the complaint, on grounds of failure to state a claim upon which relief can be granted; and "mootness".

VII. 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

Attorney Ramona M. Justice
Hearing Officer

Date Filed: *6-5-09*

cc: Assistant Attorney General Blair Matsumoto
Attorney Domiento Hill (202) 742-2098