

DUE PROCESS HEARING
BEFORE AN IMPARTIAL HEARING OFFICER

CASE NO. DP2010:109

DECISION

In the Matter Of:

[Student], a Student by and through [Student's] Parent [Parent]

Petitioner,

And

CHEYENNE MOUNTAIN SCHOOL DISTRICT 12

Respondent

A Hearing was held on Tuesday, May 11, 2010 in the School District's Administration building starting at 9:00 a.m. Present at the Hearing were the Parent Petitioner, the student, Student's caretaker, the Respondent's attorney, the Special Education Director for the District and the District's Assistant Director.

Respondent objected to the presence of Student's caretaker as said person was to be called as a witness. The Caretaker being needed for Student and Parent appearing pro se which would not allow said parent to care for the Student while engaging in advocacy for the student, the Objection was overruled.

BACKGROUND

The School District originally filed a petition for a Due Process Hearing, naming the Student, Student's Father and Student's Mother as Respondent's. That Complaint, Department of Special Education, State of Colorado, Due Process Hearing No. 2010-105 was decided by Impartial Hearing Officer Bruce Bernstein on April 19, 2010 after an extensive three day hearing was held on April 9, 10, and 11.

Before Decision DP2010-105 was rendered Student's Father filed this Due Process Complaint against the School District on April 16, 2010. In his Petition Parent alleged seven FAPE violations.

On April 27, 2010 the Respondent School District filed a Motion to Dismiss alleging

that several of Petitioner's issues had been decided and that Petitioner's Complaint failed to comply with Sec. 300.508 (2)(b)(5) in that the Complaint failed to contain "(a) description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem."

In a telephonic Pre-Hearing conference call this IHO allowed Petitioner to amend the Complaint to submit Petitioner Father's proposed resolutions of the issues raised in the Complaint. He further continued Respondent School District's Motion to Dismiss for Hearing to May 10, 2010, immediately before hearing any Issues surviving the Motion to Dismiss. This expedited time frame was required because the school year would end May 23, 2010. School staff would then be unavailable to testify in a hearing when the deadline within which this case was required to be completed was by June 11, 2010, weeks before the 2010 - 2011 school year would begin and teachers would again be available to testify.

This Hearing Officer concluded that any decision made on Respondent's Motion to Dismiss should be made orally and from the bench at the conclusion of hearing from both the School Counsel and the Petitioner Father, who appeared pro se. Those issues which could withstand Respondent's Motion to Dismiss would be the remaining issues which would be heard immediately thereafter.

On completing the Motion to Dismiss this Impartial Hearing Officer (IHO) reviewed the Petition, the Motion, arguments of the proponent and opponent, the case of Portland Public School District case published in *44 IDELR 232*, July 20, 2005 and the Decision of Impartial Due Process Hearing Officer Bruce Bernstein in *Due Process Hearing No. 2010:105* issued April 19, 2010 in which the same parties were involved and the School District was the Petitioner and the Parent was the Respondent.

This then is a written memorialization of the decisions rendered on Respondent's Motion to Dismiss, made from the bench verbally and somewhat incompletely immediately after oral argument regarding each of the Petitioner's enumerated Issues, as they had been set forth in the Petition for this Due Process Hearing.

DETERMINATION OF RESPONDENT'S MOTION TO DISMISS

Petitioner's Issue #1

The Petition refers to Students previous IEP's as being "ineffective or intolerable" in developing a homebound FAPE.

In his April 19, 2010 Order Impartial Hearing Officer Bernstein refers to preparing a new IEP upon the Parent's advising the School District whether Parent would allow Student to attend school or to inform the School District as to how Parent would plan to comply with the Colorado Compulsory School Attendance Act. (C,R,S. 22-22-104).

Further, C.F.R. Sec. 300.508 (2)(b)(5) requires Petitioner to "describe the nature of the problem . . . including facts relating to such problem".

Hearing Officer Bernstein decided a new IEP need be crafted in his earlier ruling. Also Petitioner failed to provide sufficient detail to which the School District could reply. Therefor

Respondent's Motion to Dismiss is granted as to this Issue.

Petitioner's Issue #2

Petitioner refers to a September 2009 inter-agency E-mail in complaining that the District is not providing Student with "textures and vocabularies".

The E-mail was not shown to be a part of Student's IEP. Hearing Officer Bernstein had the opportunity to consider whether it was included in Student's previous IEP. There are not facts alleged which are specific enough for the School District to reply. This Hearing Officer suggests the issue should be discussed during the IEP Ordered by Hearing Officer Bernstein. . The reasons set forth in Issue #1 apply to this Issue..

The Motion to Dismiss is granted as to Issue #2.

Petitioners Issue #3

Petitioner withdrew Issue #3.

Petitioner's Issue #4

Petitioner claims that in a Resolution meeting on March 9, 2010 the School Superintendent made reference to the word "suck" in relation to homebound services.

Suffice it to say the word may have been used in a derogatory sense but the allegation does not create a Due Process issue.

The Motion to Dismiss is granted as to Issue #4.

Petitioner's Issue #5

Petitioner claims the Student's Health Care Plan is incomplete.

If there is a proposed Plan and if the Plan is incomplete, so long as there is no Plan in place in Student's IEP, there is nothing in the Regulations of which I am aware that permits a Hearing Officer to determine if it meets or violates the Due Process Provisions of the IDEA. I note that Hearing Officer Bernstein in his April 19, 2010 Order provides for creation of a more current IEP if the Petitioner so chooses.

This hearing Officer does not have the authority to delve into the nature and scope of such a Plan and then create or complete a Health Plan for Student.

Motion to Dismiss is granted as to Issue #5.

Petitioner's Issue #6

Petitioner withdrew Issue #6.

Petitioner's Issue #7

Petitioner requests a continuation of Homebound Services during the 2010 Extended School Year (ESY).

Adequate provisions were made for the District and Petitioner to determine what and how much Homebound Services and ESY were to be provided . This was covered in Hearing Officer Bernstein's Order of April 19, 2010. See the Decision made in Due Process Hearing DP2010:105 involving these same parties. That Order covers the remainder of the school year and this Hearing Officer will not overturn Hearing officer Bernstein's ruling.

CONCLUSION

The State of Colorado has a two-tier procedure for Due Process Hearings. A Hearing Officer first Hears the Petition and makes a written Decision. When decided the case may then be appealed , to then be heard before an Administrative Law Judge (ALJ). Petitioner elected not to do so in DP2010:105 and instead, in less than a month, filed another Due Process Complaint.

Petitioner's Complaint fails because the second Petition covers the same ground which was previously covered less than a month ago.

For the above reasons Petitioner's Complaint is DISMISSED.

I make this Determination with sadness as School Districts and Parents must work cooperatively to provide a rewarding educational experience for their Students. In this instance I fail to feel that this result brings us closer to meeting the Student's needs. I wish the Parties well in working together and crafting a solution for this Student.

Done this 13h day of May, 2010

Raymond Lee Payne, Jr.
Impartial Hearing Officer