

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER**

Parents, on behalf of Student,

Petitioners,

v.

DPH 0809-28

ALBUQUERQUE PUBLIC SCHOOLS,

Respondent.

**DECISION AND ORDER DISMISSING PETITIONERS' DUE PROCESS HEARING
COMPLAINT WITHOUT PREJUDICE**

Jane B. Yohalem, Due Process Hearing Officer

The Parents in this action have insisted that they have a right under the federal Family Education Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA) to prohibit the use of any of their daughter's educational records at the hearing in this matter. The District has sought to introduce these records as exhibits at the hearing in support of the District's defense that, even if the hearing officer determines there were procedural violations in this matter, that there were no consequences to the education of Student or to the rights of the Parents because Student's behavior was plainly not a manifestation of her disability. The District has taken the position that by requesting due process the Parents have waived the confidentiality of Student's educational records for purposes of the due process hearing.

The hearing officer has previously held that the filing of the due process complaint operated to waive any confidentiality protections and that a fair decision cannot be made in this matter without the Student's IEP and evaluation documents. *See* August 9 and August 12, 2009 e-mails from the hearing officer and letter of August 18, 2009. Parents have not accepted the hearing officer's decision and have continued to assert their confidentiality rights. The hearing officer's August 9, 2009, e-mail informed Parents that their right to keep the records confidential could be protected

only by withdrawing their request for due process. Parents responded most recently by threatening suit against the District and the hearing officer if the educational records of Student were disclosed to the hearing officer or included in the exhibits at the due process hearing. *See* e-mail from Parents of Sunday, August 23, 2009.

With the hearing fast approaching on August 26, 2009, the hearing officer informed the Parents by e-mail of August 24, 2009, that if they refused to sign a waiver of confidentiality for Student's educational records for purposes of hearing, the complaint would be dismissed without prejudice and refiled conditioned on the Parents' agreeing to promptly sign a waiver of confidentiality. Parents were informed of the legal bases for the hearing officer's decision. The Parents were also informed of their right to seek review of the hearing officer's decision in state or federal court following any dismissal of the complaint. Finally, the hearing officer reiterated her willingness to ensure that the disclosure of educational records would be strictly limited to protect confidentiality to the maximum extent consistent with the resolution of the issues for hearing. The hearing officer stated, in relevant part, as follows:

I will protect your privacy by restricting access to [Student's] educational records to the parties, the court reporter, the hearing officer, and to district teachers and special education personnel who have worked with [Student] and had access to these records. No one else will be given access to these records. Of these individuals, only the hearing officer and the court reporter have not had previous access to these records. Any decision I issue will identify [Student] only as "Student" and you and your wife only as "Parents." Other names of schools and staff will be shielded as well so that no member of the public will know who was the subject of the decision. Exhibits and transcripts of the hearing are stored by the Public Education Department after the hearing and are kept confidential. These files are not available to the public. Both the court reporter and the hearing officer as well as district officials and staff are required to keep information revealed at the hearing confidential.

August 24, 2009 e-mail from the hearing officer.

The Parents responded by e-mail sent at 8:00 p.m. on August 24, 2009, stating that they would not agree to waive their confidentiality rights and insisting that the hearing proceed without the educational records. Early on August 25, 2009, the hearing officer informed the District that the hearing would not proceed on August 26, 2009, and asked the District to notify the court reporter and the student witnesses.

In a subsequent e-mail sent by Parents early the morning of August 25, 2009, and not received by the hearing officer until late in the morning, the Parents stated that they would agree to waive their confidentiality rights to Student's educational records, but only if the hearing officer obtained a waiver from the parents of a student witness, allowing Parents access to the educational records of that student witness. The hearing officer had previously ruled that access would not be allowed to a student witness's special education records. In that ruling, the hearing officer stated as follows:

I will not allow you to have access to another student's special education records. These documents, by federal and state law, are highly confidential. Although there might be a case in which they are essential to the decision where I would have to decide if I have the authority to require their production, that is not the case here. I do not see the relevance of another student's special education records. The focus of the hearing is on how [Student's] behavior was influenced, if at all, by her disability. Although another student's behavior may have been provocative, all I need to know is what that behavior was and how [Student's] reaction to it was influenced by [Student's] disability. To the extent you want to show that the other student has a habit of acting in a certain way, you can ask the teacher questions about that student's behavior and [Student's] reaction to it. That is far more relevant and direct evidence. Finally, to the extent your reason for seeking these documents is to show that another student was treated differently than [Student] by [the District], that is not relevant to this hearing. The focus of this hearing is [Student] and whether she was treated appropriately under the IDEA. This is not an equal protection case where comparisons are important. Any equal protection or discrimination claim you made has been excluded from the issues for hearing.

August 3, 2009 e-mail from the hearing officer.

Parents were also aware that the District, as reported in its letter of August 5, 2009, to the hearing officer and Parents, had asked the parents of the student at issue whether they would be willing to waive their confidentiality rights. They were not willing to do so.

Having now reviewed both the 8:00 pm and the early morning response from the Parents, the hearing officer enters this order dismissing Parents' claims without prejudice to their refile and conditions any refile on a waiver of confidentiality for the educational records of their daughter sufficient to allow those records to be introduced into evidence at the hearing, to allow the hearing officer to review those records, and to allow school district personnel and teachers to be questioned about those records. The grounds for this decision are reviewed below.

BASIS OF THE DECISION

When a hearing is requested, either in court or before an administrative agency hearing officer and relief is sought by a party, fundamental fairness requires that the party requesting relief be required to give the court and the opposing party access to the records necessary to defend and to reach a decision. Generally that waiver is automatic upon filing the action, but because Parents have actively opposed release of this information to the hearing officer, the hearing officer has demanded a written waiver by the Parents.

A number of hearing officers and courts have held that failure to waive any right to confidentiality and allow access to otherwise confidential records merits either dismissal of the action or a decision against the parents. *Hudson School District*, 16 IDELR 1340 (N.H. 1990); *Bd. of Education of the Oak Park Public Schools*, 20 IDELR 414 (Mich. 1993); *Murphy v. Commonwealth Dept of Education*, 504 A.2d 382 (Pa. Commonwealth 1986). These cases have relied on fundamental fairness to the opposing party. Here, by denying access to Student's records, the Parents have made a fair decision impossible. The hearing officer cannot evaluate the impact

of the procedural violations alleged by the Parents on Student without information about her disability. Nor can the hearing officer decide what compensatory education would be appropriate if there is a ruling in favor of Parents and Student.

Due process requires that procedures be fair to both parties. The introduction into evidence of Student's educational records are essential to allow the District an opportunity to defend. Even the procedural issues raised by Parents require review of educational records which document the procedures followed. Apparently Parents are agreeable to the hearing officer reviewing the educational records they have introduced, but not those offered by the District. These restrictions on the evidence are inconsistent with the hearing officer's duty to conduct a fair, impartial hearing which is not biased in favor of either side.

In addition, there is significant question here about whether Parents have any confidentiality rights under either the IDEA or FERPA concerning the use of educational records in a due process hearing. The IDEA regulations governing the parties' hearing rights make plain that either party is permitted to introduce educational records as exhibits at the hearing, without the consent of the parents. 34 C.F.R. § 512(b)(2) provides that either party may introduce relevant evaluations of the student who is the subject of a due process hearing at that hearing so long as the content of the evaluations are disclosed to all parties five business days in advance of the hearing. The parent can bar these records from the hearing by denying consent only if this 5-day requirement is not met.

Several of the FERPA exceptions to the parental consent requirement appear to be applicable here. Educational records may be reviewed by a state educational officials and school district personnel when the purpose of the use of the records is to determine appropriate educational services for a student or to enforce federal or state rights. 34 C.F.R. § 99.31. Those are the purposes of a due process hearing and the witnesses and hearing officer who would have access to

the records are education officials or school district personnel. FERPA also waives the consent requirement in legal proceedings in court brought either by the parent or by a school district. *Id.* Because the due process hearing is a prelude to court review and is in the nature of a court proceeding, this provision applies to due process hearings.

Given the Parents' adamant opposition and given that there may be some room for debate about whether an explicit waiver of confidentiality is required by FERPA in the context of a due process hearing, the hearing officer is unwilling to simply order Student's educational records disclosed over Parents' opposition. Instead, the hearing officer gave Parents' a choice: either agree to sign a written waiver of any confidentiality rights under FERPA and under any other source of law, or the complaint will be dismissed without prejudice, with re-filing contingent on Parents' agreement to sign a waiver promptly. Parents initially responded by again insisting on their confidentiality rights and refusing to sign a waiver. They then modified their response the day before the scheduled hearing to condition their agreement to sign a waiver on the consent of the parents of another student to releasing their daughter's special education records to Parents for use at the hearing. As noted above, the hearing officer had already ruled against Parents' identical attempt to condition access to Student's educational records on the hearing officer giving Parents access to the records of the student witness. This ruling is in the record. Parents were on notice that this issue had already been resolved by a decision of the hearing officer. Their attempting once again to condition use of Student's records on disclosure of the records of another child is, therefore, entirely inappropriate.

One further point merits mention: Parents accuse the hearing officer of improper *ex parte* contact with counsel for the District. They have made this claim before. As the hearing officer has previously explained, it is entirely without merit. All discussions have been by e-mail and written

correspondence or conference calls and Parents have received copies or been included in every exchange. The one exception was the telephone call the morning of August 25, 2009, to ask the District to inform the court reporter and student witnesses that the hearing would not proceed. This is a clerical matter, prompt notification was needed to avoid inconvenience and expense, and this communication was in no way improper. There has been absolutely no discussion of the merits of any issue in which Parents were not included.

In order to avoid a ruling which would forfeit Parents' and Student's right to a due process hearing, the hearing officer is dismissing this matter without prejudice. Parents are thus given the opportunity to either agree to a written waiver of confidentiality and refile their due process complaint or to seek review of the hearing officer's ruling in state or federal court.

ORDER

Because this matter cannot proceed to a fair hearing given Parents' refusal to waive their asserted rights to confidentiality of Student's educational records, precluding the introduction of these records as exhibits or review of the records by the hearing officer, the hearing officer hereby dismisses this matter without prejudice, and conditions refiling of the due process complaint on Parents' agreeing unconditionally to waive their FERPA and other confidentiality rights and allow Student's relevant educational records to be introduced as exhibits at the due process hearing. The disclosure of these records will be limited to the hearing officers review and to use in questioning district officials and educational personnel and Parents. They will not be disclosed to any of the student witnesses.

The District exhibits (which include Student's educational records) will be returned to the District in a sealed envelope without having been read or reviewed by the hearing officer.

RIGHT TO APPEAL

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I) (2004), 34 C.F.R. 300.516, and 6.31.2.13(I) (25) NMAC (2007). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

**THIS DECISION RENDERED AND THIS ORDER ENTERED ON THIS 26th DAY
OF AUGUST, 2009.**

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Due Process Hearing Officer
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