

XXXX XXXX,
STUDENT

v.

BALTIMORE CITY PUBLIC
SCHOOL SYSTEM

* BEFORE THOMAS G. WELSHKO,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-CITY-OT-15-04918

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**ORDER ON BALTIMORE CITY PUBLIC SCHOOL SYSTEM'S
MOTION TO DISMISS, OR, IN THE ALTERNATIVE,
FOR SUMMARY DECISION**

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STATEMENT OF THE CASE

On February 5, 2015,¹ XXXX XXXX (Parent) and XXXX XXXX (Aunt), on behalf of XXXX XXXX (Student), filed a due process complaint with the Office of Administrative Hearings (OAH), requesting a due process hearing to review the identification, evaluation, or placement of the Student by the Baltimore City Public School System (BCPSS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

The Parent and the Student's Aunt requested mediation in lieu of a resolution meeting. 34 Code of Federal Regulations (C.F.R.) § 300.510(a)(3)(ii) (2014).² Consequently, the OAH scheduled a mediation session on Monday, March 2, 2015, at 1:30 p.m. and an in-person

¹ The envelope that contained the Parent's due process complaint is postmarked February 5, 2015. The OAH's Rules of Procedure provide, "‘Filed’ means, unless otherwise indicated in this chapter, the earlier of when the document is postmarked or received at the Office and, when required, served on the other parties to a proceeding or an administrative law judge." Code of Maryland Regulations (COMAR) 28.02.01.01B(5).

² All references to C.F.R. hereafter will be to the 2014 volume.

prehearing conference (PHC) on that same day at 4:00 p.m. to discuss the scheduling of a merits hearing following mediation. No one on behalf of the Parent appeared for the mediation. After the time for the mediation had past, the Student's Aunt called the OAH and indicated that she just learned that a mediation had been scheduled. I convened the Prehearing Conference at 4:00 p.m. Darnell Henderson, Associate Counsel, BCPSS, represented BCPSS during the PHC. I reached the Student's Aunt by telephone, and she participated in the PHC by that means. The Student's Aunt indicated that she did not get notice of the PHC, even though her name appeared on the due process complaint. This was true. Consequently, I rescheduled the mediation for 9:30 a.m. on Monday, March 9, 2015, and the in-person PHC for 12:00 noon on that same date. On March 3, 2015, the OAH sent Notices of Rescheduled Mediation and Prehearing Conference to both the Parent and the Student's Aunt.

Administrative Law Judge XXXX XXXX convened the rescheduled mediation at 9:30 a.m. on Monday, March 9, 2015. Neither the Parent, the Student's Aunt, nor anyone else authorized to represent the Student, appeared for the mediation. After the time for mediation had past, the Parent called the OAH and spoke with Docket Specialist XXXX XXXX. The Parent told Ms. XXXX that he wished to "dismiss" his due process complaint. Ms. XXXX advised the Parent that because the PHC was already scheduled, he would still have to appear at the OAH for the PHC.

I convened the in-person PHC in this matter on Monday, March 9, 2015, at 12:00 noon. Mr. Henderson again appeared for BCPSS. Neither the Parent, the Student's Aunt, nor anyone else authorized to represent the Student, appeared for the PHC. I waited until 12:15 p.m., fifteen minutes after the scheduled start time for the PHC, to begin the PHC. No one appeared for the Student after waiting fifteen minutes.

Because no one appeared for the Student, BCPSS made a Motion to Dismiss³ based on (1) the Parent's failure to participate in a resolution meeting prior to proceeding to a due process hearing and (2) his alleged enrollment of the Student in the public school system of another state. Although I preliminarily granted the Motion on the first basis on the record and indicated I would be following up my oral ruling with a written decision, after I performed further analysis, I determined that my oral ruling was incorrect. My written motion decision, issued on March 20, 2015, corrected that error. In that motion decision, I ruled that because BCPSS had not made reasonable attempts to convene a resolution session, I was remanding this case to BCPSS to make reasonable attempts to convene a resolution session.

On April 3, 2015, I received BCPSS's Motion to Dismiss for Failure to Participate in the Resolution Process (Motion). Pursuant to the OAH's Rules of Procedure, at COMAR 28.02.01.12B(3)(a), I waited fifteen days for the opposing party, the Parent, to respond. Because the fifteenth day (April 18, 2015) was a Saturday, I waited until the close of business on the next business day, Monday, April 20, 2015, for a response from the Parent. When I received none, I closed the record.

The legal authority for this proceeding is: IDEA at 20 U.S.C. A. § 1415(f) (2010); 34 C.F.R. § 300.511; Md. Code Ann., Educ. § 8-413(e)(1) (2014); and COMAR 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

³ Counsel followed-up with a written version of the BCPSS's motion on March 16, 2015. The written motion contained another motion, to deny standing to the Student's Aunt, which I granted. Therefore, the Student's Aunt is no longer a party to this appeal, because of her lack of standing.

ISSUE

The issue is whether the Parent's request for a due process hearing should be dismissed because the Parent failed to participate in a resolution meeting after BCPSS made reasonable efforts to solicit his participation.

SUMMARY OF THE EVIDENCE

Exhibits

BCPSS filed its Motion on April 3, 2015, with the following attachments, which were admitted into evidence:

- Exhibit 1. March 27, 2015 letter from XXXX XXXX, Coordinator, Parent Response & Due Process, BCPSS, to the Parent, suggesting dates to schedule a resolution session

- Exhibit 2. April 2, 2015 copy of an e-mail transmission from XXXX XXXX to the Parent, sent as a follow-up to Ms. XXXX's March 27, 2015 letter

The Parent did not offer any exhibits for admission into evidence.

Testimony

No testimony was presented by either party.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. On February 5, 2015, the Parent filed a due process complaint with the OAH on behalf of the Student.

2. In the Parent's complaint, the Parent requested mediation in lieu of a resolution meeting.

3. The OAH scheduled a mediation session on Monday, March 2, 2015, at 1:30 p.m. and an in-person prehearing conference (PHC) on that same day at 4:00 p.m. to discuss the scheduling of a merits hearing following mediation.

4. When no one on behalf of the Student appeared at either the mediation or the PHC, the OAH rescheduled the mediation for March 9, 2015, because the Student's aunt, a putative party to the complaint, did not receive notice.

5. I convened a PHC on March 9, 2015, at which time no one appeared on behalf of the Student. BCPSS moved to dismiss the Parent's appeal. It followed up with a written motion on March 16, 2015.

6. On March 20, 2015, I issued a motion decision remanding this case to BCPSS because BCPSS had not made reasonable attempts to convene a mandatory resolution session, a condition precedent before dismissal was warranted.

7. On March 27, 2015, XXXX XXXX, Coordinator, Parent Response & Due Process, BCPSS, sent a letter to the Parent, in which she suggested dates to schedule a resolution session.

8. On April 2, 2015, Ms. XXXX sent an e-mail to the Parent as a follow-up to her March 27, 2015 letter.

9. The Parent did not respond to Ms. XXXX's letter or e-mail.

10. No resolution session has taken place because of the Parent's failure to participate in the resolution process.

DISCUSSION

Motion to Dismiss and for Summary Decision

The OAH Rules of Procedure provide for consideration of a motion to dismiss or a motion for summary decision under COMAR 28.02.01.12C and D. Those regulations provide as follows:

C. Motion to Dismiss. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

D. Motion for Summary Decision.

(1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavits.

(2) The response to a motion for summary decision shall identify the material facts that are disputed.

(3) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

(4) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

In considering a motion to dismiss, an administrative law judge may not go beyond the “initial pleading,” defined at COMAR 28.02.01.02B(7) as “a notice of agency action, an appeal of an agency action, or any other request for a hearing by a person.” In contrast, when ruling on a motion for summary decision, an administrative law judge may also consider admissions, exhibits, affidavits, and sworn testimony for the purpose of determining whether a hearing on the merits is necessary. *See Davis v. DiPino*, 337 Md. 642, 648 – 49 (1995) (comparison of motions to dismiss and for summary judgment).

When a motion goes beyond the initial pleading, relying as it does in this case on other documents, then the motion is properly treated as a motion for summary decision. *See Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772 (1992). As I have considered the Exhibits submitted by BCPSS with its motion in making this decision, I am treating BCPSS’s April 3, 2015 motion as one for summary decision. COMAR 28.02.01.12D.

Disposition

Section 300.510 of Chapter 34 of the C.F.R. describes the process for conducting a resolution meeting. Section 300.510(a) affords the local education agency (LEA) fifteen days to convene a resolution meeting after receiving notice of a parent's request for a due process hearing. The purpose of the meeting is for the parent to discuss the complaint and the underlying facts so the LEA has an opportunity to resolve the dispute. 34 C.F.R. § 300.510(a)(2). Section 300.510(b)(1) affords the LEA thirty days from receipt of the request for a due process hearing to resolve the complaint before a due process hearing may occur. Section 300.510(b)(4) provides that if the LEA is unable to obtain the parent's participation in a resolution meeting, the LEA may request dismissal of the parent's due process complaint. The relevant provision states as follows:

(4) If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in § 300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

34 C.F.R. § 300.510(b)(4). The regulations also provide that "the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held." 34 C.F.R. § 300.510(b)(3).

Section 300.322(d) of Chapter 34 of the C.F.R. addresses the records that may be used to document the LEA's reasonable efforts to obtain a parent's participation in a resolution meeting, such as detailed records of telephone calls made or attempted and the results, copies of correspondence sent and responses received, and detailed records of visits made to a parent's home or place of employment and the results.

In this case, BCPSS has demonstrated that it made reasonable efforts to obtain the Parent's participation in the resolution meeting, but that the Parent failed to attend the scheduled

meeting. Ms. XXXX's March 27, 2015 letter to the Parent, combined with her April 2, 2015 follow-up e-mail, indicates that BCPSS has made reasonable efforts to schedule a resolution session. Moreover, documents offered by BCPSS on March 9, 2015, related to its previous motion to dismiss, strongly suggest that the Student is no longer residing in Baltimore City; documentary evidence indicates that he is now a resident of and attending school in XXXX, Pennsylvania. Furthermore, on March 9, 2015, the Parent spoke with OAH Docket Specialist XXXX XXXX by telephone and told Ms. XXXX that he wished to dismiss the due process complaint that he filed for the Student. The Parent, however, never followed-up with a written withdrawal.

In accordance with the federal regulations, BCPSS filed a motion requesting dismissal of the Parent's due process complaint based on the Parent's failure to participate in the resolution process. In accordance with the regulations, BCPSS filed its Motion on April 3, 2015, more than thirty days after the Parent filed his due process complaint on February 5, 2015. 34 C.F.R. § 300.510(b)(4). As noted, the OAH regulations provide that a party shall file an answer to a written motion fifteen days after the motion is filed. COMAR 28.02.01.12B(3)(a). To accommodate for the fifteenth day being a Saturday, I extended the response date to the next business day, Monday, April 20, 2015. The Parent has not responded. In fact, neither the OAH nor BCPSS has heard from the Parent since March 9, 2015.

Consequently, BCPSS has established, through its Motion, that it was unable to obtain the participation of the Parent in a mandatory resolution meeting after it made reasonable efforts to solicit his participation. BCPSS has complied with the requirements of the federal regulations in making reasonable efforts to schedule a mandatory resolution meeting and in moving for dismissal of the Parent's due process complaint based on the Parent's refusal to participate. 34 C.F.R. § 300.510(b)(4).

Based on the evidence before me, I find that there is no genuine dispute of material fact and that BCPSS is entitled to judgment as a matter of law. COMAR 28.02.01.12D. Therefore, I shall grant BCPSS's Motion and dismiss the Parent's due process complaint. 34 C.F.R. § 300.510(b)(4).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parent's request for a due process hearing shall be dismissed because he failed to participate in a mandatory resolution meeting after BCPSS made reasonable efforts to solicit his participation. 34 C.F.R. § 300.510(b)(4). Therefore, the Motion for Summary Decision filed by BCPSS shall be granted because there is no genuine dispute of material fact, and BCPSS is entitled to judgment as a matter of law. COMAR 28.02.01.12D.

ORDER

I **ORDER** that BCPSS's Motion for Summary Decision, filed on April 3, 2015, is **GRANTED**, the Parent's due process complaint in OAH case number MSDE-BCPSS-OT-15-04918 is **DISMISSED**, and no further proceedings in this matter will be held.

April 28, 2015
Date Order Mailed

Thomas G. Welshko
Administrative Law Judge

TGW/tc

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8-413(j) (2014).

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings' case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.