04-0417113

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS**
**STATE OF GEORGIA**

| | | |
|---|---|---|
| [redacted] | ) | |
| PETITIONER, | ) | |
| | ) | DOCKET NO.: |
| v. | ) | OSAH-DOE-SE-0417113-67-BAIRD |
| | ) | |
| GWINNETT COUNTY | ) | |
| SCHOOL SYSTEM, | ) | |
| RESPONDENT. | ) | |



## FINAL DECISION

## I. INTRODUCTION

On April 27, 2004, the father of [redacted] filed a Request for Due Process Hearing. The reason given for the hearing was that the Norcross High School/Gwinnett County School System allegedly failed to turn over complete records and files on [redacted] within the 45 day time limit and before the education eligibility determination meeting.

A telephone prehearing conference was held on May 14, 2004.[1] During this conference it was requested by the parties that the normal disposition period on this matter be extended so that a settlement could be explored. The undersigned granted this request and scheduled the hearing for the mutually acceptable date of July 1, 2004. On June 23, 2004, the Respondent filed a Motion for Summary Determination. On June 29, 2004, the

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[1] This case was originally assigned to Administrative Law Judge Jessie Altman but was reassigned to the undersigned because Judge Altman left the employment of the Office of State Administrative Hearings.



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undersigned denied this motion because, in violation of OSAH Rule 15(1), it had not been filed at least 30 days prior to the hearing date.

During a telephone conference on June 29, 2004, the parties requested again that the disposition date on this matter be extended once more. The Respondent stated that it intended to file a Motion to Dismiss in a few days, and the Petitioner wanted the right to respond to this motion in writing and/or orally. The undersigned agreed to this request from the parties, continued the hearing and set a telephone conference for July 16, 2004.

On July 7, 2004, the Respondent filed a Renewed Motion for Summary Determination or In the Alternative To Dismiss for Lack of Jurisdiction. On July 15, 2004, the parents of [redacted] informed the undersigned that they would be unable to participate in the telephone conference. They also stated that they would respond to the Respondent's motion in writing. The parents filed a Motion in Opposition to Respondent's Motion for Summary Determination on July 15, 2004. The Respondent's motion was denied on July 27, 2004.

The hearing on this matter was held on August 31, 2004. The Respondent was represented by Victoria Sweeney. The Petitioner was represented by her parents. For reasons stated below, it is the decision of the undersigned that the Respondent has given the parents of [redacted] a copy of every educational record relating to [redacted] in their possession and thus all demands of [redacted] and her parents in this matter are DENIED.

## II. FINDINGS OF FACT

1.

At the time the Petitioner's Request for Due Process Hearing was made, [redacted]. had just completed eleventh grade and was enrolled at [redacted] High School in the Gwinnett County School District. **(Undisputed Material Fact (UMF) #1 in June 29, 2004 Order Denying the Respondent's Request for Summary Determination)**

2.

[redacted] has not yet been found to be eligible for services under the Individuals with Disabilities in Education Act (IDEA) and she does not have an Individualized Education Plan (IEP). **(UMF #2)**

3.

On April 9, 2004, Mary Anne Charron, the principal of [redacted] High School, received a facsimile transmission from the father of [redacted]. requesting that the school provide him with all of [redacted]'s educational records. In response to this request the principal, on April 12, 2004, sent an electronic mail transmission to the entire faculty and staff of [redacted] High School asking them to send to her office any document in their possession relating to [redacted] by the end of the day. On April 14, 2004, the principal sent to [redacted].'s parents by certified mail a copy of every document which the principal had received in response to her electronic mail, the permanent education records on [redacted] contained in the central office files, the records on [redacted] on the school district's computer system and all the documents related to the pre-evaluation of [redacted] for Special Education. Copies of all these

records were received by [redacted]'s father on April 16, 2004. **(Testimony of Mary Anne Charron, t. 34-44, Respondent's exhibits 1, 2, and 3)**

**4.**

A meeting between [redacted]'s parents and the school administration was held on May 13, 2004, for purposes of discussing [redacted]'s special education testing. On May 20, 2004, a Special Education eligibility meeting was held concerning [redacted]. At this meeting the father of [redacted] stated that the records of [redacted] were incorrect because they listed Ms. Valinda Whitlock as [redacted]'s algebra teacher during the first semester of 2003, when it had been Mr. Franklin. Contrary to the father's contentions, the records correctly listed [redacted]'s teacher. The parents also complained at this meeting that they did not have all of the samples from [redacted]'s writing portfolio from grades nine and ten. Teachers are not required to keep these records and the parents of [redacted] had been given a copy of each sample in the possession of the school board. **(Testimony of Charron, t. 46-60)**

**5.**

The principal received another request for records from [redacted]'s parents on June 9, 2004. On June 16, 2004, the principal mailed and the father of [redacted] received not only all the records on [redacted] which had been collected from April 14, 2004, to the date of the mailing but also another copy of all the records which were originally mailed on April 14, 2004. **(Testimony of the Charron, t. 44-46)**

**6.**

The Respondent classifies as permanent records the following: (1) standardized assessments or test scores, (2) attendance records, (3) transcript of grades, (4) information

about the custodial parents, where they live and can be contacted, and (5) immunization and hearing and vision records. **(Testimony of Charron, t. 37-39)**

7.

No official records pertaining to [redacted] were destroyed at any time by school officials without the knowledge of [redacted]'s parent **(Testimony of Charron, T. 63-64)**

## III. CONCLUSIONS OF LAW

1.

The pertinent laws and regulations governing this matter include IDEA (20 U.S.C. § 1400 *et seq.*), 34 C.F.R. § 300 *et seq.*, O.C.G.A. § 20-2-152, and Ga. Comp. R. & Regs. Chapter 160-4-7 *et seq.* (DOE Rules). IDEA requires state and local educational agencies to provide disabled children with a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1400(c).

2.

Congress has established procedural safeguards, contained in 20 U.S.C. § 1415, to protect the rights of disabled children and their parents with respect to the provision of FAPE. One of these safeguards is the opportunity to examine all school records relating to the child. 20 U.S.C.§ 1415 (b) (1). This safeguard is set out in more detail in 34 C.F.R. 300.562 which states that a school shall without "undue delay." but in no case more than 45 days "permit parents to inspect and review any education records relating to their children that are collected, maintained, or used" by the school.

3.

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, grants parents of students in public school systems the right to inspect and review the student's education records. A regulation issued pursuant to IDEA, 34 C.F.R. § 300.562, adopts the definition of education records used in a regulation issued under FERPA, 34 C.F.R. § 99.5 which defines an education record as any record which contains information directly related to a student and which is maintained by a school district or a person acting on behalf of the school district. The United States Supreme Court has interpreted this definition of education records in *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002). In finding that peer graded test papers are not education records, the Court stated that under the definition of education records found in FERPA and adopted by IDEA such records are institutional records kept by a single registrar. In reaching this conclusion, the Court looked at the ordinary meaning of the word "maintain" which is to keep in existence, or to preserve, or to retain. According to the Court, such education records would normally be kept in a records room at a school or in a permanently secure database.

The definition of permanent records used by the Respondent, as described in Finding of Fact number six, seems to conform to the holding of the court in the *Owasso* decision. Although the Respondent furnished every record concerning [redacted] that it possessed to her parents, only what it classifies as permanent records are education records according to IDEA and FERPA.

4.

20 U.S.C.§ (b) (6) states that parents must be given "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child or the provision a free appropriate public education to such child." This opportunity to present complaints includes an impartial due process hearing. 20 U.S.C. § 1415 (f).

5.

The Respondent has argued quite vigorously that since the Petitioner is not a child with a disability, neither she nor her parents are entitled to the procedural safeguards in IDEA. The Respondent points out that 20 U.S.C. § 1415 (a) states that the procedures set forth under IDEA are for children with disabilities and their parents. The Respondent argues that since the Petitioner has not yet been found to be a child with a disability under IDEA, neither she nor her parents are entitled to avail themselves of the procedural protections of the Act, including the opportunity for a due process hearing. Respondent, thus, has argued that it is entitled to an order dismissing Petitioner's request for due process due to a lack of subject matter jurisdiction and/or failure to state a claim for which relief can be granted.

To the undersigned, the wording of IDEA seems to be somewhat confusing on the point argued by the Respondent. An isolated reading of 20 U.S.C. § 1415(a) cited by the Respondent would tend to support the Respondent's argument because it does state that procedural safeguards under IDEA are intended to protect children with disabilities and

and their parents. However, reading further on in the same statute, it would seem that the Respondent's interpretation of the scope of IDEA is too narrow. 20 U.S.C.§ (b) (6) states that parents must be given "an opportunity to present complaints with respect to any matter relating to the **identification**, evaluation, or educational placement of the child or the provision a free appropriate public education to such child." (emphasis added) This opportunity to present complaints includes an impartial due process hearing. 20 U.S.C. § 1415 (f). Obviously the identification phase will involve children, such as [redacted], who have not yet been found to have a disability. It thus seems that the intent of the procedural safeguards of IDEA is to cover not only the evaluation and educational placement of a children with disabilities, but also the process of identifying which children have such disabilities.

However in any case in order to make a case under IDEA that a school board has violated its procedural safeguards by failing to provide education records to parents it is not enough to simply establish that there has been a technical violation of procedural safeguards. One must also establish that this violation caused measurable harm to the student in obtaining FAPE. In the present context this would mean that the Respondent and her parents must establish that the alleged failure of the Respondent school district to provide them access to all of the [redacted]'s pertinent education records inhibited their right to have her properly evaluated for possible special education services. *Sch. Bd. Of Collier County v. K.C.*, 285 F.3d 977 (11th Cir. 2002) and *Weiss v. Sch. Bd. Of Hillsborough County*, 141 F3d 990 (11th Cir 1998).

6.

The parents of [redacted] have argued that the Respondent has failed to provide them with a various items relating to their daughter including the following: [redacted]'s Algebra II Progress Report, [redacted].'s Social Studies and Language Arts Gwinnett Gateway taken in the spring of 2003, the Science and Language Arts Gwinnett Gateway also taken in the spring of 2003, [redacted].'s Language Arts writing portfolio from the ninth and tenth grades, class schedule changes, teacher recommendations, and essays [redacted] completed in the Pre-IB program. The parents have requested that the undersigned order the Respondent to produce [redacted].'s complete education records.

In the present case, the demands of the parents of [redacted]. must be denied because the undersigned found the testimony of Ms. Charron at the hearing to be credible when she testified that the Respondent completely and in a timely manner has complied with each and every request from [redacted]'s parents for school records relating to [redacted]., even requests for those more temporary records which do not fall under the very restrictive definition of education records contained in IDEA.

Even had the parents been able to establish that the Respondent was withholding education records from them, the undersigned still would not have found the Respondent to have violated any provision of IDEA because the parents failed to establish exactly how the absence of any particular records has prevented them from having [redacted] properly evaluated for special education services.

The parents in their Petitioner's Brief in Support of Incompleteness and Timeline of Records complain about alleged failures of the Respondent to furnish records going back to January 2004. Matters which occurred during the pendency of the [redacted]'s previous due process hearing request (Docket Number OSAH-DOE-SE-0410413-67-Altman) were not considered in this present matter. Administrative Law Judge Jessie Altman dismissed that action on March 15, 2004, as moot, finding that all the demands that the Petitioners had made of the Respondent had been met.

In addition to IDEA, [redacted]'s parents have alleged that the Respondent, by failing to provide them with [redacted]'s education records, also violated FERPA, Section 504 of the Rehabilitation Act of 1973, O.C.G.A. § 20-2-720, and § 50-18-70, DOE Rules, and the Gwinnett County School District Procedures and Policy. Given the fact that these allegations are made with no specificity, and the undersigned has found that the Respondent has completely complied with all of the parents' requests for school records, the undersigned has determined that a discussion of these allegations is unnecessary.

## IV. FINAL DECISION

It is the decision of the undersigned to DENY all the demands made by the parents of

of [redacted] in this proceeding because the Respondent has fully and in a timely manner complied with all their requests to examine their daughter's school records.

Issued this the 21st day of September, 2004.

**W. Joseph Baird**
**Administrative Law Judge**