

May 12, 2007

Office of Civil Rights, Region IV
Department of Health and Human Services
61 Forsyth Street, SW-Suite 3870
Atlanta, GA 30323

RE: OCR Complaint- Florida Department of Education (FDOE) Due Process Procedures

Affixed hereto is an executed Discrimination Complaint, submitted under Title II of the American with Disabilities Act (hereinafter "ADA"), Title 6 of the Civil Rights Act, and under Title 34, Section 504 of The Rehabilitation Act of 1973 (hereinafter "Section 504")

As Representative, I hereby submit this OCR Class Discrimination Complaint against the Florida Department of Education (FDOE), and the Department of Administrative Hearings (DOAH) under their jurisdiction, both complicit in the continued and widespread discrimination of Florida Exceptional Student Education (hereinafter ESE) students. Specifically, while a recipient of federal assistance and granted jurisdiction over IDEA and Section 504 under a Memorandum of Understanding with the Department of Education, FDOE and DOAH are not in compliance with Federal regulations as evidenced by their willful refusal to process due process complaints at the state level, as envisioned under the Federal regulatory guidelines and procedures.

This Complaint entails inter-related and continuing violations of ESE Student's (1) civil rights under the ADA and relevant state and federal law, (2) educational and privacy rights under the Family Educational Rights and Privacy Act (hereinafter referred to as "FERPA"), and (3) violations of Free and Appropriate Education (hereinafter referred to as "FAPE") rights under both the Individuals with Disabilities Education Act (hereinafter referred to as "IDEA") and Section 504.

Not only has FDOE and DOAH allowed and/or participated in a continued practice of widespread discrimination against ESE Students, in violation of their civil and legal rights under the applicable sections of these laws, but they have allowed the Public School Districts within their jurisdiction to utilize coercion, intimidation, and delay tactics to interfere with, delay, and deny ESE Student's rights to Due Process on the state level under both the IDEA and Section 504, in attempts to pressure Parent Advocates to abandon all Due Process and related legal rights.

Given their persistence in utilizing these tactics in retaliation for the filing of state Due Process complaints, Parent Advocates have been forced to withdraw their students from the public school system, relocating outside the State of Florida for services, provide home schooling, and/or place their children in alternative private schools. Those that seek protection under IDEA, Section 504, and ADA have been forced, at considerable personal expense, to hire legal counsel to protect ESE Student's rights. Rather than insure that those student's rights to Due Process and respected and upheld, FDOE and DOAH instead allow and approve delays and denials of the ESE Student's rights in order to force Parent Advocates to abandon all rights. Those tactics include the denial of educational and related services to the child during Due Process proceedings, continuous delays in Due Process proceedings, while simultaneously threatening Parent Advocates with the violation of Compulsory Education laws.

Notably, FDOE and the assigned Administrative Law Judges (ALJs) under DOAH, in IDEA Due Process Hearing Requests, are refusing to simultaneously hear educational, medical, and/or legal issues relative to the

student's rights under ADA and Section 504. In doing so, they are effectively "delaying and denying these qualified disabled person's legal rights under ADA and Section 504 for the duration of the IDEA Due Process Proceedings, in violation of the disabled student's civil rights," This is a systematic course of action to delay and deny any consideration to these critical civil rights, while forcing upon the qualified disabled person a clear and costly duplication of time and monies in having to separately pursue these rights on a State Appeal or Federal level, only after exhausting the Administrative Pre-conditions of those filings under IDEA on the State level.

Professional Background

As Representative for the OCR Class Discrimination Complaint, I am a current resident of Naples, Collier County, Florida. By way of background, I was formerly an elementary school teacher, certified K-6, and a substitute teacher in Regular and Special Education classes, including Behavior Disordered, Deaf and Hearing Impaired, EMH, LD, etc.

I was trained and served as a Due Process Hearing Officer (DPHO) for the Illinois State Board of Education serving as a Level I (Initial) and Level II (Appellate) Hearing Officer. Although I am not an attorney, I was accepted as a member of the Chicago Branch of the American Arbitration Association (AAA) on the basis of my knowledge and expertise in Special Education and Disability Rights issues. In the State of Illinois, membership in AAA was required to be a Level II Hearing Officer. I was further trained as a 504 Consumer Specialist by the Disability Rights and Educational Defense Fund (DREDF), which was under contract to the Office of Civil Rights (OCR).

Given my background and experience, I was personally the initiating party to a Federal complaint filed against the Illinois State Board of Education over 20 years ago regarding their state Due Process procedures. This Complaint resulted in a major revision of the Illinois appellate review process, under threat of LOSS of ALL FEDERAL FUNDING TO THE STATE.

Complaint Details

During the first quarter of 2006, I read an article in the Naples Daily News concerning D. H., an ESE student with Autism who utilized a Service Animal to mitigate his disability and provide him equal access to all public areas of the Collier County public school he attended. I later learned there were many more substantive educational and medical issues to the D. H. case, in addition to the Service Animal.

Foremost, the family of D. H. initiated an Individual with Disabilities Education Act (IDEA) Due Process Hearing (DPH) request on January 16, 2006. Under IDEA regulatory guidelines the hearing was clearly to have been conducted, and the assigned Administrative Law Judge (ALJ) decision rendered, within 45 days of the request. The intent of this Federal guideline is to specifically protect the educational and medical needs of the child and the child's rights to due process.

The news article explained that a DPH under IDEA had been requested on January 16, 2006, and the parents of D. H. had requested the DPH be open to the public; a procedural right. Given my background, I attended the entire hearing to both ascertain and evaluate (1) the details of the educational and medical issues contested, as well as (2) the State of Florida's IDEA and Section 504 Due Process procedures.

While originally scheduled to convene on February 20, 2006 (within the IDEA time frame), Collier County School Board (CCSB) filed a late Motion for Continuance on February 15, 2006, only three (3) business days

before the scheduled DPH was to convene. The Motion was unbelievably approved by the assigned ALJ prior to the attorneys for the family of D. H. even having an opportunity to respond to the Motion for Continuance. In their subsequent February 16, 2006 legal filings to the ALJ (Motion to Reconsider and the Petitioner's Response to the Motion for Continuance), the attorneys for D.H. emphasized to the ALJ (1) that the IDEA 45 day time frame had not been waived, (2) the urgency of the child's educational and medical issues, (3) the fact that the child was not in school, and (4) that Time Was of the Absolute Essence. The ALJ simply denied the attorney's Motion to Reconsider and Petitioner's Response.

Simultaneously, the Parent Advocates filed a formal Due Process Complaint with the assigned ALJ for CCSB's continued violations of D. H.'s rights to Due Process under both IDEA and Section 504, as well as the FERPA violations. The ALJ did not even extend the courtesy of a Response to the Parent Advocates, although he denied CCSB's later Motion to Dismiss it.

Despite these concerted attempts on behalf of both D.H.'s Parent Advocates and attorneys to compel DOAH and its' assigned ALJ to respect and uphold the intent of the Federal guidelines, all requests were simply denied or disregarded, and the scheduled DPH was delayed 45 days, to April 6, 2006.

At the request of CCSB, an additional Motion for Continuance was approved by the ALJ despite the extensive 45 day delay in the DPH. This further delayed the hearing an additional 25 days, to May 1, 2006, three (3) plus months from the date of filing the DPH Request.

Most concerning was the ALJ's ruling to hear and rule only on the IDEA aspects of the Due Process Complaint, setting aside consideration to all Section 504 and ADA issues for the duration of the Due process proceedings, which were being delayed and delayed by CCSB.

Once convened, the IDEA DPH itself entailed thirteen (13) exhaustive days, and was spread out over several weeks due to continued delays (approved by the ALJ) on behalf of CCSB's attorney. Reasons cited by the attorney included: personal injury, parental health concerns, witness unavailability, and school schedule conflicts; all again, at the objection of the family's attorneys and Parent Advocates. At no time were the pressing needs of the child considered.

The hearing was finally concluded on June 22, 2006, five (5) full months after the January 16, 2006 date of filing of the DPH Request!

During the entire period of these delays (all at CCSB's request and at the objection of the family), the Collier County School District (CCSD) exercised its' legal rights to "Stay Put" all services to the child. They refused to amend the child's Independent Education Plan (IEP) to: acknowledge his Epilepsy diagnosis by a renowned Pediatric Neurologist, allow his Seizure Response Service Dog to accompany him to school, and provide a full-time school nurse (in a middle school with 1200+ students) to administer his Epilepsy medication. This is despite a Federal mandate to require a full-time nurse for every 750 students. The Middle School D. H. attended had a student population of typically developing students exceeding 1200, in addition to all middle school ESE Autism students, with only a part-time nurse. The Parents, therefore, could not irresponsibly send their child to school during this period and were forced to provide all services to the child at home, at parental expense. All requests to CCSB for Medical Home-Bound Services during this period were refused.

With all the delays, the assigned ALJ advised the parties that no decision in the case would likely be made prior to the start of the upcoming 2006-2007 school year in August. This necessitated a second IDEA Request for a

DPH by the family, filed June 19, 2006, in an attempt to gain their son educational services over the summer of 2006. Again, a decision in this second case, as with the first, was deferred until after the start of the new school year.

Specifically note that this disabled child was denied equal access to the public school system from the time the parents had filed the first DPH request in January of 2006, during the entire hearing process, throughout the summer, and into the start of the new school year. Absolutely no accommodations were made by the CCSB for the child to obtain services for the 2nd semester of the 2005-2006 school year, summer 2006 Extended School Year (ESY) services, nor accommodations for Hospital/Homebound services. The CCSB provided NOTHING to this child, while simultaneously delaying and denying his legal rights to hearings within the time frames prescribed by the law. As late as August 21, 2006 (the new 2006/2007 school year started on August 14th), the CCSD had yet to schedule an IEP meeting to address this child's needs, despite written IEP Meeting Requests submitted on August 10th and August 11th by the parents.

Facing compulsory education requirements (which CCSB repeatedly threatened), and with no end in sight to the legal proceedings, the D. H. family was finally resigned to enroll their child in an out of state public school system in September, 2006. The child and mother were forced to relocate to Chester County, PA., where D. H. was enrolled in a PUBLIC SCHOOL that readily provided each and every service that was at dispute with the CCSB. In my mind, this certainly went to proof that the family was not being unreasonable, nor making unnecessary demands on the CCSB to provide their son with FAPE, as required by law.

Separated from his family, D.W.H.'s father remained in the family's Naples, FL. residence, paying CCSB taxes even though his son couldn't receive services. The ALJ rendered the family's IDEA Due Process Complaint "moot" on October 18, 2006, citing D. H. was "no longer enrolled in Collier County". D. H.'s father was therefore compelled to file a Federal Lawsuit in Federal Court in November, 2006, which is currently pending.

In addition to financing legal costs now exceeding \$100,000, the parents were providing D. H. with medical and educational services at home during the entire time CCSB withheld services. Also, their tax dollars were supporting CCSB, who during the same time frame was proven to have been providing education to ineligible, over-age (one 30 year old) illegal soccer players (see related Naples Daily News articles), while their eligible, minor, disabled son received NO services. This soccer player situation was immediately rectified as a result of media publicity and intervention by the FDOE and Inter-athletic Commission rules. Loss of athletic honors is sad and disheartening for the "qualified" participants, but can't compare to the loss of educational opportunity for a handicapped child or children. The FDOE and CCSB give written affirmation they will provide special services to disabled students when they accept federal reimbursement. Where is the honor in withholding educational services to any eligible child while providing educational services to ineligible illegal adults?

Wide-Spread Discrimination

My decision to initiate this Complaint against FDOE and DOAH was made when I learned of a separate OCR Class Discrimination Complaint filed April 26, 2007 against CCSB, by a group of concerned Collier County Parents and Education Advocates for ESE Students. In reviewing their OCR Class Discrimination Complaint, I was appalled by the clear pattern of wide-spread discrimination evidenced by a comparative analysis of the above-referenced D.H. Case 1 Summary (which I personally witnessed), and the Case 2 Summary for B.C., another Collier County ESE Student. Supporting the Class Complaint's challenge of wide-spread discrimination on behalf of CCSB, the two Case Summaries virtually mirror each other in every respect!

By any reasonable standard of review, no one can dispute the clear legal strategy employed by CCSB of retaliation against the two families for simply exercising their legal rights to Due Process under the state system. Questioning myself on how many similar cases the OCR investigation would uncover, I felt an obligation to

seek accountability on behalf of FDOE and DOAH as well, as they are delegated the ultimate authority for the processing of such cases.

A complete copy of this separate OCR Class Discrimination Complaint is hereto affixed, and hereby incorporated, to include all evidentiary exhibits. As in the Class Discrimination Complaint against CCSB, this supporting documentation clearly proves the pattern of discrimination herein outlined, as allowed and/or supported by FDOE and DOAH. Please accept it as such.

Conclusions

Has the FDOE system changed the spelling of Justice to Just Us? Has the FDOE and DOAH endorsed this change based on the assigned ALJ's actions in these two specific cases, and in others cases subject to the OCR investigation? Who (aside from the Federal Courts, where families must seek justice) monitors or supervises these kinds of absurd and abusive actions within the State?

To Delay is to Deny! Because the family of D. H., B.C., and other ESE students are being denied both FAPE and DPH rights under Florida's one-tier IDEA system, these families and others have had absolutely no choice, in the interest of their disabled children, but to provide home schooling and/or private schooling. As in the D.H. case, some families are even required to relocate, while splitting the family, doubling living expenses, and further straining a family already stressed by the burdens of living, caring, loving, and providing for the special needs of their disabled child.

The DPH procedures were intended to allow Parent Advocates to be able to represent themselves at a DPH; NOT so in the State of Florida. After personally observing what the family of D. H. and others have been put through emotionally and financially, in stark contrast to the guidelines established by IDEA and 504 regulation, why would any parent exercise the Floridian Due Process procedure? Not many parents have the intellect, finances, or fortitude to hold a public school system accountable. Parents have told me attorneys have dissuaded them from filing DPH, admitting to their clients that DP in Florida is a costly, painful waste of time, with only a 20 % chance of a ruling in their favor from the ALJ's. As a former Due Process Hearing Officer and a Child Advocate, I cannot recommend any parent seek a DPH in the state of Florida.

In recent years, Collier County has received more than twice the number of DPH requests compared to its' neighboring Lee County, even though Lee County has double the student population. For the period 7/04 through 2/5/07, Lee County had five (5) requests for DPH's, (Charlotte County to the North zero (0) requests), while Collier County had twelve (12) requests for DPH's. The FDOE appears to turn a blind eye to the obvious and suspicious disparity between its' counties in the number of filings, making no effort to investigate the underlying issues or necessary remedial actions.

CCSB, together with 66 other Florida school districts, is (under Federal law), a District in Corrective Action. Under the No Child Left Behind Act, they scored only seventy-two percent (72%) of the criteria. The District is being required to move some of their "funds from administration to the classroom to help specific groups of students improve". In light of this fact, I would request that OCR investigate the dispensation of ESE funds and to evaluate at what percentage level the District scores in criteria mandated for services they are obligated to provide ESE students.

At a recent April 17, 2007 School Board meeting, CCSB's attorney was presenting charts on district litigation expenses, explaining the rising costs were due to union action and "frivolous" Exceptional Student Education (ESE) cases, and that "most are not meritorious". He went on to say that IDEA was "one of the under-funded mandate scams perpetuated by Congress. There, I've said it and I'm glad." He also went on to comment that

CCSB's "ESE department was doing the right thing, or rather, it couldn't be proven they'd done anything wrong".

The School Board openly discussed the fact that when the District's new attorney was hired, a policy was adopted specific to ESE Students to litigate or fight every DPH Request filed against the District. The CCSB attorney characterized this policy as "You have to dig in your heels and duke it out. If you are a pushover, they will push you over." The Board evidently had convinced themselves that by adopting such a policy it would serve as a deterrent, discouraging others from pursuing their legal rights to due process proceedings under IDEA and Section 504. One new Board member claimed they needed to "find dollars to protect ourselves". Not one concern was raised during this televised and recorded meeting about insuring CCSB meet its' obligations under the laws protecting these ESE disabled children; only defending themselves. There was no win/win consideration. Only the "Just Us" attitude; "Justice" for the children was not a consideration.

As a former DPHO, I was shocked when the District's attorney advised the School Board that the State's ALJs were being paid as much as \$45,000 a hearing! During my time as a Hearing Officer, we were "paid by the hearing", a motivation to hold to the mandated IDEA time frame. Is it to the benefit of the ALJ's to enhance their income by delaying the hearings? Is this a collaborative effort to deter parents from filing DPH's? What a waste of tax dollars!

It appears that school attorneys and ALJ's in Florida are being given free reign in defying the IDEA, Section 504, and ADA Federal Rules and Regulations. As you review the School Board Meeting DVDs, note CCSB attorney's comment "even the NEA won't take them (Congress) on, but that some judge, somewhere, says enough is enough" seems to be promoting that attorneys and ALJ's are better informed on ESE issues than Congress, educators, and the people they represent.

The Florida Due Process system is also flawed in that the Florida ALJ's are only legally trained; few, if any, come with educational background, training, or knowledge of special needs children. In stark contrast, I was able to become a DPHO (with training on the regulatory and procedural guidelines) only because I was an educator foremost. It was an absolute requirement in my home state.

In the D. H. case, I was appalled at the attention the ALJ was giving to what I thought was "minutia"; i.e., focus on select test scores, while ignoring the much bigger issue that the individuals giving those tests were not "qualified or certified", thereby invalidating the scores. Further, D.H.'s Primary (only) Mode of Communication was sign language, yet none of his teachers or aides were "certified" signers and many knew fewer signs than the child! Not one educator working with the child had any form of objective testing done by CCSB to determine their skill level in relation to the child! These ill-trained, unqualified, "uncertified", and untested signers were accepting "approximations" in the child's signs, thereby limiting him to converse with only those who were familiar with his sign "approximations". In evaluating the delivery of FAPE, while a Free and Public Education, was this an "Appropriate" education for this non-verbal child with Autism? With the assigned ALJ's legal (and lack of educational) background, could he even make this distinction?

SUMMARY

In summary, I feel the violations herein outlined and documented on behalf of CCSB are extremely egregious in nature, and FDOE and DOAH must be held accountable for allowing and/or supporting them. As these problems are likely indicative of the state-wide system, I must request this Complaint be considered a Class Discrimination Complaint on behalf of all ESE students and their parents residing in Florida and that OCR initiate a state-wide investigation, starting in Collier County. During the investigative process, consideration should be given to an oversight committee, providing "interim" monitoring and/or intervention for all current Due Process Requests, as well as those that may be initiated during your investigative time frame.

Upon review, I welcome your comments, answers to the questions and issues raised, and proposed remediation. Focus must be placed on the needs of ALL disabled ESE children within the State's custody and control.

Sincerely,

Patty Caldwell Portenier,
Representative for OCR Class Discrimination Complaint
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