

James T. McCafferty
Attorney At Law
Post Office Box 5092
Suite 410, Woodland Hills Building
3000 Old Canton Road
Jackson, Mississippi 39296
601-366-3506

jtmnetdoor.com

4 November 2010



Dr. Suzanne C. Hawley, Superintendent
Ms. Betty Culberson, Director, Special Education
Quitman School District (1212)
104 East Franklin Street
Quitman, MS 39355

[REDACTED]
Quitman, MS 39355

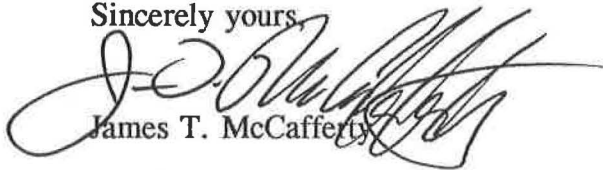
James Allen Keith, Esquire
Adams & Reese
P. O. Box 24297
Jackson, MS 39225-4297

Re: Case No. 9302010-7; Due Process Hearing request filed by Quitman Consolidated School District regarding, [REDACTED]

Greetings:

I circulated an order in the above matter by e-mail earlier today. Due to computer problems, I did not print it out and proof it carefully before circulating it, but proofed it only on the computer. Upon printing it out, I found to my embarrassment numerous typographical errors. I am withdrawing that order and substituting the enclosed as my order in this matter. As you already know, the order grants the motion of Mr. and Mr. [REDACTED] to dismiss the Complaint for Due Process of Quitman Consolidated School District and grants permission to the District to amend as to certain issues. I apologize for the confusion.

Sincerely yours,


James T. McCafferty

encls

c: Ms. Susan Davis (w/ original order)

**MISSISSIPPI DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION**

**In the matter of the Due Process Hearing Request of
Quitman Consolidated School District**

Case #9302010-7

Student: [REDACTED]

ORDER

1. This matter arises from the October 31, 2010,¹ motions of [REDACTED] and [REDACTED], parents (Parents, herein) of the above-named student (Student, herein), for dismissal and/or postponement and for an extension of the due process time-lines.

2. The Parents' motion also requests dismissal of the District's request for a due process hearing (Request, herein) on the ground that it is "premature" and that "most of the issues" involved are "procedural issues which are not proper issues for a due process hearing"

3. While the Parents do not allege the request for due process is "insufficient" using that exact word, the hearing officer deems their allegation that the Request is "premature" and involves "procedural issues" not proper "for a due process hearing" sufficient for that purpose, particularly in view of the fact that they are lay persons unrepresented by counsel. Accordingly, the Parents' letter of October 30, 2010, is received as a sufficiency challenge within the meaning of § 300.508 (d) (1) of the Mississippi State Policies Regarding Children with Disabilities under the Individuals with Disabilities Education Act Amendments of 2004 [cited herein as MDE (Mississippi Department of Education) Policy].

4. This is not a typical case in that the District, rather than the Parents, have requested the due process hearing. That, of course, is a District's right. Under MDE Policy § 300.507

¹The motion was in the form of a letter dated October 30, 2010, but served by facsimile on October 31, 2010.

either a parent or a public agency “may file a due process complaint (*request for a due process hearing*) on any of the matters described in section 300.503 (a) (1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).” The other requirement relevant to this inquiry is that the “due process complaint must allege a [qualifying] violation” *See* § 300.507 (a) (2).

5. In reviewing the District’s Request to determine whether it passes muster under the applicable regulations we first consider the District’s issues regarding “Identification and Evaluation” (Parts I & II of the Request). The District complains that the parents have refused to permit the District to conduct its own re-evaluation. The District is correct that where conditions warrant or require a re-evaluation [*e.g.*, § 300.303 (a), a re-evaluation may be undertaken by the District without parental consent. *See* § 300.300 (a) & (c). Re-evaluations, however, may not occur “more than once a year, unless the parent and the public agency agree that a reevaluation is necessary.” § 300.303 (b) (1). The District has not set out facts in its request establishing that it is entitled to conduct a re-evaluation given the limitation of § 300.303 (b) (1).² Consequently, it does not describe a violation within the meaning of § 300.507 (a) (2). Accordingly, I find that the request for re-evaluation in parts I & II of the District’s complaint fails short of the sufficiency requirements of MDE Policy § 300.507 and § 300.508 and that the same should be dismissed. Since periodic re-evaluation is a duty on the part of the District, it is appropriate that the District be permitted to amend as to the request for re-evaluation. That permission is granted.

²To the contrary, the District’s reference to “recent” evaluations of the student, in fact, suggest that the District might not be entitled to a re-evaluation without the agreement of the Parents.

6. Part III (The Child's Educational Placement) of the District's Request presents a similar problem. While the District describes disagreement between the Parents and District members of the IEP team regarding the Student's placement, it is unclear what, if any, violation is alleged. While pleading requirements under the regulations certainly are not hyper-technical, they should clearly identify the violation alleged. *See M.S.G. v. Lenape Regional High School District Board of Education*, 51 IDELR 236 (C.A. 3rd 2009) (the purpose of the pleading requirements is to provide notice by the filer to the responding party that will "foster cooperation between the parents and educational agency . . . by a development of the factual basis for the dispute prior to the initiation of adversarial proceedings."). Accordingly, I find that the requests in part III of the District's complaint fall short of the sufficiency requirements of MDE Policy § 300.507 and §300.508, and that the same should be dismissed. Permission to amend is granted as to this issue.

7. In part IV of its Request the District references an administrative complaint³ in which "[t]he parents have [alleged] that the District has been guilty of numerous procedural violations": allegedly improperly convening an Individualized Education Program (IEP) meeting; providing the IEP to the parents in an untimely manner; improperly reporting the Student's progress; and failing to follow prescribed procedures in the provision of written notice of refusal to parents following an August 20, 2010, IEP meeting. In each case the District requests that the hearing officer declare that the District committed no procedural violation.

8. As noted above, a request for a due process hearing must allege a violation. MDE Policy § 300.507 (a) (2). Part IV alleges no violations. To the contrary, it essentially asks the hearing officer to issue a declaratory judgment that no violations occurred. For that reason, I

³Filed pursuant to MDE § 300.153 with the Mississippi Department of Education (MDE).

find that the requests in part IV of the District's complaint fall short of the sufficiency requirements of MDE Policy § 300.507 and § 300.508, and that the same should be dismissed. Part IV is also insufficient for an additional, related reason. MDE § 300.513 provides that a hearing officer may decide matters procedural in nature only if they "(i) [i]mpeded the child's right to FAPE; (ii) [s]ignificantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the parent's child; or (iii) [c]aused a deprivation of an educational benefit." Part IV, by the District's admission, relates to procedural issues. Yet, the Request alleges no such situations in which a decision by a hearing officer on a procedural issue would be proper under MDE § 300.513. Again, to the contrary, it asks the hearing officer to issue a declaratory judgment that no such situations occurred. Accordingly, I find that the requests in part IV of the District's complaint fall short of the sufficiency requirements of MDE Policy § 300.507 and § 300.508 and that the same should be dismissed.

9. In part V of its complaint, the District references additional issues raised in the Parents' MDE administrative complaint. First, (sub-part A, "Access to Instructional Materials") the District asks the hearing officer to find that the Student's IEP did not include the use of a laptop computer and that the district is not required to make available a particular computer program (Kurzweil) in order to have access to FAPE. This sub-part alleges no violation as required by 300.507 (A) (2). Accordingly, this request is dismissed as insufficient under the requirements of MDE Policy § 300.507 and § 300.508.

10. Next, (sub-part B, "IEP Team's Consideration of T. K. Martin Recommendation, etc."), the District asks the hearing officer to find that the Student's IEP team "appropriately considered the recommendation of the T. K. Martin report, input from [the Student's] previous

IEP, and input from the parents . . . ,” and to conclude that the “IEP developed is reasonably calculated to provide a free appropriate education to [REDACTED].” This sub-part alleges no violation as required by 300.507 (A) (2). Accordingly, this request is dismissed as insufficient under the requirements of MDE Policy § 300.507 and § 300.508.

11. In Sub-part C, “Implementation of Positive Behavioral Strategies,” the District contends that “[t]he parents alleged the District failed to implement [the Student’s] behavior plan.” Further, the District requests “that the hearing officer find (a) that the IEP team acted appropriately when it requested an IEP meeting to consider the need for positive behavioral strategies”; (b) that the IEP team “appropriately considered [the Student’s] behavioral needs and input from the parents” before making any “decisions regarding behavioral considerations”; and that “there is no IDEA requirement that a behavioral intervention plan (BIP) be implemented at this time.” This sub-part alleges no violation as required by 300.507 (A) (2). Accordingly, this request is dismissed as insufficient under the requirements of MDE Policy § 300.507 and § 300.508.

12. Similarly, in sub-part D, “Access to Teachers,” the District references other alleged disagreements between the District and the Parents. The gist of this allegation is that the Parents “maintain . . . they were not allowed any direct communication with [REDACTED]’s teachers.” The District, as its proposed resolution, asks that the hearing officer find that the District “complied with the requirements of [the Student’s] IEP regarding teacher access and that failure of the District to respond immediately to each of the Parents’ e-mail communications did not deny FAPE.” This sub-part alleges no violation as required by § 300.507 (A) (2). Accordingly, this

request, as are all requests in Part V, is dismissed as insufficient under the requirements of MDE Policy § 300.507 and § 300.508.

13. To summarize, with two possible exceptions, the District's Request fails to state violations as required by MDE Policy § 300.507 (A) (2). Other than in the cases of those possible two exceptions, the relief requested by the District amounts, essentially, a request for declaratory relief regarding disagreements between the District and the Parents, something the regulatory framework was not designed to provide absent alleged and proven violations of law. In the case of the two possible exceptions,⁴ no violation is stated with the sufficiency required by MDE Policy § 300.507 or § 300.508. Accordingly, the District's Request for a Due Process Hearing is dismissed.

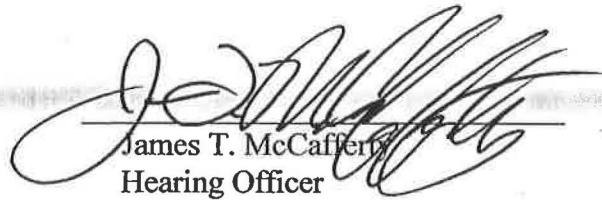
14. Permission is granted to the District to amend to allege facts establishing violations with respect to the re-evaluation issue (as set out in Parts I & II, Identification and Evaluation) and as to the placement issues stated in Part III (The Child's Educational Placement), specifically the issues of (a) the Student's being allowed to follow the rotation of classes with the inclusion teacher, and (b) that his gifted class period be replaced with a resource period to allow him to receive the additional assistance he needs to be successful.

15. The Parents also requested postponement and/or an extension of the due process time-lines. Because of the dismissal of the District's request, that request is moot and will not be decided by the hearing officer.

⁴Sections I and II of the Request, that seek re-evaluation, and Section III, regarding educational placement.

16. The Parents' letter of October 31, 2010, further requested that the hearing officer direct the District to complete and return certain "teaching rating forms" and to provide the Parents an opportunity to review all records regarding the Student without regard to where the records are maintained. A hearing officer is without authority to order relief as to issues not part of a due process hearing request. Since the Parents' requests regarding rating forms and record review was presented on motion to dismiss rather than in a request for a due process hearing, I find no authority to grant such requests. Accordingly, they are denied.

So ordered, this the 4th day of November 2010.



James T. McCafferty
Hearing Officer