

Received

MAY 16 2011

Dispute Resolution & Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION

(Student))	
)	
VS)	DUE PROCESS
)	HEARING
PUBLIC SCHOOLS)	
(PS))	

ORDER GRANTING MOTION TO DISMISS AND CANCELLATION OF PREHEARING CONFERENCE AND SCHEDULED HEARING

1. Preliminary Statement

By Request for Due Process Hearing dated April 22, 2011, and received by School Board office on April 26, 2011*, a due process hearing was requested by , father of Student, . Student became age on April 25, 2011. On May 3, 2011, I contacted Student, who is incarcerated and will be released on June 7, 2011, and he confirmed to me orally that he wished to be represented in this matter by his father. On May 4, 2011, I served my Initial Prehearing Report setting the first prehearing conference for May 18, 2011, with hearing dates on June 8, 9, 2011. On May 6, 2011, PS filed a Response To Due Process Hearing Request which states that Father's Due Process Request was defective for various stated reasons. On May 11, 2011, PS filed its Motion To Dismiss The Due Process Hearing.**

For reasons stated below, PS' Motion To Dismiss is granted.

2. PS Motion To Dismiss

* See 5/2/11 correspondence from PS to this Hearing Officer. Counsel for PS states that the "school division schools were officially closed for Spring Break" on Friday, April 22, 2011 (PS Motion To Dismiss, page 1, n.1)

** Father earlier filed an unrelated Request For Due Process hearing on May 5, 2010 which was subsequently withdrawn by him and a Dismissal Order was entered June 18, 2010.

PS sets forth four reasons for moving to dismiss Father's Request For hearing, which will be discussed in detail below:

(1) Father lacks standing to file a due process hearing request or otherwise assert rights on behalf of Student, (2) PS has complied with the 2/24/11 Order of the Juvenile and Domestic Relations District Court, and the Hearing Officer lacks jurisdiction over this matter, (3) Father's requested form of relief is premature, and (4) Father's request for damages is inappropriate.

3. Father Lacks Standing To File
Due Process Request and Assert
Rights On Behalf of Student

PS states in its Response To Request For Due Process Hearing (p. 2):

is an 18 year old adult, who is eligible under the IDEA with an identification of Other Health Impairment based upon a diagnosis of ADHD. is currently incarcerated in County Jail, an adult facility, to which he was transferred on April 25, 2011.

8 VA 20-81-180 deals with the transfer of rights to students who reach the age of majority and paragraph A states:

A. All rights accorded to the parent(s) under the ACT transfer to the student upon the age of majority (age 18), including those students who are incarcerated in an adult or juvenile federal, state, regional, or local correctional institution. (34 CFR 300.520)

8 VA 20-81-180 C further provides that Student may continue to have his father represent him in this matter by providing the necessary written authorization:

C. A student who has reached the age of 18 years shall be presumed to be a competent adult, and thus all rights under the Act shall transfer to the adult student, unless one of the following actions has been taken:

2. The adult student designates, in writing, by power of attorney or similar legal document, another competent adult to be the student's agent to receive notices and to participate in meetings and all other procedures related to the student's educational program. A local educational agency shall rely on such designation until notified that the authority to act under the designation is revoked, terminated, or superseded by court order or by the adult student.*

No written documentation has been received by the undersigned or PS transferring Student's rights to Father. Accordingly, PS correctly states this Request For Due Process and other asserted rights on behalf of Student should be dismissed.**

4. Resolution Request For
Compensatory Damages
May Not Be Awarded

In paragraph 9 of Father's Due Process Request, the proposed resolution, in part, requests compensatory damages for Student and Student's parents. It is well settled that compensatory damages are not available for alleged IDEA violations. In *Sellers v. Manassas*, 141 F.3d 524 (4th Cir. 1998), it was ruled that an award of compensatory damages is inconsistent with IDEA's structure and is not available for alleged IDEA violations. Accordingly, PS correctly argues that this Hearing Officer lacks authority to

* It is not claimed that Student is incompetent. Other regulatory exceptions concerning rights to transfer are not applicable.

** In these circumstances, PS claims (a) Since the Due Process Request was not filed before Student reached age 18, Father lacked standing to file this Request on behalf of Student and therefore it should be dismissed, and (b) assuming, *arguendo*, that this Request was timely filed, Father "has lost the ability to assert rights on behalf of Student on April 25, 2011".

award such damages and Father's claim in this regard should be dismissed.*

5. Resolution Relief For Independent
Educational Evaluation Is Available

The remaining proposed resolution relief requested by Father is for an Independent Educational Evaluation (IEE) and psychological evaluation at PS expense.

8 VAC 20-81-170 states in part:

2. Parental right to evaluation at public expense (34 FR 300.502 (b) and (e)) a. The parent(s) has the right to an independent educational evaluation at public expense if the parent(s) disagrees with an evaluation component obtained by the local educational agency. b. If the parent(s) requests an independent educational evaluation at public expense, the local educational agency shall, without unnecessary delay, either: (1) Initiate a due process hearing to show that its evaluation is appropriate; or (2) Ensure that an independent educational evaluation is provided at public expense - - -

Thus, Father has the right to an IEE at public expense, even absent the claims made in its Request For Due Process. Apparently, no IEE inquiry or request has previously been made by Father concerning an IEE.

RCPS, in its Motion To Dismiss, states:

Here, the School Board - - - should have been provided a meaningful opportunity to respond to the parent's [Father's] concerns prior to the filing of the instant due process complaint. Neither the parent nor the student has requested an IEE during the current school year. Therefore, the School Board has not been given sufficient time to respond to the perceived problems. An IEE

* For jurisdictional reasons stated below, no opportunity to file an amended due process request is being offered Father to cure the transfer and damage relief deficiencies.

is not the proper subject of a due process hearing and cannot be considered by the Hearing Officer until available administrative remedies have been exhausted. The student must first present his request for an IEE for consideration by an IEP team before proceeding with a due process hearing request. Until such time as the request has been made, the Hearing Officer cannot entertain the relief requested in the present due process hearing request.

In support of its contentions, PS cites *Combs v. Rockingham*, 15 F.3d 357 (4th Cir. 1994) ("School boards must be given adequate notice of problems if they are to remedy them, and must be given sufficient time to respond") and *Ellenberg v. New Mexico*, 478 F.3d 1262 (10th Cir. 2007) (Failure to amend IEP before pursuing IEP claim is a failure to exhaust administrative remedies.)

Neither case involves an IEE matter, the PS cited cases are clearly distinguishable, and are not persuasive. It is doubtful that Father must first attend an IEE meeting or first present some rationale to support his IEE request. Neither appears to be required by the IEE regulations. Instead, 8 VA 20-81-170 B2 appears to contradict PS' position. This portion of the IEE regulation states:

d. If the parent(s) requests an independent educational evaluation, the local educational agency may ask the reasons for the parent's objection to the public evaluation. However, the explanation by the parent(s) may not be required and the local educational agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

However, this question need not be resolved since I find that Father, as a matter of right, may request and secure an IEE at public expense without the need to file a request for a due process hearing as support for such request. In other words, IEE relief is now available to Father and may now be secured as a form of relief without approval of his Request for Due Process.

6. Dismissal Warranted Since Hearing Officer
Lacks Subject Matter Jurisdiction
Over Desired J & D Court Reversal

Student's background is stated, in part, in PS' Response To Due Process Request which states (pp. 2-3):

[Student] was placed for non-educational reasons by the Community Services Board, through FAPT, and pursuant to a June 23, 2010 court order, into the Residential Program. After completing the court ordered program on September 29, 2010, returned to County. In October 2010, began attending School - - - pursuant to an IEP that was developed on October 4, 2010, and signed by the parent (Father) on October 5, 2010 - - -

attended school pursuant to the October 5, 2010 placement until January 10, 2011. when the court sent to Detention Center. was discharged from the Detention Center on March 1, 2011. Pursuant to another court order, enrolled in the School Board's GED program after his March 1, 2011 discharge. On March 31, 2011, the court sent the student back to Detention Center, where he remained until his April 25, 2011 transfer to County Jail. The student has spend the vast majority of the past calendar year attending programs and placements pursuant to court orders. For the few months when has been available for instruction, the School Board has implemented the appropriate IEP and made

available an appropriate education.

The background for Father's "nature of the problem" is set forth below (Due Process Request, Attach. pp. 1-2):

On February 24, 2011 a Delinquency Disposition Hearing Case was heard in the Juvenile and Domestic Relations District Court for the County of _____, for _____, under Hon. _____, Presiding Judge. After hearing recommendations from _____ Social Worker Cecilia Jones and Court Service Rep. Rosemary Walker (Senior Probation Officer), that a GED program would be _____ best option; court ordered _____ (The Student), to cooperate with _____ Public Schools in developing an education plan to obtain a GED. ("the parent") was also court ordered not to interfere with the GED program. The Honorable _____ never asked the Parent about his concern for his son's education.

_____ proposed an IEP amendment to change the diploma status, "that _____ will graduate with a GED when he completes all GED requirements, to reflect a court ordered GED program, that was expedited on February 25, 2011 were [where] the parent was court ordered on February 24, 2011 not to interfere, - - - [Father] signed the IEP - - - February 25, 2011 "UNWILLINGLY" - - - [Father] only signed because of the court order, also because he was told - - - by [Judge] that he would be incarcerated if he interfered with the GED program - - - "

The Court Order attached hereto as Appendix 1 is the signed (2/24/11) Order discussed above which states in relevant part:

"UPON EVIDENCE PRESENTED, - - - the Court hereby ORDERS the Juvenile and others directed to comply with the following conditions: to remain on GOOD BEHAVIOR - - - and MUST OBTAIN G.E.D., and attend all preparatory classes as directed. PARENT(S) - - - must cooperate with _____ Schools in development of education plan for Juvenile to receive GED.

REVIEW OF PROGRESS in this matter 3/31/11 - - -

PS correctly argues that it has complied with this Court Order and that the Hearing Officer lacks jurisdiction in this matter. Father's central complaint is his request to reverse or change this Court-Ordered GED schooling requirement for Student. Instead, Father desires Student's participation in general curriculum studies so that Student would be prepared "to begin college level classes" (Request For Due Process, Attachment p.4).

"Jurisdiction" is the power to entertain a suit, consider the merits, and render a binding decision thereon. *General v. NYC*, 271 U.S. 228, 230 (1926).

This Hearing Officer lacks jurisdiction to reverse or change this Court Order directing GED schooling. In short, the basic relief here requested by Father is beyond the scope of this Hearing Officer's authority. See generally, *Alex v. Forrestville*, 375 F.3d 603 (7th Cir. 2004).

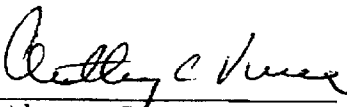
It appears that the basic relief desired by father for GED change may only be secured by seeking relief under the legal system and not from this Hearing Officer.* As such, the Motion To Dismiss based on this Hearing Officer's lack of jurisdiction must be granted.

Wherefore it is ORDERED that Parent's Request For a Due Process Hearing (a) is insufficient because it fails to meet the minimum standards set forth in 20 USC §1415(b)(7)(A), fails to meet 8 VA 20-81-180 requirements, requests damage relief which cannot be awarded, requests GED relief which cannot be provided

* Of course, this J&D Order was appealable. A petition to reopen the J&D case, among other possible relief efforts, with or without PS support, appears to be an avenue that could provide the relief desired.

because of Hearing Officer's lack of jurisdiction, and therefore a due process hearing may not be ordered at this time; (b) Parent's Request For Due Process Hearing is hereby dismissed; and (c) the prehearing conference set for May 18, 2011, and the hearings ordered to be held on June 8 and 9, 2011, are hereby canceled.

DATED: May 16, 2011


Anthony C. Vance
Hearing Officer

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days.

Certificate of Service

I hereby certify that on May 16, 2011, a copy of the foregoing Order has been served by facsimile upon the following persons except _____ was served by correspondence:

_____, VA
Fax: _____
(Also served by US Mail)

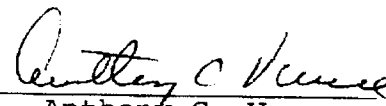
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Jail

_____, VA
(By US Mail)


Anthony C. Vance

Original will follow ____
Original will not follow X

VIRGINIA:

IN THE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT FOR THE OF

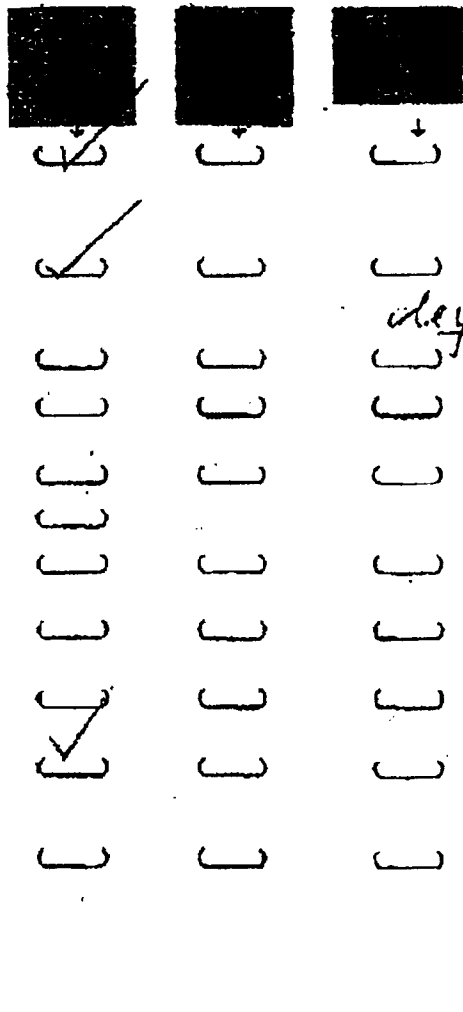
Case

DISPOSITION HEARING DELINQUENCY / CHILD IN NEED OF SERVICES OR SUPERVISION CASES

Commonwealth of Virginia, Age, Preferred first name:

PRESENT: Juvenile, Mother, Father, Grandparent, Defense Attorney, Com. Atty, C.S.U./LSMP Staff, Other

Table with 3 columns: Charge (Charge 1 to Charge 6), Case No., and Check here if Clerk to forward to OCRE Juvenile's FINGERPRINTS for guilty finding on any delinquent charge.



UPON EVIDENCE PRESENTED, including all required reports filed in this matter, the Court hereby ORDERS the Juvenile and others directed, to comply with the following conditions:

- to remain in GOOD BEHAVIOR and follow house rules and school rules and cooperate with school personnel, and no truancies, no skipping class, no curfew below 8, and no school disciplinary referrals, and MUST OBTAIN G.E.D., and attend all preparatory classes as directed.
PARENT(S) to comply and cooperate with following:
to have NO CONTACT with victim(s) and/or Co-defendant(s).
For a period of months, PROHIBITED FROM PREMISES as follows:
to write an APOLOGY / ESSAY (circle one) as directed.
to pay a fine of \$ (not to exceed \$500)
to obey RESTRICTIONS of association, travel or place of abode, as follows:
to perform hours of COMMUNITY SERVICE, to be completed within days / months, with C.S.U. / C.D.J.
to pay RESTITUTION of \$, payable within days / months, paid through, payable to
to enter into and comply with REHABILITATIVE OR EDUCATIONAL SERVICES and PROGRAMS as directed: by C.S.U./LSMP staff by F.A.P.T. by school personnel.
to ENTER AND COMPLY WITH RULES OF FOLLOWING PROGRAM(S): Life Skills Mentoring Program (LSMP), and all of its services as directed. Substance Abuse Assn's/Treatment/Random Drug Screens, as directed. Anger Management Program as directed by C.S.U. or LSMP staff. Student Assistance Program at Counseling with Other:

Please note that the portion of the Disposition Hearing under "PARENTS" reads as follows: Must cooperate with Schools in development of education plan for juvenile to receive GED.



Custody of Child is transferred to: _____ (a relative or qualified individual) Form DC-573
or to the _____ Dept. of Social Services (agency given reasonable
notice and opportunity to be heard; if EMERGENCY exists then agency to accept
custody for 14 days if gives no notice/opportunity to be heard: see Form DC-562).

DC-577 DC-577 DC-577

placed on PROBATION under such conditions as prescribed by the Court.

DRIVER'S LICENSE suspended for _____ months, or subject to CURFEW;
 Restricted License Permitted, upon showing of hardship.

SENTENCED to DETENTION HOME for _____ days (not to exceed 10 days)
with _____ days suspended on condition of compliance with this Order.
[16.1-292(B) - at least age 14 yrs.] and the basis for this finding is:

to a _____ CONDITION: Sentenced to 6 months
JDC - suspended on condition of
probation, in compliance with
this order.

SENTENCED TO DETENTION HOME for _____ days (not to exceed 90 days), with _____ days suspended on
condition of compliance with this Order. [16.1-284.1(A) - at least age 14 yrs.]

COMMITTED to the DEPARTMENT OF JUVENILE JUSTICE [16.1-378.3(A)(14) and

Juvenile remanded to Detention Home pending placement, or
 the COMMITMENT IS SUSPENDED on following conditions:

or
 the COMMITMENT IS SUSPENDED, and sentenced to IMPACT 180 PROGRAM
(not more than 6 mos). [16.1-284.1 - at least age 14 yrs.]
with first review set for _____ at _____ a.m. / p.m. (not to exceed 30 days)

SENTENCED TO JAIL FOR _____ months (not to exceed 12 months). [16.1-284 - offense committed
before age 18, and defendant is now an adult.]

COMMITTED AS SERIOUS OFFENDER TO Department of Juvenile Justice for _____ years [16.1-285.1]

REVIEW OF PROGRESS in this matter is set for 3/31/11 at 3:00 p.m. (P.M.)

to obey all rules of this Order, allowing for DISPOSITION TO BE DEFERRED FOR _____ MONTHS
after which time the matter(s) will be DISMISSED (under Part II below).

The juvenile and persons present were advised that the conditions specified may, at any time, be amended to impose additional or
different conditions of release, and that failure of juvenile or parties to comply may be punishable as by contempt or other sanctions.

ENTERED: 2/24/11 [Signature] JUDGE

