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Dispute Resolution & Administrative Services

07-026

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

Public Schools
School Division

Name of Parents

Division Superintendent

Name of Child

John F. Cafferky, Esquire
Andrea D. Gemignani, Esquire
Counsel Representing LEA

William E. Houston, Esquire
Counsel Representing Parent/Child

James M. Mansfield, Esquire
Hearing Officer

Party Initiating Hearing

February 18, 2007
Decision Date

Public Schools
Prevailing Party

CASE CLOSURE SUMMARY REPORT

Hearing Officer's Determination of Issue(s):

The Parents agreed to a dismissal of this due hearing with prejudice on condition that their daughter receive one-to-one reading instruction at _____ Elementary school in addition to the services outlined in the November 17, 2006 IEP. _____ Public Schools agreed to that condition and is prepared to deliver those services. The November 17, 2006 IEP provides the student a free appropriate public education at public expense in the least restrictive environment.

Hearing Officer's Orders and Outcome of Hearing:

The Parents' attempt to unilaterally withdraw their request for a due process hearing, over the objection of _____ Public Schools, and _____ Public Schools attempt to file a counterclaim, are without any statutory or regulatory basis. Further, the Parents' attempt to rescind their settlement agreement is denied, as is their request for a further continuance, and this matter is dismissed with prejudice. _____ Public Schools is the prevailing party.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

James Michael Mansfield
Printed Name of Hearing Officer


Signature of Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Case Closure Summary Report was delivered *via* facsimile and mailed first class, postage prepaid, this 18th day of February 2007 to:

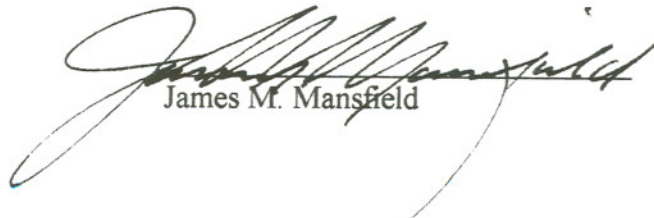
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P.O. Box 2120
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, Director, Special Education
Public Schools

And mailed first class, postage prepaid, this 18th day of February 2007 to:


James M. Mansfield

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

DECISION

| | |
|---|--|
| _____ Public Schools School Division | _____ Name of Parents |
| _____ Division Superintendent | _____ Name of Child |
| John F. Cafferky, Esquire <u>Andrea D. Gemignani, Esquire</u> Counsel Representing LEA | <u>William E. Houston, Esquire</u> Counsel Representing Parent/Child |
| <u>James M. Mansfield, Esquire</u> Hearing Officer | _____ Party Initiating Hearing |

PROCEEDINGS

By facsimile sent November 21, 2006, the _____ requested a Due Process Hearing challenging _____ Public Schools' (" PS") November 17, 2006 proposed IEP for their daughter _____. This hearing officer was appointed and a Due Process Hearing was scheduled for December 21, 2006, with a pre-hearing conference to be convened December 7, 2006. At the pre-hearing conference, it was agreed that the Due Process Hearing was rescheduled to January 4 and 5, 2007 due to counsels' scheduling conflicts. The Parties also agreed to narrow and specify the issues for consideration. By letter dated December 13, 2006, Mr. Houston, on behalf of the _____, submitted what he believed were the issues for consideration; and by letter dated December 14, 2006 Mr. Cafferky did the same for PS.

Thereafter, the hearing officer was advised that the Parties desired to go to mediation and had scheduled the same for January 4, 2007. In order to facilitate mediation, and finding it in the child's best interest to do so, the Due Process Hearing was continued to January 30 and 31, 2007,

with the Decision in the matter due February 18, 2007. Mr. Houston subsequently advised that he had a conflict on these dates and the hearing was rescheduled for February 5 and 6, 2007.

By letter dated January 8, 2007, the Parties advised they were unable to resolve their differences through mediation and wished to proceed with the Due Process Hearing. PS then timely submitted its witness list and exhibits. However, by facsimile on January 29, 2007, Mr. Houston notified the hearing officer that the were withdrawing their Due Process Complaint. By letters dated January 29 and 30, 2007, PS objected to the withdrawal and advised that they wished to proceed with what was referred to as PS' counterclaim. A telephone conference was requested to determine the status of the case. By letter dated January 30, 2007, Mr. Houston provided the hearing officer with arguments in support of a unilateral withdrawal of his clients' Due Process Complaint and stated they would not go forward. By agreement of the Parties, a telephone conference was convened February 5, 2007 to determine how the case should properly be resolved.

The telephone conference was held as scheduled. At the hearing Mr. Houston reiterated he wished to withdraw his clients' request for a Due Process Hearing. Mr. Cafferky again indicated he wanted to proceed with what was referred to as PS' counterclaim. The Parties were advised that the hearing officer was unable to find any statutory or regulatory authority authorizing a non-suit or unilateral withdrawal of a request for Due Process. Similarly, there does not appear to be any statutory or regulatory authority permitting the filing of a counterclaim in a Due Process Hearing. Accordingly, by agreement a hearing was scheduled for Friday, February 16, 2007, before a court reporter, to determine whether the case would be dismissed with or without prejudice, with both Parties having an opportunity to argue their respective positions.

Subsequently, by letter dated February 6, 2007, Mr. Houston advised that his clients

agreed to the dismissal of the case with prejudice on condition that [redacted] receive one-to-one reading instruction at [redacted] Elementary School, in addition to the services contained in the November 17, 2006 proposed IEP. By letter dated February 7, 2007, Mr. Cafferky confirmed that PS agreed to provide one-to-one reading instruction as part of the proposed program at [redacted] Elementary School. Based on these representations, it appeared that the Parties had settled the matter by agreement. However, by letter dated February 12, 2007, Mr. Cafferky inquired as to whether the hearing scheduled for February 16, 2007 would still be held. To clarify the issue, a telephone conference with counsel was held February 13, 2007, wherein the Parties were advised that if they were in agreement as to [redacted]'s placement at [redacted] Elementary School, the case would be dismissed. If the Parties were not in agreement, the hearing scheduled for February 16, 2007 would proceed. As the Parties could not reach consensus, they were advised the matter would proceed as scheduled.

By letter dated February 14, 2007, Mr. Houston wrote the hearing officer stating the

[redacted] rescind their 29 January 2007 letter withdrawing their complaint. They are also rescinding their 6 February 2007 letter acceding to the hearing officer's decision to dismiss with prejudice. The [redacted] are waiving their right to a hearing decision within seventy-five (75) days. They are demanding a scheduling conference to discuss mutually agreeable times for the disclosure of documents and witnesses and documents, [sic] and the scheduling of the hearing itself.

Mr. Houston also stated in his letter that the [redacted] had contacted the Virginia Department of Education "who informed them they had an absolute right to withdraw a complaint and that the hearing officer's jurisdiction ended at that point."

The hearing on February 16, 2007 was convened at 10:00 a.m. as scheduled. PS was present with counsel together with its representatives. The hearing officer waited approximately

twenty (20) minutes before proceeding. Neither Mr. Houston nor the [redacted] appeared. Thereafter, PS presented argument as to the proper disposition of this matter and introduced PS' Exhibits Nos. 1 through 81, and proffered testimony which was verified under oath by [redacted]. Whereupon the hearing was concluded.

FINDINGS OF FACT

[redacted] is a fifth grade student with a disability requiring a special education program and related services. She is currently attending the [redacted], a local private day school, at public expense. [redacted] first began attending [redacted] in third grade and it is her current placement pursuant to the last agreed IEP dated November 6, 2006 (PS Exhibit No. 15). Subsequent to this IEP, Mr. and Mrs. [redacted] requested that [redacted] be removed from [redacted] and placed in Commonwealth Academy, another private day school. (Parents' Request for a Due Process Hearing).

An IEP team convened on November 17, 2006 and "determined that a public school placement will provide FAPE and is the least restrictive environment." (PS Exhibit No. 16).

[redacted], Coordinator, Special Education, [redacted] Public Schools and member of the IEP Team testified that PS' proposed placement at [redacted] Elementary School would provide [redacted] with a free appropriate public education in the least restrictive environment. (Tr. [redacted]).

Finally, the Due Process Hearing in this matter has been continued at the request of the Parties, purportedly in order to facilitate a settlement. The [redacted] ultimately agreed to a dismissal of their complaint with prejudice on condition that their daughter receive one-to-one reading instruction at [redacted] Elementary School in addition to the services outlined in the

November 17, 2006 IEP. PS agreed to that condition and is prepared to deliver those services. (Tr. ____). The _____, however, have not attempted to register _____ at _____ Elementary School. (Tr. ____).

CONCLUSIONS OF LAW

Under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400, *et seq.* (“IDEA”), and the state and implementing federal regulations, there is no express provision permitting the withdrawal of a request for a due process hearing over the objection of the other party. Similarly, IDEA and the applicable regulations do not expressly provide for the filing of counterclaims in a due process proceeding. In the absence of such provisions, I cannot imply that such rights exist by analogy to other bodies of procedural law, such as Rule 41 of the Federal Rules of Civil Procedure (Dismissal of Actions) or § 8.01-380 of the Code of Virginia (1950), as amended (Dismissal of action by nonsuit); and Rule 13 of the Federal Rules of Civil Procedure (Counterclaim and Crossclaim) and Rule 3:9 of the Rules of the Supreme Court of Virginia (Counterclaims).


The Virginia Regulations do provide, however, that the hearing officer has authority to take action to move the case to conclusion, including dismissing a proceeding if either party refuses to comply in good faith with the hearing officer’s orders; and to enter a disposition as to every issue presented for decision and identify and determine to prevailing party on each issue to be decided. 8 VAC 20-80-76 K.

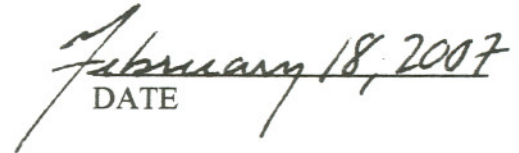
DECISION

After careful consideration of all of the pleadings, correspondence, exhibits and proffered testimony, and for the reasons stated herein, I conclude: 1.) to the extent Mr. Houston, by his

letter of February 14, 2007, has motioned for a continuance and a rescheduling of the Due Process Hearing in this matter, that motion is denied; 2.) PS has no counterclaim in this proceeding; and 3.) this Due Process Hearing be and hereby is dismissed with prejudice.

Finally, this decision is final and binding unless either party appeals in a federal District court within ninety (90) calendar days of the date of this decision or in a state court within one year of the date of this decision.


HEARING OFFICER'S SIGNATURE


DATE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Hearing Officer's Decision was delivered *via* facsimile and mailed first class, postage prepaid, this 18th day of February 2007 to:

William E. Houston, Esquire
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James M. Mansfield