04-101

CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

JUN 2004
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Complaints & Due Process

Public Schools
School Division

Mr. and Mrs.
Name of Parents

Name of Child

May 28, 2004
Date of Decision

Bradford King & Yvonne Wellford
Counsel Representing LEA

None
Counsel Representing Parent/Child

Parents
Party Initiating Hearing

Not Applicable
Prevailing Party

Hearing Officer's Determination of Issue(s):
The parents and the LEA concluded another due process proceeding by entering into that certain Settlement Agreement and Order (the "Settlement Agreement") signed by the different hearing officer in that proceeding, the and the LEA on or about May 10, 2004. The parents instituted this administrative due process proceeding within 3 days of the previous hearing officer dismissing the earlier proceeding with prejudice on the basis of the Settlement Agreement. The parties represented to the hearing officer that all issues in this present proceeding pertain to the Settlement Agreement and to alleged breaches or violations which the contend the LEA has committed concerning the Settlement Agreement. No allegation was made by the parents that the child's circumstances had changed in the intervening 3 days so that it had become "educationally necessary" for him to obtain an appropriate education as guaranteed by the IDEA. On his own motion, the hearing officer raised the issue of whether he had subject matter jurisdiction over this proceeding in which the parents seek enforcement of the Settlement Agreement.

Hearing Officer's Orders and Outcome of Hearing:
The hearing officer decided that he lacked the power to enforce settlement agreements and, accordingly, dismissed the proceeding for lack of subject matter jurisdiction.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties to 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.

John V. Robinson
Printed Name of Hearing Officer

John V. Robinson
Signature

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

, et als.

Complainants

v.

PUBLIC SCHOOLS

Respondent.

DECISION OF THE HEARING OFFICER

I. Introduction

The family requested an administrative due process hearing on May 13, 2004 to address various issues described in the family's Request for Due Process Hearing dated May 13, 2004, which is incorporated herein by this reference.

The hearing officer was appointed to this proceeding on May 14, 2004. The parties scheduled a second pre-hearing conference with the hearing officer at his premises at 9:30 a.m. on May 27, 2004 to address various items on the hearing officer's written agenda dated May 18, 2004 for such meeting. At the beginning of the meeting, the hearing officer, on his own motion, raised the issue of whether he had subject matter jurisdiction over this matter. The hearing officer offered the parties an opportunity to provide him any written argument or legal authorities on the subject but the parties declined, opting instead to rely on the hearing officer's own legal research on the issue.

For the reasons provided below, the hearing officer decides that he lacks subject matter jurisdiction over this proceeding. Accordingly, the other items discussed and agreed to by the parties concerning the agenda and the then anticipated hearing are rendered moot as the hearing officer, under the particular circumstances of this proceeding, decides that he lacks subject matter jurisdiction and, accordingly, hereby dismisses this administrative due process proceeding.

The parties do not dispute that had a disability, that needs special education and related services and that is entitled to a free appropriate public education pursuant to the Individuals with Disabilities Education Act ("IDEA" or the "Act") 20 U.S.C. §§ 1400 et seq., and Va. Code Ann. § 22.1-213-221 (1950), and the regulations promulgated thereunder.

Recently, the and the LEA concluded another due process proceeding between them by entering into that certain Settlement Agreement and Order (the "Settlement Agreement"), signed by the different hearing officer in that proceeding and the on or about May 10, 2004. The instituted this administrative due process proceeding within

three (3) days of the previous hearing officer dismissing the earlier proceeding with prejudice on the basis of the Settlement Agreement. Not surprisingly, during the second pre-hearing conference, which was tape-recorded by the hearing officer and the , the parties represented to the hearing officer that all issues in this present proceeding pertain to the Settlement Agreement and to alleged breaches or violations which the contend the LEA has committed concerning the Settlement Agreement.

No allegation is made by the Parents that 's circumstances have changed in the intervening three (3) days so that it has become "educationally necessary" for him to obtain an appropriate education as guaranteed by the IDEA. A settlement agreement which contractually waived 's rights, as a disabled student, to received educationally necessary services or which improperly excused a School Board from its legal duty to provide educationally necessary services to a disabled child could potentially be invalidated. See, e.g., D.R. v. East Brunswick Bd. of Educ., 25 IDELR 734, 109 F.3d 896 (3rd Cir. 1997); Miller Tabak Hirsch & Co. v. Commissioner of Internal Revenue, 101 F.3d 7, 10 (2d Cir. 1996). Because the Commonwealth of Virginia receives IDEA federal grant funds it must provide its handicapped citizens with the requisite educational assistance under the IDEA. See Bd. of Ed. of East Windsor Regional Sch. Dist. v. Diamond, 808 F.2d 987, 991 (3d Cir. 1986); Equal Employment Opportunity Commission v. Astra USA, Inc., 94 F.3d 738, 744-45 (1st Cir. 1996).

As the SEA states in its opinion there is certainly a split of authority concerning whether a hearing officer has subject matter jurisdiction to hear alleged violations of a mediation or settlement agreement. Decisions which militate against such authority include, for example, Sch. Bd. of Lee County v. M.C., 35 IDELR 273 (FL Dist Ct 2001); Hillsboro Sch. Dist., 32 IDELR 190 (SEA OR 2000); Wyner et al v. Manhatten Beach Unif Sch Dist, 33 IDELR 98 (9th Cir. 2000). Decisions which suggest the hearing officer may have such authority include, for example, Ojai Unif Sch Dist, 36 IDELR 58 (SEA 2001); Indept Sch Dist No 728, 30 IDELR 467 (SEA MN 1999); Jersey South Shore Area Sch Dist, 32 IDELR 194 (SEA PA 1999); Mr. J. v. Bd. of Ed., 32 IDELR 202 (D.Conn. 2000); D.R. v. East Brunswick Bd. of Ed., 25 IDELR 734 (3rd Cir. 1997).

While there is no binding legal precedent addressing this issue within the 4th Circuit, the hearing officer finds the reasoning in certain cases, decisions and opinions compelling, helpful and applicable in the proceeding before him. In this regard, the hearing officer has already provided to the parties, and attaches to this decision, a non-binding opinion dated February 23, 2004 of the SEA provided to another hearing officer who requested guidance on this issue.

The Regulations Governing Special Education Programs For Children With Disabilities in Virginia (effective March 27, 2002) (the "Virginia Regulations") provide the typical bases (other than disciplinary matters) for administrative due process hearing requests:

> 1. Either a parent or parents or a local educational agency may request a due process hearing when a disagreement arises regarding any of the following:
>
> a. Identification of a child with a disability;

b. Evaluation of a child with a disability (including disagreements regarding payment for an independent educational evaluation);

c. Educational placement and services of the child; and

d. Provision of a free appropriate public education to the child.

8 VAC 20-80-76(B); 34 C.F.R. § 300.507.

Under IDEA and its regulations, each party has the right to findings of fact and a decision. 34 C.F.R. 300.509(a)(5). Whether directly or after a hearing officer's decision at the administrative level, each party has the right to bring a civil action in a state or federal court, which has the authority to "grant the relief that the court determines to be appropriate" [34 C.F.R. 300.512(b)(3). Emphasis supplied.] In Burlington Sch. Committee v. Dept. of Educ. of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985), the Court held that under IDEA a court has broad authority to fashion appropriate relief to realize the purposes of IDEA, considering all equitable factors.

Since Burlington, the Office of Special Education Programs ("OSEP") and certain courts have stated that a hearing officer has the same broad authority as a court to grant any such appropriate relief under IDEA.

In Cocares v. Portsmith Sch. Dist., 18 IDELR 461, 462-3 (U.S.D.C. NH 1991), the Court held that given the importance that IDEA places on the protections afforded by the administrative process, the hearing officer's authority to award relief, including compensatory education, must be coextensive with that of the court. The Court went on to state that to find otherwise "would make 'the heart of the [Act's] administrative machinery, its impartial due process hearing' less than complete." S-1 by and through P-1 v. Spangler, 650 F.Supp. 1427, 1431 (M.D.N.C. 1986, *vacated as moot*, 832 F.2d 294 (4th Cir. 1987), quoting Madecke v. School Bd. of Pinellas County, 762 F.2d 912, 919 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

In Letter to Kohn, 17 EHLR 522 (OSEP 1991), OSEP, with supporting cases, clearly states its position concerning compensatory education for procedural violations of IDEA which result in a denial of FAPE. Part B and its legislative history show the importance attached by Congress to the procedural safeguards as a means of ensuring that FAPE is made available to children with disabilities. OSEP's position is that Part B intends an impartial hearing officer to exercise his authority in a manner which ensures that the right to a due process hearing is a meaningful mechanism for resolving disputes between parents and responsible public agencies concerning issues relating to the provision of FAPE to a child. Id. While Part B does not address the specific remedies an impartial hearing officer may order upon a finding that a child has been denied FAPE, OSEP's position is that, based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he deems

necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he is entitled. Id.

Accordingly, the reasoning is that for exhaustion of the administrative remedy to be meaningful, the party must be able to gain from it any "appropriate relief" which he could obtain once he gets to court.

However, other courts appear to have cast doubt on the issue whether hearing officers or state review officers have at their disposal the full range of judicial remedies. For example, under the so-called Honig injunction, it is to the courts and not hearing officers that school officials must go to obtain injunctive relief to remove a student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or others. Honig v. Doe, 108 S.Ct. 592, 606 (1988). See also, Roher v. District of Columbia, Cir. A. Nos. 89-2425, 89-2503, 1989 W.L. 330800, at *4 n. 7 (D.D.C. 1989) which can also be read to support the position that an administrative hearing officer has no power to issue an injunction, which that note suggests is solely a judicial remedy.

The Virginia Regulations do not explicitly provide hearing officer the power to enforce settlement agreements and, on balance, this hearing officer, sitting within the Commonwealth of Virginia and within the Fourth Circuit and taking note of their approaches to such matters, decides that he does not have such authority.

Accordingly, the hearing officer hereby dismisses this proceeding for lack of subject matter jurisdiction.

The LEA is reminded of its obligations concerning 8 VAC 20-80-76(I)(16) to develop and submit an implementation plan to the parties, the hearing officer, and the SEA within 45 days of the rendering of this decision.

Right of Appeal. A decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party within one year of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) without regard to the amount in controversy. 8 VAC 20-80-76(O)(1).

ENTER: 5 / 28 / 04

John V. Robinson

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail, via facsimile and/or e-mail, where possible)