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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

6144/05-06 AS

File Number

K.B.

Child's Name

Xx/xx/xx

Date of Birth

None

Date of Hearing

Closed

Type of Hearing

For the Student:

Parent(s)

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215 Darby Road
Paoli, PA 19301

**For the Spring-Ford Area School
District:**

Joseph Krueger
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Date of Oral Argument:

February 10, 2006

Date of Last Party Submission:

February 13, 2006

Date of Decision:

February 20, 2006

Hearing Officer:

Daniel J. Myers

BACKGROUND

In 2004, a previous hearing officer and appeals panel determined that this Student was denied a free and appropriate public education (FAPE) for the entire 2002-2003 school year and for a portion of the 2003-2004 school year. Consequently, they awarded compensatory education for such FAPE denials. Student has requested this due process hearing to resolve a dispute between the parties regarding the proper implementation of the 2004 compensatory education awards.

ISSUE

Whether or not I have jurisdiction to conduct a due process hearing regarding implementation of previous hearing officer and appeals panel orders.

RECORD

The record in this matter consists of the following documents:

Hearing Officer Exhibit 1 (eleven pages):

- A one page December 12, 2005, fax cover sheet;
- A three page ODR Request Form;
- A one page supplement describing the Parent and School District Positions;
- A three page Bureau of Special Education Hearing Order Implementation Report; and
- A three page Notice of Recommended Educational Placement (NOREP) indicating parental disapproval and concurrent requests for mediation and due process hearing, dated December 2, 2005.

Hearing Officer Exhibit 2 (four pages):

- December 22, 2005, Hearing Officer Correspondence No. 1;
- January 2, 2006, Hearing Officer Correspondence No. 2;
- January 3, 2006, Hearing Officer Correspondence No. 3;
- January 18, 2006, Hearing Officer Correspondence No. 4.

Hearing Officer Exhibit 3 (five pages):

- The School District's January 31, 2006 Brief in Support of Motion to Dismiss.

Hearing Officer Exhibit 4 (forty-seven pages):

- The Student's February 7, 2006 Response to the Motion to Dismiss, including:
 - Exhibit A (Hearing Officer Carroll's February 23, 2004 Order);
 - Exhibit B (Appeals Panel's April 9, 2004 Decision);
 - Exhibit C (April 26, 2004 correspondence);
 - Exhibit D (May 27, 2004 correspondence); and
 - Exhibit D (November 22, 2005 correspondence),

Hearing Officer Exhibit 5 (three pages):

- The School District's February 8, 2006 Reply Brief.

Hearing Officer Exhibit 6 (two pages):

- The Student's February 13, 2006, letter following up on the February 10 telephone conference call.

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a [teenaged] resident of the School District (School District) with autism and attention deficit disorder (ADD.) (HO 4, Exh. B) ¹
2. On February 23, 2004, Hearing Officer Carroll issued an Order requiring the School District to conduct certain evaluations, provide compensatory education, reimburse the cost of an independent educational evaluation, and reconvene Student's IEP team. (HO 4, Exh. A)
3. On April 9, 2004, the Pennsylvania Special Education Appeals Panel issued an Order affirming Hearing Officer Carroll's Order, and expanding the compensatory education award. (HO 4, Exh. B; In Re the Educational Assignment of K.B., Special Education Opinion No. 1470 (2004))
4. On December 2, 2005, Student's parents rejected a November 16, 2005 NOREP and requested mediation and a due process hearing. The parents' reason for disapproval was,

The compensatory education awards from 2004 has not been properly implemented and the S.D. has refused services of Dr. K and a psychiatrist for [Student] and has excluded speech and language services from the compensatory education services.

(HO 1)

5. On December 12, 2005, the School District faxed to the Office for Dispute Resolution (ODR) the December 2, 2005 request of Student's parents for mediation and a due process hearing. (HO 1)
6. On December 20, 2005, I was assigned to serve as hearing officer in this matter.
7. On December 22, 2005, I scheduled this matter to be heard on January 10, 2005, and I further scheduled a prehearing telephone conference call for January 3, 2006. (HO 2)

¹ References to HO are to Hearing Officer exhibits that comprise the record in this matter. "HO 4, Exh. B" refers to the exhibit labeled "Exhibit B" that is located within Hearing Officer Exhibit 4.

8. On January 2, 2006, I granted the Student's request for a continuance of the hearing to accommodate counsel's schedule, rescheduling the January 10 hearing to February 23 and February 28, 2006. At the same time, I rescheduled the January 3 telephone conference call to January 17, 2006. (HO 2)
9. During the January 17, 2006 telephone conference call, the School District argued that this matter should be dismissed due to lack of jurisdiction. I asked the parties to brief their respective positions regarding the motion to dismiss. (HO 2)
 - a. On January 31, 2006, the School District filed a Brief in Support of Motion to Dismiss. (HO 3)
 - b. On February 7, 2006, the Student filed a Response to the Motion to Dismiss. (HO 4)
 - c. On February 8, 2006, the School District filed a Reply Brief in Support of Motion to Dismiss. (HO 5)
10. On February 10, 2006, I conducted a telephone conference call to hear the parties' oral arguments regarding the Motion to Dismiss. At end of that telephone conference call, I informed the parties that I would grant the School District's Motion to Dismiss.
11. On February 13, 2006, Student submitted a letter following up on the February 10 telephone conference call. (HO 6)
12. No hearing on the record has been conducted in this matter. No transcripts of the telephone conference calls in this matter exist.
13. The record upon which my decision is based consists solely of the documents contained within HO 1 through HO 6.

DISCUSSION

The School District correctly argues that Section 1004(B) of the Office for Dispute Resolution's (ODR) Dispute Resolution Manual expressly states that failure to implement a hearing officer decision is not within the jurisdiction of due process proceedings. The School District further cites to Section 501(B) of ODR's Dispute Resolution Manual, which states, in full, that "The parent or LEA may request a due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education (FAPE)."

Of course, the manual, by itself, cannot serve as a jurisdictional basis – its provisions regarding jurisdiction must have a basis in law. That basis is Section 615(b)(6) of the Individuals with Disabilities Education Improvement Act (IDEIA), which permits any party to present a complaint for due process with respect to any matter relating to: 1) the identification of

a child with a disability; 2) the evaluation of a child with a disability; 3) the educational placement of a child with a disability; or 4) the provision of a free appropriate public education (FAPE) of a child with a disability. 20 USCA §615(b)(6) Federal regulations reiterate these jurisdictional bases for a due process hearing at 34 CFR §§300.503(a) and 300.507(a).

During oral argument, the School District also referred to Sections 300.660-300.664 of the federal regulations. 34 CFR §§300.660-300.664. Section 300.661(c)(3) states, in full, “A complaint alleging a public agency’s failure to implement a due process decision must be resolved by the SEA.” 34 CFR §300.661(c)(3) In addition, one of the Pennsylvania Department of Education’s (PDE) Basic Education Circulars, titled “Special Education Compliance 22 Pa. Code §14.102(a)(4),” lists, as one of the compliance problems that falls within PDE’s compliance investigation responsibilities, the “failure to comply with the order of a hearing officer, review panel, or court (unless an appeal is pending)”.² The School District notes that, in fact, PDE has investigated the School District’s alleged failure to implement the hearing officer and appeals panel decisions at issue in this case. (HO 1)

The Student’s well-written opposition to the School District’s Motion to Dismiss stresses the word “only” in the following sentence of Section 1004(B) of ODR’s Dispute Resolution Manual: “A due process hearing request should not be filed when the only issue is the alleged failure of the educational agency to implement a hearing officer decision.” Student argues that implementation failure is not the only issue in this matter.

Student also strongly objects to any reliance upon PDE’s November 1, 2005 report, arguing that it reflects an incomplete, *ex parte* investigation, and that the report itself constitutes unreliable hearsay evidence. (HO 4) I do not believe that the report constitutes hearsay evidence because it is not offered for the truth of the matter asserted, i.e., that the School District has complied with its compensatory education obligations. Rather, the report is offered to prove that PDE investigates, and indeed has investigated in this case, allegations of failure to implement hearing officer and appeals panel decisions.

This Motion to Dismiss, however, can be decided even without the November 1, 2005 report. That is because this matter concerns an issue of law, not fact, and whether or not I have jurisdiction over the complaint does not depend upon whether or not PDE ever conducted an investigation, nor does it depend upon the results of any such investigation. Either I have jurisdiction or I do not, regardless of the existence or content of the November 1, 2005 report. Thus, I will decide the School District’s Motion to Dismiss without regard to PDE’s November 1, 2005 compliance report.

First, I reject Student’s argument that the due process hearing request in this matter involves other issues in addition to the issue of implementation of the previous hearing officer and appeals

² Of course, the jurisdictions of the state compliance and due process systems are not mutually exclusive. In fact, federal regulations explicitly contemplate that some issues fall within both bailiwicks, i.e., they may be the subject of a compliance investigation as well as the subject of a due process hearing. In such cases, the due process hearing takes precedence. 34 CFR §300.661(c)

panel decisions. The parental rejection of the NOREP complains that the previous compensatory education awards have not been implemented properly and that the School District has “refused” certain services “from the compensatory education services.” (HO 1, p. 11) Student’s response brief similarly lists the due process issues as failure to comply with previous orders, and refusal of the School District to allow consultation with Dr. K, a monthly psychiatric consultation, and speech and language services to be included in those previous compensatory education awards. (HO 4, pp. 9, 15) The Student’s complaints, therefore, concern the manner in which the School District has, or has not, implemented the hearing officer and appeals panel’s previous compensatory education awards. For purposes of deciding the jurisdictional issue in this case, I conclude that all issues raised by Student concern the same, overarching issue, i.e., whether or not the School District has properly implemented the hearing officer and appeals panel’s previous compensatory education awards.

The question in this case is whether or not this single issue, i.e., the School District’s failure to implement properly a previous hearing officer and/or appeals panel’s decision, falls within one of the four jurisdictional categories for which a due process hearing complaint may be made. To reiterate those four jurisdictional categories, they are: 1) identification; 2) evaluation; 3) educational placement; or 4) the provision of a free appropriate public education.

I conclude that Student’s issues concerning implementation of a previous hearing officer and/or appeals panel decision do not fit within any of these four jurisdictional categories. Clearly, it does not concern Student’s identification, evaluation, or educational placement. I am not asked to review Student’s current educational placement, and his past evaluation and placement have already been reviewed and were the bases for the compensatory education awards at issue in this case.

Student argued during oral argument that this dispute fits within the fourth jurisdictional category, i.e., the provision of FAPE to Student. In other words, Student contends that the School District has denied FAPE to Student by failing to implement the previous compensatory education awards. I reject this argument.

FAPE is the provision of special education and related services necessary to meet a qualifying student’s educational needs. 20 USC §1401(9); In Re the Educational Assignment of E.M., Special Education Opinion No. 1462 (2004) Compensatory education, on the other hand, is an in-kind remedy focused on replacing denied services that should have been provided as an element of past FAPE, and it may not be used to supplant instruction and services that should be included in a current or future IEP. In Re the Educational Assignment of K.B., Special Education Opinion No. 1470 (2004); In Re the Educational Assignment of J.W., Special Education Opinion No. 1138 (2001) Compensatory education concerns a past FAPE denial, and is unrelated to any current FAPE entitlement. A student receiving compensatory education is entitled to both FAPE and compensatory education. In other words, compensatory education is an award over and above a Student’s current FAPE entitlement.

In this case, both Hearing Officer Carroll and the appeals panel have already determined that Student was not provided FAPE in the past. That is the reason for their compensatory education awards in the first place. There is no current FAPE dispute for me to review. The disapproved

NOREP does not raise issues concerning Student's current program and placement. Thus, I conclude that this dispute regarding implementation of a compensatory education award is not a FAPE dispute, and does not fit within the fourth jurisdictional category of matters appropriate for due process hearing. Accordingly, the School District's Motion to Dismiss is granted.

CONCLUSION

In 2004, a previous hearing officer and appeals panel determined that this Student was denied a free and appropriate public education (FAPE) for the entire 2002-2003 school year and for a portion of the 2003-2004 school year. Consequently, they awarded compensatory education for such FAPE denials. Student has requested this due process hearing to resolve a dispute between the parties regarding the proper implementation of the 2004 compensatory education awards. I hold that I lack jurisdiction over this dispute. Accordingly, the School District's Motion to Dismiss is granted.

ORDER

For the reasons described above, I ORDER that:

- The School District's Motion to Dismiss is GRANTED;
- This matter is DISMISSED and considered CLOSED.

Daniel J. Myers

Hearing Officer

February 20, 2006

Re: Due Process Hearing
File Number 6144/05-06 AS
Student