

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: B.W.

Date of Birth: [redacted]

Dates of Hearing: Decided on Motion to Dismiss

Closed HEARING

ODR File No. 17632-15-16

Parties to the Hearing:

Representative:

Parents
Parent[s]

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Date Record Closed:
Date of Decision:

June 20, 2016
July 2, 2016

Hearing Officer:

Charles W, Jelley Esq. LL.M.

Overview of the arguments

Background and Procedural History¹

1. The Student is currently in eighth grade and attending “[Redacted] School.”
2. The Student attended [Redacted] Cyber Charter School for parts of the sixth and seventh grade.
3. The Student has been identified as a student with a Specific Learning Disability and a Hearing Impairment requiring the use of hearing aids and an amplification device. The Complaint contends the Student is in need of specially-designed instruction.
4. [Redacted] Cyber Charter School (“Charter School”) was the Local Educational Agency (“LEA”) responsible for providing the Student with a free appropriate public education (FAPE) during all relevant times for purposes of this Complaint.
5. Pursuant to 20 U.S.C. §1413 *et.seq.*, the Pennsylvania Department of Education (“PDE”) is the State Educational Agency (“SEA”) responsible for direct general supervision of the LEA Charter School’s provision of FAPE during all relevant times.
6. PDE as the SEA has a general supervisory responsibility to ensure that all students with a disability in the Commonwealth receive FAPE. 20 U.S.C. §1412(a)(11)(A).
7. The Student is “disabled” as defined by Section 504 of the Rehabilitation Act (“Section 504”) and Title II of the Americans with Disabilities Act (“ADA”).
8. The Student is “otherwise qualified” to participate in school activities.
9. PDE as the SEA receives federal financial assistance.
10. The Parent, on behalf of Student, filed a special education due process complaint alleging the LEA Charter School and PDE denied the Student a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (“IDEA”). The Complaint also alleged the Charter School and PDE discriminated against the Student in violation of Section 504, and Title II of the ADA.
11. The Charter School ceased operations and is currently in bankruptcy. As a result of the Charter School’s bankruptcy petition; therefore, the Parent does not seek relief against the LEA Charter School.

¹The background information is taken from the pleadings and exhibits provided by the Parties as indicated in this Decision. The information was not gleaned from any sworn testimony or parties’ evidentiary documents.

12. The Complaint contends the “Student was not provided adequate Individualized Education Program(s) (“IEPs”) that were reasonably calculated to provide FAPE. The Complaint specifically alleges the Student did not receive IEPs that afforded: (a) appropriate, sufficient, and measurable goals and/or objectives in all relevant areas that were aligned with state standards and designed to meet Student’s educational needs; (b) adequate methods for assessing and monitoring Student’s progress or lack thereof; (c) adequate specially designed instruction, modifications, accommodations, supplementary aids and services, and/or related services given the degree of Student’s behavioral, academic, and hearing deficiencies; and (d) an adequate placement.”
13. The Parents contend while the Student was enrolled in the Charter School, the Student did not receive an education that allowed the Student to make meaningful educational progress in all educational areas because the Student’s IEPs were inadequate, or they were not implemented with fidelity.
14. The Complaint does not allege the SEA ever provided direct services to the Student or that the SEA refused to provide FAPE. The Complaint does not allege the SEA took any action whatsoever in regards to the Student’s program. The Complaint does not allege the LEA or the Parents ever notified the SEA of the alleged FAPE violations.
15. The Parents contend pursuant to the SEA’s “general supervisory” responsibilities the SEA is solely liable for the actions, omissions or inactions of the LEA. 20 U.S.C. §1412(a)(11)(a); §1413(g).
16. The Complaint does not name the LEA as a party to the action. Instead, the Parents seek to establish direct liability for the alleged Charter School’s violations of IDEA, Section 504 and Title II of the ADA against the SEA in its “general supervisory” capacity. The Parents seek a complete make whole remedy of compensatory education and attorney’s fees from PDE for the alleged violations of the LEA. The Parents do not seek FAPE for future services.
17. Parents allege, under these circumstances, when the LEA declares bankruptcy, PDE, as the SEA, pursuant to 20 U.S.C. §1412 et seq., as a condition of receiving federal IDEA funds, must stand in the shoes of the LEA and defend the Parents’ claims. The Parents also contend PDE has an obligation to provide compensatory education for all of the LEA’s alleged FAPE violations.
18. PDE has responded to the Complaint by filing a Motion to Dismiss contending the hearing officer lacks jurisdiction over the instant special education due process Complaint and the tag along discrimination claims.
19. Upon receipt of the PDE’s motion, the hearing officer invited the Parents to submit a Response, followed by PDE’s reply to the Parents’ Response.
20. On June 20, 2016, the hearing officer, three of the Students’ attorneys and two attorneys from PDE participated in a 49-minute conference call to resolve unanswered questions in the parties’ written submissions.

21. The Pleadings are closed, and the matter is ripe for adjudication.

In its motion to dismiss, PDE argues, under these facts, this special education due process hearing officer does not have jurisdiction over PDE to determine liability for an alleged denial of FAPE by the LEA. In support of its position, PDE relies on rulings from two other Office for Dispute Resolution (ODR) hearing officers staying other due process actions where PDE and the bankrupt charter school are parties. The hearing officers in those actions stayed the Parents' due process claims, finding the automatic stay in bankruptcy a bar to the due process hearing. (PDE Motion to Dismiss and Attachments April 28, 2016).

PDE next argues published opinions from the 11 Circuit in *R.W. v. Ga. Dep't of Educ.*, 353 Fed. Appx. 422, 2009 (11th Cir. 2009), and in the 10th Circuit in *Chavez v. N.M. Pub. Educ. Dep't*, 621 F.3d 1275, (10th Cir. 2010) hold that the SEA is not a proper party to a due process complaint, unless the SEA either provides direct services or the LEA places the SEA on notice the LEA is "unable" or "unwilling" to provide FAPE. PDE concedes, under these circumstances, if the parents file a complaint against the LEA, and the LEA is liable for a denial of FAPE, PDE under its "general supervisory authority" will provide the Student with the ordered remedy (PDE Reply to Parents' Response p.5). PDE, upon receipt of the Parents' Complaint, acting under its "general supervisory authority" initiated "fact finding" to determine if the LEA denied the Student FAPE. (PDE Reply to Parents' Response May 23, 2016). PDE does not concede, if the LEA failed to provide FAPE and compensatory education is ordered, they are responsible for attorneys' fees (PDE Reply to Parents Response May 23, 2016).

The Parents on the other hand contend the IDEA's "general supervisory" responsibility found at 20 U.S.C. §1412(a)(11)(A) when read together with 20 U.S.C. §1413(g) provides this hearing officer with subject matter jurisdiction over the Parent versus PDE cause of action. They contend the "general supervisory" provision coupled with the SEA's permissive use of LEA funds when the LEA is "unable" or "unwilling" eliminates the requirement for the LEA's participation at the due process hearing. Parents contend once the LEA is in bankruptcy, the IDEA requires PDE to stand in the shoes of the LEA, defend the Parents' claim and provide the remedy 20 U.S.C. §1413(g). (Parents' Response to Motion to Dismiss, pp.3-4; 20 U.S.C. § 1413 (g)(1). In support of its multiple arguments, the Parents rely on two ODR hearing officer decisions and an unpublished district court decision in another PDE bankrupt charter school FAPE dispute.²

² *Charlene R. v. Solomon Charter Sch.*, 63 F. Supp. 3d 510, 520 (E.D. Pa. 2014) (holding SEA financially liable when bankrupt charter school agreed to provide compensatory and then became "unable" to fulfill its contractual obligations); *X.J. v. Pennsylvania Department of Education*, ODR File No. 15962-1415AS, Ruling on Motion to Dismiss Filed by PDE at 8 (H.O. McElligott, April 27, 2015) (agreeing with *Charlene R.*'s finding that an SEA must step in and provide the remedy when an LEA cannot or will not provide a

The Parents also rely on an unpublished district court Order, denying PDE’s Motion to Dismiss, in yet another district court action between PDE and the Parents’ lawyers for other children who attended the instant bankrupt LEA charter school. Finally, the Parents rely on *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 696 (3d Cir. 1981) holding the SEA responsible for appropriate relief, after the hearing officer found the LEA liable for a denial of FAPE.³ When cobbled together, Parents contend 20 U.S.C. §1412 *et. seq.* and 20 U.S.C. §1413 *et. seq.* provides jurisdiction and an implied standalone IDEA cause of action against the SEA. They further contend the standalone cause of action is enforced through the procedural due process rights at 20 U.S.C. §1415 *et seq.* On its face, the Parents’ multiple arguments conflate two disparate theories—subject matter jurisdiction and the availability of a private right of action.

For all the reasons set forth below, PDE’s Motion is granted and an appropriate Order dismissing the Parent’s claims as exhausted is attached hereto. A special education due process hearing is the proper venue for adjudication of a student’s denial-of-FAPE action against an LEA; the SEA, in this instance, is not a proper party to defend the LEA’s liability. Assuming the LEA’s liability is established, under these facts, the SEA is the agency responsible for providing the relief 20 U.S.C. §1413(g); §1412(11)(a). While the IDEA does permit the parent to file a due process hearing against the SEA when the SEA is the direct provider of FAPE, those facts are not present here therefore 20 U.S.C. §1413(g), 20 U.S.C. §1412(11)(a), and 20 U.S.C. §1412(25)(b) do not support the Parent’s SEA theory of liability.

The SEA, in this instance, did not take any “action” pro or con relating to the Student’s entitlement to FAPE. The SEA did not participate in any decisions about the Student’s IEP or FAPE. The Complaint does not allege the SEA was made aware of the LEA’s actions, omissions, or inactions. The Complaint does not allege the SEA did not exercise its “general supervisory” responsibility to ensure compliance or take affirmative action to enforce a complaint investigation report. As the 504 and the Title II ADA claims are intertwined with the IDEA claim, those claims are also dismissed and are otherwise exhausted. The Parents are free to file an adverse action in the bankruptcy

child with FAPE); *accord J.M. v. Pennsylvania Department of Education*, ODR File No. 16308-1415KE, Pre-Hearing Order at 4-5 (H.O. Ford, July 8, 2015).

³*St Tammany Parish Sch. Bd. v. State of La.*, 142 F.3d 776, 784 (5th Cir. 1998) (finding that once an LEA is unable or unwilling to establish and maintain programs that comply with the IDEA, the SEA is responsible for providing the services); *Gadsby v. Grasmick*, 109 F.3d 940, 943, 953 (4th Cir. 1997) (finding that an SEA may be held liable for tuition reimbursement costs, even when the LEA was the entity that failed to develop an appropriate IEP for the child); *Doe v. Maher*, 793 F.2d 1470, 1492 (9th Cir. 1986) (holding that a court may order the SEA to provide services directly to a disabled child where the LEA failed to do so); *Vander Malle v. Ambach*, 673 F.2d 49, 53 (2d Cir. 1982) (requiring the SEA to fund a child’s private placement in order to ensure the child receives FAPE).

proceedings to establish liability and then submit the result, if they prevail against the LEA charter school, to PDE for implementation.⁴ Alternatively, they may file a complaint with PDE to investigate the alleged denial of FAPE. 34 C.F.R. §§300.660-662

The issue is does either 20 U.S.C. §1412 *et seq.*, 20 U.S.C. §1413 *et. seq.*, or 20 U.S.C. §1415 *et. seq.* provide the Student with a cause of action to file an IDEA due process complaint against the SEA for the alleged FAPE violations of a bankrupt charter school LEA ? The answer is no.

Applicable Legal Principles

Types of Charter Schools

In Pennsylvania, schools that operate under a charter are divided into three general categories—charter schools, regional charter schools, and cyber charter schools. Charter schools are independent public schools established and operated under a charter from the local school board. Charter schools are commonly referred to as "bricks-and-mortar" charter schools. A cyber charter school is an independent public school established and operated under a charter from PDE. Cyber charter schools use electronic media to educate children without the daily requirement that students regularly attend a physical "bricks-and-mortar" school. To comply with the IDEA, charter schools and cyber charter schools must be organized as a public, nonprofit corporation.⁵ A charter may not be granted to a for-profit entity. <http://www.education.pa.gov/K-12/Charter%20Schools/Page>

Charter School Responsibilities

Charter schools and cyber charter schools must comply with Pennsylvania and federal regular education, special education, federal civil rights and disability laws. Chapter 711 *et. seq.* of the Pennsylvania School Code, "Charter School and Cyber Charter School Services and Program for Children with Disabilities," contains regulations specific to individuals with disabilities being educated in charter schools and cyber charter schools. Chapter 711 incorporates by reference all of the IDEA regulations and the applicable

⁴ Eastern District Court of Pennsylvania Local Bankruptcy Rules 7003 and 7005. <https://www.paed.uscourts.gov/documents/locrules/bankruptcy/bkrules.pdf>

⁵ The detailed requirements for cyber and charter schools are found at 24 P. S. 17-1732-A(c)(2) and 17-1749-A(b)(8).

Section 504 regulation 22 Pa. Code 711.3. Charter schools and cyber charter schools also must comply with 22 Pa. Code Chapter 4 relating to academic standards and assessment, 22 Pa. Code Chapter 11 relating to pupil attendance, and 22 Pa. Chapter 12 relating to discipline of students 22 Pa. Code §711. et. seq.

<http://education.pasenategop.com/files/2014/03/Summary-Charter-Bill.pdf>

Charter Schools and IDEA FAPE Requirements

Under the IDEA, a state must ensure all children with a disability receive FAPE. 20 U.S.C. § 1412(a)(1)(A). FAPE, among other things, is provided in conformity with an IEP for a particular child. Each year, a child's IEP is developed by a team that includes the child's parents, at least one regular-education teacher, at least one special-education teacher, a representative of the LEA, and the child himself or herself, if appropriate. *Id.*; 20 U.S.C. §1414(d)(1)(B).

The IEP should state the child's present levels of achievement and performance, provide annual goals, and explain how progress will be measured. 20 U.S.C. §1414(d)(1)(A)(i). The IEP should also state "the special education and related services and supplementary aids and services . . . to be provided to the child" and "the anticipated frequency, location, and duration of those services and modifications". *Id.* § 1414(d)(1)(A)(i)(IV), (VII). Once an IEP is created, it may only be amended by the entire IEP team or by agreement between the parents and the local educational agency. § 1414(d)(3)(F).

Due Process Procedural Safeguards

IDEA also requires that states provide a dispute resolution system should a parent or LEA disagree whether the child is receiving FAPE. Either party may seek mediation or present a complaint to a hearing officer, who will then adjudicate the parties' disagreement in a due process hearing. 20 U.S.C. §§1415(b)(6), (c)(2), (d), (e), (f). The procedural safeguards identify the LEA and the parent as the parties at the due process hearing. Any party aggrieved by the hearing officer findings can file an action in a court of competent jurisdiction. 20 U.S.C. §1415(g);§1415(i)(2).

The IDEA also provides other procedural guarantees that give parents the right to file an IDEA noncompliance complaint with the SEA. A parent may "present a complaint . . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" to the SEA. 20 U.S.C. §1415(b)(6)

In Pennsylvania, the Bureau of Special Education (BSE) investigates noncompliance complaints.⁶ Within 60 days of receiving a noncompliance complaint, BSE must report their findings to the parent. In the event the LEA is found to be in noncompliance with the IDEA, the BSE Complaint Investigation Report (CIR) will provide the LEA with a corrective action plan. If the LEA refuses to correct the violations, the SEA will initiate proceedings to ensure compliance.⁷ These two complaint options, a due process complaint, and the BSE noncompliance complaint are not mutually exclusive, and a parent may choose one or both. 34 C.F.R. §§300.660-662.

If a parent opts for a due process hearing, the request is filed with ODR and the LEA. After a hearing, if either party is "aggrieved by the findings and decision" the aggrieved party "shall have the right to bring a civil action with respect to the complaint presented ... in a district court of the United States, without regard to the amount in controversy". 20 U.S.C. § 1415(i)(2)(A).

Agencies responsible for FAPE

The IDEA classifies various agencies within a given state that may have a duty to ensure or provide FAPE. First is the "state educational agency" (SEA), which, in the Commonwealth, is PDE. Followed by "local education agency" (LEA), which is most commonly understood as a school district or a charter school 20 U.S.C. §1401(19); 34 C.F.R. §300.28). Next is an "educational service agency," (ESA) which in Pennsylvania is the intermediate unit 20 U.S.C. §1401(5); 34 C.F.R. §300.12. The IDEA also includes an umbrella term called a "public agency," which includes the SEA, LEAs [public schools and nonprofit public charter schools] any other political subdivisions of the State that are responsible for providing education to children with disabilities. 34 C.F.R. §300.12; 300.28; §300.33; §300.41.

SEA and LEA duties and obligations

Under the IDEA, the federal government makes grants of money to states to assist them in providing special education and related services to children with disabilities. 20 U.S.C. § 1411(a)(1). Section 20 U.S.C. 1412 *et seq.* identifies 25 different assurances the state's IDEA plan must contain to receive IDEA funds. The SEA is required to exercise "general supervisory responsibility" over all other agencies to ensure proper administration of the statute. 20 U.S.C. § 1412 (a)(11)(A). PDE is responsible for ensuring

⁶The specifics of the Complaint Investigations process see <http://www.education.pa.gov/Documents/K-12/Special%20Education/Compliance/English%20Complaint%20Packet%20and%20Form.pdf>

⁷ 22 PA Code §14.102(a)(4) and the related Special Education Compliance Basic Education Circulars.

that: "(i) the requirements of [the IDEA] are met; (ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency; (I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and, (II) meet the educational standards of the SEA." 20 U.S.C. §1412(11)(A)(i)-(iii).

Local educational agencies become eligible to receive IDEA funds if they demonstrate, to the satisfaction of the SEA, the existence of policies and procedures consistent with state-established IDEA policies and procedures. 20 U.S.C. §1413(a)(1); 20 U.S.C. §1412 *et seq.* The SEA is empowered to determine if an LEA is eligible to receive IDEA funds. The statute provides that an SEA cannot make a determination depriving an LEA of IDEA funds without first affording the LEA reasonable notice and an opportunity for a hearing. 20 U.S.C. §1412(a)(13); *see also* 20 U.S.C. §1413(c). The notice required must inform the general public within the jurisdiction of the LEA of the pending action to withhold funds. 20 U.S.C. §1413(d)(2). If, after reasonable notice and an opportunity for a hearing, the SEA determines that the LEA cannot comply with state IDEA policies and procedures, the statute provides that the SEA "shall reduce or may not provide" IDEA funds to the LEA until the SEA is satisfied that the LEA is complying with IDEA policies and procedures. 20 U.S.C. §1413(d); 34 C.F.R. §300.197(a).

SEA use of withheld LEA Funds

In three circumstances the SEA "shall" use the LEA's IDEA funds to either directly provide or arrange for the provision of special education services. 20 U.S.C. §1412(25)(b); 20 U.S.C. §1413(g). The first instance is when the LEA "(A) has not provided the information needed to establish the eligibility of such local educational agency or State agency under this section." The second is when the LEA "(B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a) [FAPE requirements]." The third is when the LEA "(C) is unable or unwilling to be consolidated with 1 or more local educational agencies in order to establish and maintain such programs." 20 U.S.C. §1413(g). The IDEA requires the SEA to monitor the LEA's compliance with the requirements outlined in 20 U.S.C. §1412 *et seq.* as executed by the LEA in exchange for IDEA funds at §1413 *et seq.* 20 U.S.C. §1416(a).

With these legal principals as background, I will first analyze the statute to determine if the statute provides this hearing officer with subject matter jurisdiction over the Parent's direct or implied cause of action against the SEA.

Application of Legal Principles and Analysis

Due Process Hearings

In Pennsylvania, special education due process hearings are heard against the LEA through the ODR, as authorized by the 22 Pa Code §14.162(p). Hearings conducted by ODR meet the IDEA standards of impartiality regardless of the agency status. 20 U.S.C. §§1415(f); 34 C.F.R. §§300.511-300.515; 22 Pa Code §14.162.

Section §1412, §1413, and §1415 do not provide a direct or implied cause of action

The starting point of all statutory construction is the text, structure and context of the statute, but where that text is ambiguous, hearing officers are reminded that "we 'must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2492, 192 L. Ed. 2d 483 (2015) (quoting *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2441, 189 L. Ed. 2d 372 (2014)). I will begin with a review of the interlocking structure of 20 U.S.C. §1412, §1413, and §1415.⁸

Section 1412 begins with a general statement that to be eligible for federal funds the SEA must "provide assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions . . ." following this preamble §1412 *et. seq.* enumerates 25 different policies, procedures or assurances the SEA must put into the state plan to receive federal funds. This extensive listing serves as a table of contents for the expanded descriptions of these same policies and procedures that then appear in roughly the same order in the following provision of the statute §1414 through §1416. For example, at §1412(1)(a) the SEA must have a policy to provide FAPE, the details of which are described in §1414 *et. seq.*; §1412(6) calls for procedures to ensure procedural safeguards are provided to parents, the details of which are described in §1415 *et.seq.*

While the SEA must have policies and procedures to ensure the procedural safeguards are enforced, the procedural safeguards described in §1415 *et. seq.* isolate the LEA as the responsible entity charged with physically providing the due process procedural safeguards to the parents. 20 U.S.C. 1415(d). The statute makes the LEA the responsible agency to implement the safeguards, for example, the parent and the LEA participate in the resolution session §1415(f)(1)(B); the LEA and the parent participate in mediation §1415(e); the LEA must answer the allegations in the complaint §1415(b)(3)-

⁸ *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 363 (3d Cir. 2015) (examining the "structure and ... parallels" of a statute to determine the meaning of its terms).

(4); §1415(c)(1); §1414(b)(1); the LEA must provide the 5-day witness and document disclosure §1415(f)(2), §1415(h); the LEA will call witnesses at the hearing *id.*; the LEA as the aggrieved party after the hearing may file an action in the district court §1415(i)(2)-(3)(A); § 1415(l); the LEA must implement the due process decision §1415(j), and the LEA must pay the attorney’s fees when the LEA does not prevail at the hearing §1415(i)(3)(B)-(G). Nowhere in Section 1415 does the statute provide for an SEA parent due process hearing when the SEA does not provide direct services.

Section 1412(11)(a) provides the SEA is responsible for ensuring all education programs “[a]re under the general supervision of individuals responsible for educational programs,” “meet the educational standards of the SEA,” and ensure “the requirement of the subchapter are met.” This subclause, unlike the child-centered provisions at §1414 and §1415, does not specify, in any detail, how the SEA is to achieve this general assurance. Moreover, this subclause does not provide either subject matter jurisdiction or a private cause of action to enforce its terms against the SEA.

Similarly 20 U.S.C. §1413 *et. seq.* as a condition of receiving federal IDEA funds requires the LEA to provide assurances, policies, and procedures to the SEA that the LEA will comply with all 25 of the requirements of 20 U.S.C. §1412 *et. seq.* The relevant clause here, relied upon by the Parents, is 20 U.S.C. §1413(g)(1)(B)-(C), which provides the SEA may use the LEA’s IDEA funds if the LEA is the “unable” or “unwilling” to provide FAPE. 20 U.S.C. §1413(g)(1)(B)-(C). These sub-clauses when triggered after notice to the LEA and the public of a public hearing, grant the SEA the authority to withhold funds from the LEA when the LEA does not perform its responsibilities. 20 USC 1413(d); 34 CFR §300.197; *Letter to Harris* (May 27, 2002) (upholding the SEA’s decision to withhold funds when the charter school was unable to provide FAPE).⁹

Contrary to the Parents’ contentions, §1413(g)(1)(B)-(C) “unable” or “unwilling” language does not by operation of law make the SEA the direct provider of services. Instead, each sub-clause is circumscribed by 20 U.S.C. §1413(g)(2) which states the SEA “**may**” provide services in a variety of ways. Simply stated, Section 1413(g)(1)(B)-(C) does not automatically upload the LEA’s undetermined past liabilities to the SEA, absent a hearing on the LEA’s failures and a finding the LEA is “unable” or “unwilling.”¹⁰

⁹ Letter to Harris (May 27, 2002) <http://www2.ed.gov/policy/speced/guid/idea/letters/2002-2/harris062702-2q2002.pdf> last visited June 24, 2016.

¹⁰ *See also*, 20 U.S.C. §1412(25)(b)(if SEA elects to provide a FAPE then SEA acts as LEA for due process purposes cross referencing 20 U.S.C. §1413).

Alternatively, assuming *arguendo* the Student is permitted to bring a direct cause of action under 20 U.S.C. §1413(g), this hearing officer is not prepared to conclude, under these circumstances, that the SEA can be held liable for a failure to supervise an LEA, unless the SEA is given clear notice, via the complaint procedure outlined in 34 C.F.R. §§ 300.660-300.662 and the SEA makes a finding of noncompliance that is not enforced. It is axiomatic that an SEA must be afforded some procedural due process protection before being held liable under the IDEA; requiring the Student, at a minimum, to comply with 34 C.F.R. §§300.660-300.662 accomplishes that goal.¹¹ In this case, the Parents did not take advantage of 34 C.F.R. §§ 300.660-300.662 by informing the SEA of any alleged violations. Accordingly, absent notice, the SEA is not responsible for investigating or remediating the alleged violations of the LEA.¹² Therefore, the SEA's Motion is granted; the Parents' due process complaint is dismissed.

The case law does not support the Parents' claim against the SEA

The Parents rely heavily on *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 696 (3d Cir. 1981) and *Gadsby v. Grasmick*, 109 F.3d 940, 943, 953 (4th Cir. 1997) for the proposition that the SEA must stand in the shoes of the LEA at the liability phase of the due process hearing for the alleged violations of the LEA. This argument misconstrues the courts' holdings in *Kruelle*, and *Grasmick*. In each case, the appeals court found the SEA was responsible after the hearing officer held the LEA denied the student FAPE. The Parents' argument overlooks the critical fact that in both cases the SEA did not participate at due process hearing. The Parents do not explain how *Kruelle* or *Grasmick* support their position when the SEA was not found directly liable for the LEA's FAPE violations. Both cases do however stand for the proposition that when the LEA is "unable" or "unwilling" the SEA by operation of law is the payor of last resort for the child's remedy.

Similarly any reliance on *Charlene R. v. Solomon Charter Sch.*, 63 F. Supp. 3d 510, 520 (E.D. Pa. 2014) and *H.E. v. Commonwealth of Pennsylvania Dep't of Educ.*, Civil Action No. 15-3864, at 3 n.2 (E.D. Pa. Mar. 28, 2016) is misplaced. In *Charlene R.*, the LEA and the parent entered into a settlement agreement after which the LEA filed for bankruptcy. The

¹¹ *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[t]he legitimacy of Congress' power to legislate under the spending power... rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'")

¹² *B.R. v. District of Columbia*, 802 F. Supp. 2d 153, 161, 2011 U.S. Dist. LEXIS 89619 (D.D.C. 2011) (the court granted the SEA's motion to dismiss, ruling the LEA charter school "retained responsibility for providing a FAPE" because the LEA charter did not notify the SEA that it needed assistance and SEA did not agree to assume responsibility to provide FAPE); *See also Friendship Edison Pub. Charter Sch. Collegiate Campus v. Murphy*, 448 F. Supp. 2d 166, 169-170, 2006 U.S. Dist. LEXIS 62921 (D.D.C. 2006).

court held although the SEA was not a party to the agreement, once the LEA was “unable” to perform; the SEA by operation of law became the agency responsible for the student’s remedy. *Charlene R.* 63 F. Supp.3d 520. Therefore *Charlene R.* does not support the Parents here as the LEA’s liability and the agreed upon remedy have yet to be determined.

Next, the Parents rely on *H.E.*, an unpublished district court Order denying PDE’s motion to dismiss. The Parents argue that the court’s comments in the footnote in the Order support their SEA theory of liability. I do not find the comments persuasive as the Order was entered without benefit of an opinion explaining the court’s analysis. *H.E.* is also distinguishable on the facts, and the applicable law. In *H.E.*, the parents made two claims for denial of FAPE against the LEA and the SEA. The first centered upon enforcing a settlement agreement where the LEA agreed to provide compensatory education and funding for the three students to attend a private school. The second claim alleged the LEA failed to provide FAPE even though the students were attending a private school. The hearing officer dismissed the three students’ complaints against PDE and the charter school, finding that the parents failed to enforce their settlement agreement against the charter school. The district court dismissed PDE’s jurisdictional claim on two different theories. First, the court rejected the SEA’s exhaustion argument even though the hearing officer did not write a “substantive opinion.” Second, the court applying 20 U.S.C. §1413(g)(1)(B)(C) held the SEA was responsible for the implementation of the LEA’s compensatory education agreements.

For the following reasons, I find *H.E.* is not persuasive in this instance. First, like *Charlene R.*, the parents were enforcing a settlement agreement that became PDE’s responsibility, by operation of law, when the LEA was not available. Second, unlike here, the complaint named both the SEA and the LEA. Third, the bulk of the comments in the footnotes of the court’s order dismissing PDE’s 12(b)(6) motion focused on exhaustion and the parent’s contract rescission arguments; neither issue is present here.¹³ 20 U.S.C. §1413(g)(1)(B)(C).

Although *D.M. v. N.J. Dep’t of Educ.*, 801 F.3d 205 (3d Cir. N.J. 2015) was cited by the court in *H.E.*; neither party briefed the decision. In *D.M.* the parent challenged the SEA’s licensing decision of a private school contending the SEA’s decision interfered with the implementation of EM’s agreed upon IEP between the parent and the LEA. EM’s parents then filed an action in the district court seeking a declaratory judgment and a temporary injunction precluding the SEA from interfering with the implementation of EM’s IEP.

¹³ cf. *J.K. v. Council Rock Sch. Dist.*, 833 F. Supp. 2d 436, 450 n.9, 2011 U.S. Dist. LEXIS 143660, 2011 WL 6210665 (E.D. Pa. 2011)(hearing officers do not have subject matter jurisdiction to enforce settlement agreement but can decide if an agreement does exist).

The district court granted the parent's motion for a temporary injunction directing the SEA not to interfere with the implementation of the "stay put" IEP. The SEA then challenged the ruling arguing that the "stay put" injunction was improper.

On appeal, the circuit court held the student was entitled to an injunction because the SEA's licensing decision was a direct action, by the SEA, to alter the student's educational placement. The court also held the student's failure to exhaust administrative remedies did not deprive the district court of subject matter jurisdiction because the IDEA "did not authorize an action between the parent and the SEA." *Id.* Given the unsettled state of the record, the case was remanded back to the district court with the stay-put injunction in place.

On remand, the district court relying on the circuit court's holding that the IDEA does not provide a cause of action "**for a parent to challenge an action of a state agency, only to challenge the action of a local public-school system**" concluded the SEA was not a proper party in *E.M.'s* administrative action. *D.M. v. N.J. Dep't of Educ.*, 2015 U.S. Dist. LEXIS 155556 *18-19 (D.N.J. Nov. 17, 2015). The court then concluded while the SEA was not a proper party to the due process hearing, 20 U.S.C. §1415 did permit *E.M.* to file a "proceeding" against the SEA for its licensing decision *id.* Despite finding a cause of action against the SEA, in federal court, the district court dismissed the action by *E.M.'s* private school concluding the text and structure of the IDEA did not permit a direct or an indirect cause of action by the private school to challenge the SEA's licensing determination. *D.M.* at *24-34.

Even assuming *arguendo*, the statements in the Complaint that the SEA failed to perform its "general supervisory responsibilities" these conclusions do not support a direct, or implied cause of action. The complaint states the LEA, not the SEA allegedly failed to evaluate the Student, prepare, and implement an appropriate IEP. I cannot accept the Student's generalized statements contending a direct or implied cause of action against the SEA, when the text and structure of the statute do not provide, and the Parents have not pointed to any text, or structure, supporting such a cause of action.¹⁴

When you outline the elements of the Student's cause of action, peel away the legal conclusions, that provide the framework of the complaint, which are not entitled to the presumption of truth, the Complaint fails to state what action(s), refusal(s), or inaction(s) the SEA did or failed to do that caused the Student to be denied FAPE. Unlike the SEAs, in *D.M.*, *Kurrelle*, and *Grasmick*, the SEA here did not make any decisions or participate in the Student's IEP meetings.

¹⁴ *Cf. D.M. v. N.J. Dep't of Educ.*, 2015 U.S. Dist. LEXIS 155556 *24-31 (D.N.J. Nov. 17, 2015)(finding a not delegable duty of the LEA to provide a FAPE collecting case rejecting a cause of action between the LEA and the SEA).

Accordingly, I find the hearing officer lacks subject matter jurisdiction, and the proposed direct or implied cause of action against the SEA, for the LEA's alleged failures, under these facts fails. Therefore, the Parents' Complaint is dismissed, and the SEA's Motion to Dismiss is granted.

This hearing officer holds specifically as follows: The Student's due process complaint against the SEA alleging violations of a defunct LEA charter school that does not name the LEA charter school as a party must be dismissed for lack of subject matter jurisdiction and the failure to state a claim. The SEA's responsibility to provide a remedy pursuant to 20 U.S.C. §1413(g)(1)(B)(C) does not create subject matter jurisdiction or state a direct or implied cause of action against the SEA. *R.W. v. Ga. Dep't of Educ.*, 353 Fed. Appx. 422 (11th Cir. Ga. 2009); *Chavez v. N.M. Pub. Educ. Dep't*, 621 F.3d 1275, (10th Cir. N.M. 2010); *cf. D.M. v. N.J. Dep't of Educ.*, 801 F.3d 205 (3d Cir. N.J. 2015). The SEA's duty to provide appropriate relief, as the payor of last resort, is triggered when the LEA notifies the SEA it is "unable" or "unwilling" or the SEA after a hearing concludes the LEA is "unwilling" or "unable" to provide FAPE. §20 U.S.C. §1413(g). PDE's Motion is granted the Complaint is dismissed. The Parents have exhausted all administrative proceedings.

ORDER

In accord with the background, analysis and discussion above, PDE's Motion to Dismiss is granted. The Parents have exhausted all claims.

/s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer

July 2, 2016