

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: Q.B.

Date of Birth: [redacted]

Dates of Hearing: 8/18/2016

DECISION DECIDED BY MOTION

ODR File No. 18044-16-17

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Pennsylvania Department of Education
333 Market Street, 9th Floor
Harrisburg, PA 17101

Date:
Hearing Officer:

Representative:

Parent Attorney
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September 9, 2016
Charles W. Jelley Esq. LL.M.

Background¹

1. During the 2015-2016 school year, the Student was enrolled as a 6th grader and attended Charter School.
2. Sometime prior to or during the 2015-2016 school year, the Student was diagnosed, by a private provider, as a person with an Intermittent Explosive Disorder. During 6th grade, the Student failed some classes and had ongoing behavioral, social, and educational problems.
3. At all times relevant, the Charter School was the Local Educational Agency (LEA) responsible for locating, evaluating and educating the Student. This responsibility is commonly called the “child find” duty. 20 U.S.C. §1412(a)(11).
4. Sometime during the 2015-2016 school year, the LEA evaluated the Student and determined the Student did not qualify as a person with a disability who needed specially-designed education as described by the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. §1401 *et. seq.*
5. Pursuant to 20 U.S.C. §1413 *et. seq.*, the Pennsylvania Department of Education (PDE) was the State Educational Agency (SEA) responsible for direct general supervision of each LEA’s provision of IDEA services during all relevant times.
6. PDE acting as the SEA has a general supervisory responsibility to ensure that all students with a disability in the Commonwealth are located, evaluated, and educated.
7. The Parents filed a due process complaint notice alleging the LEA Charter School failed to identify, evaluate, and educate the Student. The Parents’ complaint alleged the Charter School was the responsible LEA. To remedy the alleged violation, the Parent seeks an independent educational evaluation and compensatory education.

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. Along with the instant action, the Parents filed similar due process complaint notices against the Charter School and the Pennsylvania Department of Education for this Student’s two other siblings. The Parents have filed six due process complaint notices in 30 days for three children. The generic use of “student”, rather than a name and gender-specific pronoun, is employed to protect the confidentiality of the student.

8. On July 24, 2016, the Parents filed a second due process complaint notice this time against the Pennsylvania Department of Education acting in the role of the SEA. The SEA complaint does not identify the Student's LEA. The factual narrative describing the SEA's alleged violation is identical to the factual narrative describing the LEA's alleged violations in the Parents' due process complaint notice filed against the LEA.
9. The complaint alleges the LEA has closed and will not contest or defend the Parents' child find claim.
10. The SEA complaint does not allege the SEA ever refused to locate, evaluate, or educate the Student. The SEA complaint does not allege the SEA ever took any action whatsoever in regard to the Student's overall education. The SEA complaint does not allege that the Parents ever notified the SEA of the alleged child find violations or filed a complaint with PDE about the evaluation, identification, or education of the Student.
11. The Parents contend pursuant to the SEA's "general supervisory responsibilities" the SEA is now the proper party to defend the omissions or inactions of the LEA. 20 U.S.C. §1412(a)(11); §1413(g).
12. The Parents seek to establish the SEA's failure either caused or in some fashion contributed to the LEA's child find violation. The Parents seek an independent educational evaluation and compensatory education; the Parents do not seek future services in upcoming school years. The due process complaint does not identify if the Student is currently enrolled in school.

The SEA's Motion to Dismiss

13. The SEA responded to the Complaint by filing a Motion to Dismiss. Stated simply, the SEA's Motion contends the hearing officer lacks subject matter and *in personam* jurisdiction over the SEA to hear this matter and grant any relief.
14. Upon receipt of the SEA's motion, the hearing officer invited the Parents to submit a response to the SEA's Motion, followed by an invitation to the SEA to submit a *sur-reply*.
15. The Parents filed a 79-page response with multiple attachments. The SEA filed a timely *sur-reply*.
16. On August 17, 2016, the hearing officer directed the Parties to file letter briefs, on what effect, if any, a recent August 5, 2016, United States Department of Education Dear Colleague Letter on the role of the SEA, the local school district, and LEA charter schools may have in locating, evaluating, and

educating children with disabilities in charter schools.

17. On August 26, 2016, both Parties filed the Dear Colleague letter briefs.

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

Overview of the arguments

In its Motion to Dismiss, the SEA argues, under these facts, special education due process hearing officers do not have jurisdiction over the SEA to make findings of fact and conclusions of law about the Parents' child find and denial of FAPE violations by the LEA. In support of its position, the SEA relies on rulings from two other Office for Dispute Resolution (ODR) hearing officers staying other due process actions where the SEA and the charter school are the named parties. The hearing officers in those actions, however, stayed the Parents' due process claims, pursuant to the automatic stay in bankruptcy (PDE Motion to Dismiss and Attachments). The automatic stay in bankruptcy is not an issue here.

The SEA also argues that *R.W. v. Ga. Dep't of Educ.*, 353 Fed. Appx. 422, 2009 U.S. App. LEXIS 26317 (11th Cir. Ga. 2009), and *Chavez v. N.M. Pub. Educ. Dep't*, 621 F.3d 1275, 2010 U.S. App. LEXIS 20853 (10th Cir. N.M. 2010) support their position. The SEA argues unless one of two events occurs, the SEA provides direct services to the student or the LEA places the SEA on notice the LEA is "unable" or "unwilling" to provide FAPE, the SEA is not a proper party. The SEA concedes under these circumstances if the Parents prevail against the LEA, the SEA will provide the Student with any relief ordered by the hearing officer (SEA's Motion to Dismiss and SEA *sur reply*). The SEA upon receipt of the Parents' Complaint, acting under its "general supervisory authority" initiated "fact finding" to determine if the LEA failed in its child find duty (SEA's Motion and SEA *sur reply*). The SEA states that if the "fact finding" determines the LEA failed its child find duty, the SEA will provide the Student with appropriate relief. Notwithstanding the statutory obligation to provide appropriate relief when the LEA is "unable" or "unwilling" the SEA does not concede any responsibility for attorneys' fees (SEA Motion and SEA *sur reply*).

The Parents, on the other hand, contend the IDEA's "general supervisory responsibility" found at 20 U.S.C. §1412(a) (11) provides this hearing officer with both subject matter and *in personam* jurisdiction over the SEA when the charter school closes. They also contend the "general supervisory responsibility" provision coupled with the SEA's permissive use of LEA funds when the LEA is "unable" or "unwilling" creates an implied cause of action that requires PDE to defend and remedy the Parents' claims under 20 U.S.C. §1413(g). In the alternative, the Parents argue that the "general supervisory responsibilities" obligation creates a standalone cause of action against the SEA. Finally, though not part of these proceedings the

Parents also seek payment of attorneys' fees incurred in enforcing the Student's IDEA rights (Parents' Complaint and Response).

In support of its multiple arguments, the Parents rely on two ODR hearing officer decisions and a district court ruling.² Next, the Parents rely on an unpublished district court Order, denying PDE's Motion to Dismiss, in a similar SEA, student, and LEA charter school action.³ When cobbled together, Parents contend 20 U.S.C. §1412 and 20 U.S.C. §1413 provide both jurisdiction and an implied or a standalone IDEA cause of action against the SEA. Finally, they contend the SEA 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 implied right of action. The starting point to resolve the dispute is the plain language of the statute.

Issue

The issue is, does either 20 U.S.C. §1412 *et seq.*, and/or 20 U.S.C. §1413 *et seq.* of the IDEA provide jurisdiction over the SEA, thereby permitting the Student to enforce an implied or direct cause of action against the SEA? If the answer is yes, can the Student litigate the IDEA claim at an administrative due process hearing within the meaning of 20 U.S.C. §1415 *et seq.* The answer to both questions is no. For all the reasons set forth herein, the SEA's Motion is granted and an appropriate Order dismissing the Parents' claims against the SEA as exhausted is attached hereto.

² *Charlene R. v. Solomon Charter Sch.*, 63 F. Supp. 3d 510, 520 (E.D. Pa. 2014) (holding SEA financially liable where student was denied FAPE by a defunct charter school LEA); *H.E. v. Commonwealth of Pennsylvania Dep't of Educ.*, Civil Action No. 15-3864, Ruling on Motion to Dismiss at 3 n.2, (E.D. Pa. Mar. 28, 2016) (holding that PDE, "has an 'obligation, as the state education agency, to step in and provide educational services if and when a public school cannot or will not provide the services'.... Here, DOE must step into Palmer's shoes given that Palmer has filed for bankruptcy and effectively ceased to exist."), citing 20 U.S.C. ¶ 1413(g); *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 when the LEA cannot or will not provide a child with FAPE).

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 a FAPE).

Applicable Legal Principles

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 Programs 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 at 22 Pa. Code 711.3. Chapter 711 also incorporates relevant antidiscrimination provisions from Section 504 and its implementing regulations. 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 School’s IDEA Requirements

Under the IDEA, a state must ensure all LEAs locate, evaluate, and educate children with a disability. 20 U.S.C. §1412(a)(1)(A). Provided that the evaluation identifies a disability and that the child is in need of specially-designed instruction, the LEA must provide the student with a free appropriate public education. The IDEA directs the LEA to prepare, develop, and implement an Individual Education Program (IEP). *Id.* The child's IEP must be 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). The student’s progress must be regularly monitored and reported to the parents. *Id.* Once an IEP is created, it may only be amended by the entire IEP team or by agreement between the parents and the LEA. 20 U.S.C §1414(d)(3)(F).

IDEA also requires the states to provide a dispute resolution system should a parent or LEA disagree whether the child is a person with a disability in need of specially designed instruction. 20 U.S.C. §§1415(b)(6), (c)(2), (d), (e), (f). 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. *Id.* The procedural safeguards recognize the LEA and the parent as the parties at the due process hearing. *Id.* Any party aggrieved by the hearing officer’s findings can file an action in a court of competent jurisdiction. *Id.* § 1415(g);§ 1415(i)(2). The IDEA also provides that the parents can file a complaint about the SEA or the LEA with the SEA about alleged LEA violations. 34 C.F.R. §§ 300.660-300.662. The complaint process found at 34 C.F.R. §§ 300.660-300.662 is the single procedural safeguard targeting SEA and parent disputes.⁴ 20 U.S.C. §1221e-3.

Duties, Responsibilities, and Obligations of the various agencies

The IDEA classifies various educational 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] and 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.

⁴ *Letter to Alice Parker, Ed.D.* (October 27, 2003) (state would need to investigate a complaint alleging that the State’s policies and procedures for child find do not ensure the identification, location and evaluation of students with disabilities attending private schools in the State in violation of 34 CFR §300.125). <http://www2.ed.gov/policy/speced/guid/idea/letters/2003-4/parker102703safeguard4q2003.pdf>

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 responsibilities" over all other agencies to ensure proper administration of the statute. 20 U.S.C. § 1412 (a)(11)(A). Specifically, PDE as the SEA is responsible for ensuring that the requirements of the IDEA are met. Next, the statute provides that all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency, are under the general supervision of the SEA. All LEA programs must meet the educational standards of the SEA. 20 U.S.C. § 1412(a)(11)(A).

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 the state-established IDEA policies and procedures in the state plan. 20 U.S.C. § 1413(a)(1). The SEA has the power to determine whether an LEA is eligible to receive IDEA funds.

SEA use of LEA Funds

The direct use of LEA IDEA funds, by the SEA, is authorized when an LEA fails to establish eligibility to receive IDEA funds and/or when the LEA is "unable or unwilling to establish and maintain programs" providing FAPE that "meet the requirements of" the IDEA. 20 U.S.C. § 1413(g)(1)(A) and (B). The IDEA requires the SEA to monitor the LEA to ensure compliance with the requirements set forth at 20 U.S.C. §1412 and §1413 *et seq.* The statute provides, however, that an SEA can make no 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); 20 U.S.C. § 1413(c). The notice required must include sufficient notice to the 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 IDEA 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). When the SEA withholds

IDEA funds from the LEA, the SEA may directly provide or make other arrangements for the provision of IDEA services to a child. *Id.*

With these legal principles as background, I will first analyze the statute to determine if the statute provides for an implied cause of action and jurisdiction 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 Office for Dispute Resolution (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.

The structure, context, and language of 20 U.S.C. §1412, §1413, and §1415

The starting point of all statutory construction is the text 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 (2015) (quoting *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2441 (2014)). I will begin with a review of the interlocking structure of 20 U.S.C. §1412, §1413, and §1415.

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 place 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 and procedures to provide FAPE, the details of which are described in §1414(d)(1)(A)-§1414(d)(7). Likewise, §1412(6) calls for procedures to ensure procedural safeguards are provided to parents, the details of which are described at §1415(d).

While the SEA must have policies and procedures to ensure the procedural

safeguards are enforced, the procedural safeguards throughout §1415 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 IDEA makes the LEA the responsible agency for a number of the safeguards. For example, parent-LEA participation in the resolution session §1415(f)(1)(B); LEA participation in mediation §1415(e); the LEA must answer the allegations in the complaint §1415(b) (3)-(4); §1415(c)(1); §1414(b)(1); the LEA must provide the parent with 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 or identify the SEA as the responsible party to participate or initiate any of the procedural safeguard rights, duties, or obligations enumerated in Section 1415.

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(s) “the requirement of the subchapter are met”. This subclause, unlike the child-centered provisions at §1414 and §1415, does not specify or command, in any detail, how the SEA is to achieve this general supervisory assurance. Moreover, this subclause does not provide either subject matter jurisdiction or *in personam* jurisdiction over the SEA at a due process hearing, when the parent alleges the SEA failed in any of its “general supervisory responsibilities”.

While 20 U.S.C. §1413 *et. seq.* as a condition of funding 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 is 20 U.S.C. §1413(g) (1)(B)-(C), which provides the SEA may use LEA IDEA funds if the LEA is “unable” or “unwilling” to provide FAPE. The SEA's obligations pursuant to 20 U.S.C. §1413(g)(1)(B)-(C) are discretionary. These subclauses when triggered, after notice to the LEA, the public, and a hearing, permit the SEA to withhold funds from the LEA when the LEA does not perform its IDEA duties, obligations, or 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).⁵ These interlocking provisions, however, do not

⁵ 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.

provide for an SEA/parent due process hearing, within the meaning of 20 U.S.C. §1415 *et seq.* when the LEA fails its duties or obligations. The only SEA remedy identified in the IDEA is the loss of funds.

Contrary to the Parents' contentions, Section §1413(g)(1)(B)-(C) "unable" or "unwilling" language does not by operation of law make the SEA the direct provider of the IDEA services. Instead, these subclauses are circumscribed by 20 U.S.C. §1413(g)(2) which states the SEA "**may**" provide IDEA services in a variety of ways. Simply stated, Section 1413(g)(1)(B)-(C) does not automatically upload the LEA's undetermined past lapses to the SEA, absent a due process hearing officer decision on the LEA's child specific failures. Even when the LEA is unable or unwilling, the SEA's obligations are limited to arranging for services and ensuring the provision of appropriate relief. *Id.*

Alternatively, assuming *arguendo*, the Student is permitted to bring a direct cause of action against the SEA; this hearing officer is not prepared to conclude, in this instance, that an SEA can be held liable for failure to supervise an LEA, unless the SEA is given clear notice of the LEA's alleged violation(s). The complaint does not allege the Parents made the SEA aware of the LEA's alleged violations. The complaint does not allege the Parents utilized the complaint procedures outlined at 34 C.F.R. §§ 300.660-300.662 and the SEA failed to investigate. It is axiomatic that before being held responsible under the IDEA the SEA must be afforded some form of notice along with a modicum of procedural due process protections. In this case, the Parents did not file a complaint pursuant to 34 C.F.R. §§ 300.660-300.662 informing the SEA of any alleged violations. Likewise, the due process complaint notice does not allege the SEA failed, once on notice in July of 2016, to correct the LEA's noncompliance or violations. Instead, the SEA once on notice of the alleged violations did initiate "fact finding" to investigate the Student's allegations. In this instance requiring the Student, at a minimum, to comply with complaint and notices provisions found at 34 C.F.R. §§ 300.660-300.662 would have accomplished the Student's notice obligation. The SEA is on record that if it finds a violation it will offer a remedy. The SEA is also on record that if the Parents prevail in the action against the LEA they will provide any Student specific relief, but for attorney's fees, otherwise ordered. Accordingly, the plain language of the IDEA does not provide a direct or an implied cause of action. To the extent that a cause of action does exist, absent notice, the SEA is not responsible for investigating or remediating unreported violations of an LEA.⁶ That

⁶ *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*

said, now that the SEA is acting under its “general supervisory” authority and has initiated “fact finding”, the Parents are free to challenge the SEA’s IDEA “fact finding” conclusions in an appropriate forum. Even assuming *arguendo* the Student does have a direct due process claim against the SEA, Section 1415 *et seq.* does not provide for an SEA/parent due process hearing.

The applicable case law does not support the Parents’ SEA cause of action

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 also flawed. In *Charlene R.*, the LEA and the parent entered into a settlement agreement wherein the LEA agreed to provide the student with appropriate relief, and sometime later, the LEA filed for bankruptcy. The court held although the SEA was not a party to the agreement, once the LEA was “unable” to provide the appropriate relief, the SEA by operation of law became the state agency responsible for the student’s remedy. *Charlene R.* 63 F. Supp. 3d 520. The extension of *Charlene R.* beyond its facts is not supported here as the LEA’s responsibility and the scope of the appropriate relief have yet to be calculated.

Similarly, any reliance on *H.E.* is equally misplaced. *H.E.* is distinguishable both on the facts and the applicable law. *H.E.* is an unpublished district court Order entered without benefit of an opinion explaining how the court reached its interim conclusions. First, the *H.E.* 12(b)(6) interim ruling is not yet final; therefore, the persuasive value is diminished. Second, unlike here the parents in *H.E.* made dual claims for denial of FAPE against the LEA and the SEA in one complaint. The first claim focused on 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 targeted the LEA’s alleged failure to provide FAPE even though the students were attending a private school. Both claims were directed at the LEA violations, not the SEA. The hearing officer dismissed the three students’ complaints against the SEA and the LEA, finding that the parents failed to enforce their contract claims against the LEA. When the claims reached the district court, the district court, in a footnote in an order dismissing the SEA’s motion, rejected the SEA’s jurisdictional arguments, 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 agreed to proceed with the contract claims. Following *Charlene R.* the court applying 20 U.S.C. § 1413(g)(1)(B)-(C) held the SEA was

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).

responsible to provide the agreed upon compensatory education. Finally, the court maintained jurisdiction over the remaining IDEA denial of FAPE claims in the private setting. The comments in the footnote are unclear if the remaining claims are proceeding under the IDEA or under breach of contract theory. Therefore as it stands now the persuasive value of *H.E.* is yet undetermined.

Accordingly, I find *H.E.* is not germane in this instance. First, unlike here the Parents are not enforcing a settlement agreement. Second, the bulk of the comments in the court's footnote focused on SEA's exhaustion argument and the Parent's contract rescission claims; neither legal nor factual issue is present here.⁷ 20 U.S.C. §1413(g)(1)(B)(C). Finally, until the LEA/parent due process hearing is finalized, a factual dispute exists, if the LEA will defend and if the LEA did violate the IDEA. Therefore, *H.E.*, in its current form, does not support the Parents.

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 the court nor the Parents here, reconcile the appeals court holding that “Neither the Individuals with Disabilities Education Act nor the New Jersey administrative code provides an administrative means **for a parent to challenge an action of a state agency, only to challenge the action of a local public-school system.**” (emphasis added). The Parents here do not point to any provision in Chapter 14, or the school code supporting a cause of action or jurisdiction.

Unlike *D.M.*, the Student here does not plead or challenge any actions or decisions by the SEA. Instead, the Student here argues the complaint against the LEA is for all intents and purposes an action against the SEA. In the alternative the Student argues, the SEA failed in its general IDEA duties. Absent more than the bare bones complaint here, I do not accept either contention as a good faith or logical extension of *H.E.* or *Charlene R.* In situations like this, the IDEA does not provide for a cause of action against the SEA.

Accordingly, I conclude the hearing officer lacks subject matter jurisdiction and *in personam* jurisdiction over the SEA. Next, under these facts, the Parents do not have an implied or direct cause of action against the SEA for the LEA's alleged failures. Likewise under these facts, absent notice to the SEA, the Parents do not have a cause of action against the SEA for any “general supervisory” acts or

⁷ 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 agreements but can decide if an agreement does exist).

omissions. Therefore, the Parents' Complaint is dismissed with prejudice, and the SEA's Motion to Dismiss is granted.⁸

To the extent the Parents are aggrieved by the SEA's "fact finding" decision or this decision, the Parents are free to seek appropriate relief in a court of competent jurisdiction.

ORDER

In accord with the background and discussion above, the SEA's Motion to Dismiss is granted. The Parents have exhausted all claims.⁹

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

September 9, 2016

⁸ *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); *D.M. v. N.J. Dep't of Educ.*, 801 F.3d 205 (3d Cir. N.J. 2015).