

In re: Special Education Due Process Case # DP-22-06

ORDER RE: SUPERVISORY UNION’S MOTION TO DISMISS

In this case, the Supervisory Union has filed a motion to dismiss Parent’s due process complaint seeking an order requiring the school to reimburse Parent for tuition paid to a private school after Parent unilaterally placed Student in that private school.

The Supervisory Union’s motion asserts that the complaint is time-barred because it was filed more than 90 days after Parent unilaterally placed Student in the private school. *See* VSER 2365.1.6.1(a)(2). Parent has filed a memorandum in opposition to the Supervisory Union’s motion.

For the reasons set forth below, the Supervisory Union’s motion to dismiss is hereby granted.

FACTS

1. In June 2021, Parent filed a due process complaint alleging that the Supervisory Union had denied Student a free appropriate public education (FAPE) and requested an order placing Student at an out-of-state private school (hereinafter “private school”).
2. The case, docket number 21-10, was assigned to this hearing officer for adjudication.
3. Subsequently, the Supervisory Union filed a motion for summary judgment.
4. This hearing officer granted the Supervisory Union’s motion on July 26, 2021 and entered judgment in favor of the Supervisory Union.

5. In August 2021, Parent decided to unilaterally place Student in the private school.
6. The private school's calendar for the 2021-2022 school year indicates that the program for new students was scheduled to begin on August 30, 2021.
7. On August 31, 2021, Parent's support person sent the Supervisory Union an email indicating that "[w]e are giving you a ten day notice that we are unilaterally placing [Student] at the [private school]." *See* VSER 2368.3(c)(1)(ii) (Limitations on tuition reimbursement).
8. On October 24, 2021, a Vermont Legal Aid staff attorney notified Parent by email that his office would be unable to represent Parent in litigation related to Parent's attempts to secure tuition reimbursement from the Supervisory Union.¹
9. The Legal Aid staff attorney, however, advised Parent that a due process complaint seeking tuition reimbursement for the 2021-2022 school year had to be filed no later than December 14, 2021.
10. The Legal Aid staff attorney's email also advised Parent that, pursuant to VSER 2365.1.9, an appeal of the July 26, 2021 judgment order in Doc. No. 21-10 had to be filed in state or federal court by October 22, 2021.
11. On November 1, 2021, Parent appealed the July 2021 judgment order by filing a civil complaint in the United States District Court for the District of Vermont. *See* Doc. No. 21-cv-266.

¹ This otherwise privileged communication between Parent and the Legal Aid staff attorney was voluntarily provided to the hearing officer and counsel to the Supervisory Union on January 6, 2022 following the initial telephone conference during which there was a discussion of the 90-day limitations period for filing a request for tuition reimbursement.

12. Parent's civil complaint informed the court that Student had been unilaterally placed at the private school and requested an order requiring the Supervisory Union to reimburse Parent for tuition paid to the private school for the school year 2021-2022.
13. The complaint alleged that because Parent notified the Supervisory Union of Student's unilateral placement on August 31, 2021, the "effective date" of that placement was September 15, 2021.
14. On November 17, 2021, the court granted Parent's application to proceed *in forma pauperis*.
15. The court's order, however, suggested that because Parent had yet to file a due process complaint seeking tuition reimbursement for the school year 2021-2022, the court might lack subject matter jurisdiction to provide the relief requested.²
16. On December 13, 2021, Parent notified the Supervisory Union by email that Parent would be "seeking tuition reimbursement for an educational placement at the [private school]. A hard copy will be mailed by US Post Office to be dated December 14, 2021 and [mailed] to you."
17. On December 20, 2021, the Vermont Agency of Education received a copy of Parent's second due process complaint, docketed as 22-06, and assigned the new case to this hearing officer for adjudication.
18. Parent's complaint alleged that because the Supervisory Union had failed to provide Student with a FAPE, Parent unilaterally placed Student in a private school for the 2021-2022 school year.

² The Supervisory Union filed a motion to dismiss the federal civil complaint on January 3, 2022. The court has not yet ruled on this motion.

19. Parent's complaint requested an order requiring the Supervisory Union to reimburse Parent tuition paid to the private school.

I. DUE PROCESS COMPLAINTS ARE SUBJECT TO SUMMARY DISPOSITION

The Second Circuit has held that due process complaints are subject to summary disposition. *See J.D. ex rel. J.D. v. Pawlet School District*, 224 F.3d 60, 68-69 (2d Cir. 2000). As the Court observed: "the purpose of an adversarial hearing is to resolve disputed issues of fact. Issues of law reside where they always have - with the adjudicator, whether an administrative or judicial officer."

Although the Court in *J.D. ex rel. J.D.* addressed only the application of Rule 56 summary judgment motions to complaints filed under Individuals with Disabilities Education Act (IDEA), there is nothing in the opinion suggesting that summary disposition of due process complaints for failure to state a claim under Rule 12(b)(6) would be inappropriate. After all, resolution of both Rule 12(b)(6) motions to dismiss and Rule 56 motions for summary judgment require an adjudicator to resolve issues of law, not disputed issues of fact.

II. STANDARD OF REVIEW

When ruling on a Rule 12(b)(6) motion to dismiss, the adjudicator must take the allegations of the complaint to be true and "draw all reasonable inferences in favor of the plaintiff." *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. CONCLUSIONS OF LAW

The IDEA does not contain a time limitation for filing due process complaints seeking reimbursement for tuition. In the absence of a federal time limitation, "the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson v. Garcia*, 471 U.S. 261, 266-267 (1985).

Under Vermont law, "an action against a local, intermediate, or State education agency for reimbursement of the costs of a unilateral special education placement shall be commenced by an administrative due process hearing within 90 days of the unilateral placement, and not thereafter." 16 V.S.A. §2957(b).

Reflecting this statutory mandate, the Vermont Agency of Education has adopted a state regulation requiring that requests for tuition reimbursement be filed within 90 days of a unilateral placement. VSER 2365.1.6.1(a)(2). This rule is consistent with "[o]ne of the fundamental goals of the statutory scheme codified in the IDEA," i.e., "to promote the expeditious resolution of educational programming disputes." *M.D. v. Southington Board of Education*, 334 F.3d 217, 224 (2d Cir. 2003).

The issue in this case is whether Parent complied with Section 2958(b) and Rule 2365.1.6.1(a)(2) and filed the request for tuition reimbursement within 90 days of Parent's unilateral placement of Student at the private school.

The undisputed facts in this case show that the private school's program for new students commenced on August 30, 2021. The following day, Parent notified the Supervisory Union that Student had been unilaterally placed at the private school. Parent filed the due process complaint seeking tuition reimbursement on December 20, 2021.

The question here is what does “unilateral placement” mean as that term is used in 16 V.S.A. § 2957(b) and VSER 2365.1.1(a)(2) and whether the notification required by VSER 2368.3(c)(1)(ii) triggers the 90-day limitations period for tuition reimbursement requests.

In *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶14 the Vermont Supreme Court described a basic rule of statutory interpretation: “If the statute is unambiguous and its words have plain meaning, we accept the statute’s plain meaning as the intent of the Legislature and our inquiry proceeds no further.”

The dictionary defines “placement” as follows: “the action of putting someone or something in a particular place or the fact of being placed.” The word “unilateral” means: an action or decision “performed by or affecting only one person, group, or country involved in a particular situation, without the agreement of another or the others.”

Section 2957(b) is unambiguous and the words “unilateral” and “placement” as used in that section can have only one meaning in the context of IDEA: a student who enjoys special education rights is unilaterally placed in a new program when that student first starts taking classes at the new educational program without the consent of the local education agency (LEA).

Section 2957(b) does not refer to other possible conduct that might trigger the 90-day limitations period, including the prior notification requirement found in VSER 2368.3(c)(1)(ii).

This interpretation of Section 2957(b) is consistent with the IDEA’s requirement that every LEA has an obligation to provide a free and appropriate public education. VSER §2360.2, Free Appropriate Public Education (FAPE) (34 CFR §300.101). Thus, if a parent provided timely notification to the LEA of their intent to unilaterally place a student in a private school,

the LEA would be responsible for providing a FAPE in the event the plan to unilaterally place the student fell through at the last minute.

In this case, Parent unilaterally placed student at a private school on August 30, 2021. The following day, Parent notified the Supervisory Union that Parent had unilaterally placed Student at the private school.

Under Vermont law, Parent's due process complaint seeking tuition reimbursement had to be filed with the Vermont Agency of Education no later than November 29, 2021.

The record shows that Parent asked Vermont Legal Aid to represent her in her attempt to secure an administrative and/or court tuition reimbursement order. A staff attorney erroneously advised Parent that a due process complaint requesting tuition reimbursement had to be filed by December 14, 2021. Parent waited until December 14, 2021 to mail the due process complaint to the Vermont Agency of Education. Parent's complaint was received and docketed by the Agency on December 20, 2021, or 21 days after Vermont's 90-day limitations period for tuition reimbursement requests had expired.

But, even if Parent had followed the staff attorney's erroneous advice and hand-delivered the complaint to the Agency of Education on December 14, 2021, the filing of the complaint would have been untimely.

Because Parent failed to file the due process complaint seeking tuition reimbursement within 90 days of Student's unilateral placement in a private school, the Supervisory Union's motion to dismiss must be granted.

CONCLUSION

For the reasons stated in this order, the Supervisory Union's motion to dismiss is granted and judgment is entered in its favor in this matter.

NOTICE OF APPEAL RIGHT

Pursuant to Vermont Department of Education Rule 2365.1.8:

"(a) The decision of the hearing officer is final unless appealed to a state or federal court of competent jurisdiction.

(b) Parties have the right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction in accordance with Rule 2365.1.9.

Dated, February 16, 2022

David J. Williams
Vermont Agency of Education
Due Process Hearing Officer