

In re: Special Education Due Process Case # DP-22-09

ORDER RE: SUPERVISORY UNION’S MOTION FOR RECONSIDERATION

After its Motion to Dismiss Parent’s due process complaint was denied, the Supervisory Union filed a Motion for Reconsideration of that order. For the reasons set forth below, the Motion for Reconsideration is granted and judgment is entered in favor of the Supervisory Union.

As discussed at the hearing on the Supervisory Union’s Motion for Reconsideration, this case presents a unique set of underlying facts. A thorough search of the WestlawNext database found no controlling precedent that would provide a straightforward answer to the difficult issues presented in the due process complaint and the Supervisory Union’s Motion for Reconsideration.¹

It is worth summarizing the undisputed facts that are relevant to the resolution of the Motion for Reconsideration. In October 2021, Parent met with Student’s math teacher and the school’s guidance counselor to discuss the math teacher’s concerns about Student’s “ability to stay focused” and complete tasks, and Student’s “organizational skills.”

¹ For example, in *Regional School District No. 9 Board of Education v. Mr. and Mrs. M.*, 2009 WL 2514064 (D. Ct.), the court held that when a student attends a private school in another state, the LEA’s in the state in which the student resides and the state in which the student attends school may both have child find responsibilities of their own.

In the present case, Student resides in one Local Education Agency (LEA) and pays tuition to attend a public school in a different LEA in the same state. There do not appear to be any reported cases determining whether LEA’s in the same state may both have child find responsibilities of their own.

A meeting to discuss these issues was noticed for November 4, 2021. During this meeting, the evaluation planning team (EPT) created an evaluation plan and determined the scope of the planned evaluation. Subsequently, on November 29, 2021, the Supervisory Union received parental consent to initiate a special education evaluation plan.

Around this same time, Student's family was planning to move to a different town, one that was outside of the Supervisory Union. The EPT met again on January 12, 2022 to discuss the results of Student's special education evaluation.

The EPT reached the following conclusions:

- Student did not meet the criteria for Specific Learning Disability
- Student met the disability determination in the area of Other Health Impairment
- Student did not meet the adverse effect in three (3) out of six (6) measures for one (1) basic skill level

Based on these conclusions, the EPT concluded that Student was not eligible for special education and related services.

During the school's February 2022 vacation, Parent enrolled Student in a new school in the School District. Sometime later, Parent decided that it would be in Student's best interest to complete the school year at the school in the Supervisory Union.

On March 16, 2022, while Student was still attending the school in the School District, Parent filed a due process complaint. The complaint asserted that the Supervisory Union failed to identify Student as a student with a disability entitling Student to special education and related services.

Parent's original complaint and the amended complaint allege that the data developed during the special education evaluation was misinterpreted and that adverse effect was, in fact, demonstrated. Based on this alleged identification failure, the complaint requested a placement order that would require Student's tuition-free return to the school Student had been attending in the Supervisory Union. Parent's amended complaint alleges that the School District had an obligation to accommodate Student by keeping Student enrolled at the Supervisory Union's school.

Recently, Student returned to the school in the Supervisory Union as a tuition-paying student and no longer attends classes at the school in the School District.

Based on the fact that Student is a tuition-paying student attending a school in the Supervisory Union, the hearing officer found that the Supervisory Union retained its child find responsibilities as the Student's LEA and denied its motion to dismiss.

In its Motion for Reconsideration, the Supervisory Union challenges this finding and argues that Parent's due process complaint is moot and should be dismissed.

On May 17, 2022, the parties participated in a hearing on the Motion for Reconsideration. During the hearing, the attorneys for the Supervisory Union and the School District pointed out that even if Parent could prove "adverse effect" based on objective test results ("gate 2"), Student's EPT did not engage in any discussion or analysis to determine whether Student met the requirements of "gate 3," i.e., the need for special education and related services.

In its post-hearing memorandum, the Supervisory Union focused primarily on this issue. Under Vermont's Special Education Rules, "[t]he fact-specific question presented by gate 3 is whether '[t]he student needs special education services to benefit for his or her education and

this support cannot be provided through the educational support system, standard instructional conditions or supplementary aids and services provided in the school.” VSER 2362(a)(3).

Because Student’s EPT had not considered these issues, the Supervisory Union argues that “any decision rendered by the Hearing Officer would necessarily rest on impermissible speculation ... Stated differently, the Hearing Officer may rule on the merits of the Team’s decision to go to gate 2 – but cannot stand in the Team’s shoes and make findings as to gate 3, a question the Team itself never considered given its finding around adverse effect.”

At the hearing, the School District took the position that it was Student’s LEA and that the School District was prepared to consider Student’s eligibility for special education and related services. According to attorneys for both parties, the process would have to be completed within 60 days of a parent’s consent to a special education evaluation. During the hearing, Parent indicated that Student will be attending high school when the 2022-2023 school year begins in a few months.

During the hearing, the Supervisory Union’s attorney explained that if Student was found eligible for special education and related services by the School District in the future, Parent would be able to apply for compensatory special education services based on the scoring error raised in the pending due process complaint.

A. Standard of Review

The standard for granting a motion for reconsideration is “strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

Virgin Atl. Airways, Ltd. V. Nat'l Mediation Bd., 956 F.2d 1245, 12 55 (2d Cir. 1992).

B. Conclusions of Law

As noted above, this case presents a unique set of facts and a series of novel legal issues that have not been addressed or otherwise resolved in published court orders or opinions. For example, at least one federal court has held that LEAs in different states, one where a child resides and the other where a child attends school, may both have child find responsibilities of their own. Whether the principles underlying this decision apply to two LEAs in the same state is an open question of law.

In its Motion for Reconsideration, the Supervisory Union correctly points out that Vermont's Special Education Rules designate that a student's LEA is based on the student's place of residence. V.S.E.R. 2362.11(a). Due process proceedings in Vermont are governed by these rules. *See* VSER 2360.1(b) ("These rules are designed to ensure that ...[t]he rights of children with disabilities and their parents are protected"); *Make the Road New York v. Pompeo*, 475 F.Supp.3d 232 (S.D.N.Y. 2020) (legislative rules that create new law, rights, or duties, have the force of law); *Nattural Resources Defense Council v. National Highway Traffic Safety Administration*, 894 F.3d 95 (2d Cir. 2018) (A basic principle of administrative law is that an agency issuing a legislative rule is itself bound by that rule until that rule is amended or revoked). Thus, for the purposes of this proceeding, the Supervisory Union is no longer Student's LEA.

If an evidentiary hearing were held in this case, the only issue that could be resolved is whether the person evaluating Student's test results improperly scored Student's test results and found no adverse effect despite the fact that the test score met the criteria proving adverse effect. If Parent prevailed on this issue, the matter would have to be remanded to the Supervisory Union's EPT team to determine whether Student meets "gate 3" requirements and is entitled to special education and related services.

However, under Vermont law, the Supervisory Union is no longer Student's LEA and has no authority to reconstitute Student's EPT to consider whether Student is eligible for special education and related services. That fact, as the Supervisory Union points out in its Motion for Reconsideration, renders this case moot. *B.D. by and through Davis v. District of Columbia*, 548 F.Supp.3d 222, 235-236 (D.D.C. 2020). For that reason, the Supervisory Union's motions for reconsideration and dismiss are granted and judgment is entered in its favor.

This result does not leave Parent without recourse. During the May 17, 2022 motion hearing, the School District's attorney indicated that the School District is prepared to initiate a special education evaluation to determine whether Student qualifies for special education and related services. Furthermore, the Supervisory Union's attorney informed Parent that in the event Student qualifies for special education services, Parent may apply for compensatory special education services by contacting a representative of the Supervisory Union.

CONCLUSION

For the reasons stated in this order, the Supervisory Union's motions for reconsideration and dismiss are 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, June 6, 2022

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