

12-022

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JAN 20 2012

VIRGINIA:

DEPARTMENT OF EDUCATION (SPECIAL EDUCATION)

Dispute Resolution &
Administrative Services

V.

PUBLIC SCHOOLS

HEARING OFFICER DECISION

For the Child:

, by Power of Attorney from the child

For the Public Schools:

Bradford A. King, Esq.

Sands Anderson

Yvonne S. Wellford, Esq.

Senior Assistant County Attorney

Hearing Officer
Raymond E. Davis
VSB 05381

VIRGINIA:

DEPARTMENT OF EDUCATION
DUE PROCESS HEARING

In re:

Pursuant to an appointment by letter dated December 14, 2011, from _____, Director of Special Education, _____ Public Schools, the undersigned hearing officer was assigned the subject case from the approved hearing officer's list in the Office of the Executive Secretary of the Virginia Supreme Court.

Further, pursuant to Virginia Code Sections 22.1-219 et seq.; 9-6.14; 14.1-1 et seq. and federal regulations 34 C.F.R. part 300 et seq., a pre-hearing conference was held before the undersigned hearing officer on the 6th day of January, 2012 at the offices of _____ Public Schools, _____ Street, _____, Virginia _____ at 1:30 pm to hear argument on a motion from _____'s counsel and testimony from a witness to challenge the jurisdiction of the hearing officer to hear and decide the case set forth in the due process request. Counsel also moved for the hearing officer to dismiss the case due to mootness of the issues resulting from the graduation of the child involved from _____ School in _____ (_____) with an Advanced Studies diploma on June 19, _____.

At the scheduled and noticed pre-hearing conference, counsel presented evidence, testimony and argument to support his motion as a threshold issue to be determined prior to addressing the merits and details of the issues set forth in the due process request because the challenge was to the jurisdiction of the hearing officer. Counsel also presented regulatory and federal case law in his argument to support his motion concerning the lack of jurisdiction of the hearing officer in this matter.

FINDINGS OF FACT:

1. On or about December 9, 2011, a due process hearing request was filed for the subject child by _____, acting under a Power of Attorney from the child, _____, with _____ Public Schools.
2. The due process request contained many areas of issues including seeking relief for misdiagnosis for various alleged disabilities, for failure to give special education remedies while the child attended college, failure of the county schools to pay a college loan,

failure to provide remedial education for English and History classes in college, withholding educational information, not continuing special education and related services until the child was 22 years old, etc. Some of the complaints appeared to involve other agencies in addition to _____ and all of the complaints were alleged to constitute a failure to give the child a free appropriate public education under the federal Individual with Disabilities Education Act (the "IDEA"). The request also requested compensatory damages of \$1,000,000.00 from the County schools.

3. By letter dated December 24, 2011, counsel for _____ Public Schools challenged the sufficiency of the due process request under Virginia regulation 8 VAC 20-81-210(F)(2)(c)(d) and(e) for not naming the school the child was attending, not giving the nature and facts concerning her complaints and, other than damages and assistance in paying for college, and no proposed resolution for the child's issues.
4. By letter of December 24, 2011, the hearing officer ruled that the due process request was insufficient under the cited Virginia regulation and granted Ms. _____ 5 days to file an amended due process request which complied with the Virginia regulations but to be filed before or by January 4, 2012. Ms. _____ was also advised again concerning the January 6, 2012 pre-hearing to receive, take evidence, testimony, argument and review counsel's challenge to dismiss based on no jurisdiction for the hearing officer.
5. By letter dated December 28, 2011, Ms _____ filed an amended due process request acknowledging that the child had attended _____ College for the 2010-2011 academic year, re-submitting her prior complaints, increasing her request for compensation to \$10,000,000.00, but gave no facts to support her other requests for relief nor did she give any further information as to a resolution of the issues. She did note that she and the child would not respond to the pre-hearing on January 6, 2012 and would not be available until January 11.
6. By letter dated January 1, 2012, the hearing officer wrote the parties that the amended due process request was still not sufficient to comply with the Virginia regulations 8 VAC 20-81-210(F)(2)(d) and (e). The Hearing officer also took Ms. _____'s announcement that she declined to attend the January 6, 2012 pre-hearing conference as a motion for continuance after she had received 2 prior notices of the date, time and location set and had not objected to it. The hearing officer denied the motion for continuance because there was no explanation as to why Ms. _____ and the child could not attend and also due to the complexity, volume of the complaints raised and the tight guidelines for the time allowed for the hearing and decision set forth under State and

federal regulations and guidelines constituting due process and efficient and timely handling of cases.

7. On January 6, 2012, as noticed, the pre-hearing conference was held at the Public School building offices at Street, Virginia at 1:30 pm. As stated in the December 28, 2011 letter from Ms. neither she or the child attended. Public Schools was represented by counsel and presented Ms. Director of Special Education as a witness for the schools.
8. Ms., a witness for Public Schools (the local education authority, hereinafter the "LEA"), testified that the last fully implemented and approved by Ms. Individualized Education Plan (hereinafter "IEP") for the child was for the 2008-2009 academic year. The subsequent IEPs were reviewed and modified from the 2008-2009 IEP in those areas that Ms. agreed were acceptable. The 2009-2010 IEP was begun with those changes that Ms. agreed with but continued to be amended several times from March 2010 up to graduation. (Tr. pp. 12-16)
9. The child graduated from School with an Advanced Studies diploma on June 19, 2010 at the age of 18. (See Exhibit S-1 – child's transcript).
10. Additionally, the testimony showed that, up to graduation, the child received special education and related services and was given collaborative classes in a regular education classroom with a regular education teacher and a special education teaching present and assisting the child. (Tr. pp. 19-24) (See Exhibits S-1 and S-2 which show the child's academic achievement and functional performance.)
11. There is no evidence in this record that the child or Ms. ever challenged the child's graduation from high school.
12. The child was born on November 21, and is now years old.
13. The LEA also presented as evidence Exhibit S-3 which included all of the IEPs, meetings and correspondence information from 2009 through graduation as well as Exhibit S-4 setting forth the transitional information and secondary goals prior to the graduation of the child. (Tr. pp. 25-26).
14. Ms., in her letter of December 28, 2011, acknowledged that the child was admitted and attended College in, Virginia for the 2010-2011 academic year, but it is unclear as to whether the child returned for the 2011-2012 academic year due to alleged financial obligations. (Tr. Pp. 26-27) (See Exhibit S-5).

15. The LEA also presented evidence and testimony regarding Ms [redacted]'s failure to engage in a required resolution session pursuant to federal law and regulation, which resolution session the LEA did not waive or agree to not hold. (Tr. Pp.29-31) (See Exhibit S-6).

THRESHOLD ISSUE:

The LEA, through counsel, argued that by virtue of an unchallenged graduation of a child with an Advanced Studies diploma, regulations and law terminated the obligations of the LEA to provide special education and related services to the child pursuant to the IDEA. The LEA cites State and federal regulations under the IDEA as well as two interpretive U.S. Circuit Court's opinions which have held that graduation by a child, without challenge, ends requirements of the State and the local LEA under IDEA to provide special education and related services and a subsequent due process request is moot and must be dismissed.

This case appears to be one of first impression in Virginia and counsel for the LEA and this hearing officer could find no judicial precedent in Virginia on this particular issue. Such a ruling, however, would appear to require a hearing officer to dismiss the due process hearing as moot and for no jurisdiction to proceed.

The Virginia regulation titled "Termination of special education and related services" at 8 VAC 20-81-90(F)(1) begins..."For a child whose eligibility terminates due to graduation with a standard or advanced studies high school diploma...". It also recites that the LEA shall provide the child with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the student's post secondary goals. These requirements in this case were done by the LEA. Clearly, the regulation calls for termination of special education and related services at graduation if the LEA meets the requirements set forth therein.

Likewise, under the federal regulations at 34 C.F.R. 300.305(e)(2)(3) which states where evaluation of the student for a change in placement is required, subsection (2) states that termination without evaluation due to graduation from a secondary school with a regular diploma is an exception to that requirement. Subsection (c) of that regulation requires the same requirement of a summary of academic achievement and functional performance with recommendations to meet the child's post secondary goals as Virginia does. (See 20 U.S.C. 1414 (c)(B)(5)(B)(i)(ii).)

Both regulations state that special education ceases if those conditions in the regulations are met. (See 16 Michie's Jurisprudence, Schools Section 23, p. 466 and Am Jur 2d, Vol. 67B Schools Section 414, p. 691 Limitations on a Free Appropriate Public Education citing T.S. v. Independent School No. 54, 265 F. 3d 1090 (10th Cir. 2001), as support for graduation from a secondary school ending special education and related services for a free appropriate public education.

While Virginia and the 4th Circuit Court of Appeals have not ruled on this specific issue, there is persuasive authority in two federal circuits who have addressed graduation of students with regard to special education and related services.

The T.S. case cited supra at p. 1092 held that if a child has graduated from high school and does not contest his graduation, the case is moot and the judge (or hearing officer) lacks jurisdiction to conduct a due process hearing. The U.S. Supreme Court denied certiorari, 535 U.S. 927 (2002). Further, the T.S. case cited a 7th Circuit case, Board of Education v. Nathan R., 199 F 3d 377, 381 (7th Cir 2000) cert. denied 531 U.S. 822 (2000) determining that the action brought by a student under the IDEA who had graduated from high school was moot due to the graduation. "Once a student has graduated, he is no longer entitled to a free appropriate public education; thus any claim that a free appropriate public education was deficient becomes moot upon graduation." T.S case supra at 1092.

Likewise, there is no evidence or testimony that anyone has contested the graduation of the child in this case; neither the parent nor the child. Ms. _____, for the LEA, testified that no one had challenged the graduation.

While the holdings in T.S. and Nathan R. are not binding authority in Virginia, they are persuasive authority. A fair reading of both cases indicates that, in those circuits, graduation moots the request for relief in due process proceedings and thereby the case should be dismissed by the judicial officer since special education and related services cease at graduation under IDEA. Both federal and Virginia regulations recognize that graduation from high school, with the attendant information being furnished as required by those regulations to the student or the parent, ends the special education and related services requirement for the child and IDEA no longer applies. Additionally, certiorari was denied by the U.S. Supreme Court in both cases cited which is, at least, indicative that the high court felt that the circuit courts involved made a correct decision. Both of these case decisions, by the 7th and the 10th U.S. Circuit Courts, this hearing officer finds to be logical, reasonable, persuasive and convincing given the facts in the instant case as set forth in the testimony, evidence and findings.

CONCLUSIONS OF LAW:

This hearing officer makes the following Conclusions of Law based upon his findings of fact and the application of law and regulations as set forth above.

1. That the issues in this case, as set forth in the Request for Due Process, are moot due to the graduation of the student with an advanced studies diploma from high school and there is no evidence before me that anyone challenged that graduation. The hearing officer adopts the legal decisions and rationale of the 7th and 10th U.S. Circuit Courts as his own as set forth supra in the consideration of the threshold issue in this decision.
2. By virtue of that ruling, the hearing officer has no jurisdiction to address any issues raised herein and must dismiss this case.
3. That by virtue of the decision in the previous findings above, this case is hereby dismissed with prejudice.
4. That Public Schools has substantially prevailed herein.
5. That the decision of the hearing officer is final and binding on the parties in the case unless any aggrieved party to this due process hearing appeals to the appropriate State Circuit Court within 180 calendar days or to the appropriate Federal District Court within 90 calendar days of the date of this decision.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Raymond E. Davis', with a horizontal line extending from the end of the signature.

Raymond E. Davis
Hearing Officer
VSB 05381

January 20, 2012

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing decision was mailed first class postage prepaid to counsel and the parties to this case at their addresses of record herein this 20th day of January, 2012.



Raymond E. Davis