NEW MEXICO PUBLIC EDUCATION DEPARTMENT
PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER

PARENTS on behalf of CHILD,

Petitioners,

v. **Case No. DPH 0910-33**

PORTALES MUNICIPAL SCHOOLS DISTRICT and NEW MEXICO PUBLIC EDUCATION DEPARTMENT,

Respondent.

DECISION OF THE DUE PROCESS HEARING OFFICER DISMISSING THE CLAIMS AGAINST THE NEW MEXICO PUBLIC EDUCATION DEPARTMENT

Jane B. Yohalem, Due Process Hearing Officer
July 22, 2010

This matter is before the due process hearing officer upon the Parent's request that the due process hearing officer accept jurisdiction over the complaints made by the Parent against the New Mexico Department of Public Education.

In the due process complaint in this matter, the Parent named as parties both the Portales School District which is the Local Education Agency (LEA) where Student attends school, and the New Mexico Department of Public Education, which is the State Educational Agency (SEA) under the IDEA. When a due process complaint is brought against the Department (with the exception of cases where the Department is directly providing educational services to a child), the Department's practice, pursuant to State regulation, is to decline to appoint a hearing officer for the claims against it. 6.31.2.13(I)(3)(d) NMAC. The Department's letter of appointment in this case followed this practice. The burden, therefore, is on the complaining party to affirmatively request that the hearing officer assume jurisdiction over the Department.

In this case, the Parent has claimed that the Department failed both to adequately perform its duty of general supervision over the provision of services to children with autism by local districts and "to intervene to require or deliver full time schooling in the least restrictive environment for [Student] when notified by Parent during the first week of April 2010 that [Student] was a student with autism who was not being provided a full day of education and that the school was requiring medication and/or medical evaluation prior to school attendance." *Complaint,* ¶ 24 (1).

Parent's Request for Systemic Relief from the Department

Parent has alleged in her due process complaint that the Department has failed to provide a free appropriate public education (FAPE) to Student during the 2009-2010 school year as shown by: providing misleading publications about autism; approving the use of aversives in serving students with autism and other disabilities; and failing to provide technical assistance to school districts in New Mexico to guide them in providing FAPE to students with autism.

The hearing officer has not been able to find any authority which supports the jurisdiction of the hearing officer over complaints like those made by the Parent here alleging that the State has failed to comply with its duties to monitor and supervise local school districts. It is settled law that due process hearing officers are limited by both statute and regulation to matters relating to the identification, evaluation, and educational placement of a child with a disability, or the provision of FAPE to that child. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a); 6.2.31.13(I) NMAC.

Although the courts, which have far broader authority to enforce the IDEA, may be permitted to address a parent's claims that the Department has failed to comply with the general eligibility requirements of the statute for monitoring, supervision and assistance to school districts, hearing officers are narrowly limited to addressing the needs of the particular child who is the subject of the due process hearing and determining whether that child has been provided appropriate educational

services under the Act. *Id.* It is beyond the scope of the hearing officer's authority to address complaints like those made here concerning the adequacy of the oversight, monitoring and technical assistance provided by the SEA to school districts in general. It is also beyond the scope of the hearing officer's remedial authority to order the State to adopt certain procedures or provide certain services to all school districts in the State, as Parent's complaint requests.

Even Judge Browning in his decision in *Chavez v. Bd. of Ed. of Tularosa Municipal Schools*, 614 F.Supp. 2d 1184 (D. N.M. 2008), which adopts an expansive view of the hearing officer's jurisdiction, holds that it is not appropriate in addressing the services needed by a particular child to consider allegations concerning macro-level deficiencies in the state system. *Id.,* 614 F.Supp.2d at 1214.

The Claim that the SEA is a Proper Party Because the District is Unable or Unwilling to Provide FAPE to Student

The Parent has also claimed here that the Department violated its duty to intervene where appropriate educational services are not being provided by a District to a child and the District is unable or unwilling to provide those services. Parent claims that the Department must either intervene to require the District to serve the student, or, if the District remains unwilling or unable to provide appropriate services, provide the services itself. Parent's claim arises under 20 U.S.C. § 1413(g).

In *Chavez*, Judge Browning distinguished a claim under Section 1413(g) from a claim alleging a general failure by the SEA to provide oversight, monitoring or technical assistance to school districts, holding that when a claim is made under Section 1413(g) based on the inability or unwillingness of a district to provide services to a child, the Department is a public agency that may be responsible for providing direct services to the child and, therefore, is a proper party to a due

process proceeding. *Chavez*, 614 F.Supp. 2d at 1204. Recognizing that this ruling could potentially make the SEA a proper party to every due process proceeding in the State, the court imposed certain restrictions. It required that the denial of services be significant and that the SEA be given both adequate notice and an adequate opportunity to correct the problem prior to the filing of the due process complaint. *Id.*

Judge Browning's decision appears to be unique. There are no other published cases which the hearing officer has been able to locate after a search which address the jurisdiction of a hearing officer on the basis stated by Judge Browning.[1] There are decisions which permit the courts to require an SEA to provide relief, but these cases do not address the special limitations on the jurisdiction of due process hearing officers. *See e.g. Doe by Gonzales v. Maher*, 793 F.2d 1470, 1478 (9th Cir. 1986)*; Kruelle v. New Castle County School District*, 642 F.2d 687 (3rd Cir. 1981). The *Chavez* decision remains on appeal to the Tenth Circuit Court of Appeals. The guidance of that Court on this difficult issue will be appreciated. However, the hearing officer must decide this issue at this time without that guidance.

The hearing officer concludes that the district court's broad interpretation of Section 1413(g) of the IDEA, when read together with other important sections of the Act, is not supported by either the language of the statute or by its purposes and evident Congressional intent.

Section 1413(g) of the Act must be read in context. Section 1413 as a whole addresses the eligibility of an LEA for funding under the Act and imposes conditions on the use of those funds once awarded. Subsection (a) of Section 1413 establishes the requirements for local education

[1]With the possible exception of claims for private residential treatment or where the local education agency has conceded its inability to serve the student and has sought the assistance of the SEA, factors not present here. See *Gadsby by Gadsby v. Grasnick*, 109 F.3d 940 (4th Cir. 1997).

agency plans. Subsections (c) and (d) assign to the State educational agency the responsibility for determining whether an LEA is eligible for funding and require the SEA to provide the LEA an opportunity for a hearing if the State denies funding. Subsection (e) allows the SEA to require that an LEA establish joint eligibility together with another district if the SEA concludes that the LEA alone cannot maintain programs sufficient to meet the needs of children with disabilities. Subsection (g), the provision at issue here, lists the circumstances which permit an SEA to "use the payments that would otherwise have been available to an [LEA]" to provide direct services itself. These include an SEA determination that "the [LEA] has not provided a sufficient plan under subsection (a); is unable to establish and maintain appropriate programs meeting the requirements of subsection (a); refuses to consolidate with other districts or agencies; or has one or more children who can best be served by a regional or State program or service delivery system. Where the SEA decides to establish regional services, it is further authorized by Section 1413(g) to determine both the manner in which these services will be provided and their location. The SEA is also required, when it provides direct educational services in such a regional program, to provide these services "in accordance with this subchapter."

Section 1413(g) is plainly intended to authorize the SEA to make decisions about the organizational model for the provision of services in the state and about the adequacy of LEA's plans and service model. If the State finds these inadequate or decides to offer regional services, the State is permitted to transfer funds away from district either entirely, or for each child more appropriately served in the regional setting. These activities are undertaken under the State's general oversight authority and its authority to make decisions about the allocation of funds under the IDEA.

Therefore, this is not a provision which addresses the resolution of claims made about the education of individual students. Only where the State provides a regional program for a child or

there is an issue about whether an existing regional program is the appropriate placement for a child, does this section mandate compliance with the procedural and other requirements of the Act applicable to LEAs. 20 U.S.C. § 1413(g)(2).

Section 1415 of the Act, dealing with due process protections, confirms this reading of Section 1413(g). Section 1415 makes clear that the responsibility for providing a FAPE rests on the LEA or other entity providing direct services to the child. It is the LEA's responsibility to prepare the child's individual education plan, to ensure that the parent is given prior written notice of the LEA's decisions, and is given the right to challenge those decisions by invoking the right to a due process hearing.

In addition to and separate from the due process procedures aimed at resolving disputes about the services provided to an individual child by the LEA, each SEA is required to adopt state-level complaint procedure. Section 1415 provides that the due process rights will not in any way be exclusive: a parent is permitted to choose to file a complaint with the SEA or to instead proceed with a due process hearing if cognizable issues overlap. The state-level complaint procedures must include an opportunity to file a complaint on both systemic and individual violations of the IDEA. The State must investigate, including allowing the complainant to submit additional information orally and in writing, and must make a decision within 60 days. 34 C.F.R. § 300.151 and 300.152; Subsection H of 6.31.2.13 NMAC. See also 6.31.2.13(I)(3)(d) NMAC, (providing that a claim "asserting that the department should be required to provide direct services to a child with a disability pursuant to 20 USC Sec. 1413(g)(1) and 34 CRF Sec. 300.227 because the responsible public agency is unable to establish and maintain appropriate programs of FAPE, or that the department has failed to adequately perform its duty of general supervision over educational programs for children with disabilities in New Mexico" may be made via the State-level complaint

procedure). If the SEA finds a denial of appropriate services by the LEA or by the SEA, it is required "pursuant to its general supervisory authority under Part B of the Act," to address both appropriate services to address the needs of the child and to address the future provision of services for all children with disabilities." 34 C.F.R. § 300.151(b).

Read together, these sections of the Act and regulations establish a due process system for resolving disputes between parents and the agency directly serving their child concerning the identification, evaluation or provision of FAPE to that child. Complaints against the State based on the State's supervisory responsibilities, including complaints that an LEA is unable or unwilling to serve a child or children with particular needs and that the State should exercise its authority to take over the education of that child pursuant to its Section 1413(g) or to assist the LEA are properly raised by the filing of a State-level complaint, by seeking enforcement by the federal administrative authorities, or by filing an action in court.

Under the provisions of the IDEA, when a parent calls the SEA to complain about a denial of services to a particular child, it is entirely appropriate for the SEA to provide that parent with information about the various available dispute resolution mechanisms in the State, including due process procedures and state-level complaint procedures and to allow that parent to choose how to proceed. The SEA's failure to intervene directly and remedy the violations alleged here within the three-week period from April 1, 2010, until the Parent chose to file a due process complaint in this matter simply does not make the SEA complicit in the denial of FAPE to this child.

To interpret Section 1415(g) to allow parents to make the SEA a party to a due process hearing before the parent obtains a ruling on whether the LEA has denied FAPE and before the Parent has determined whether the LEA can provide the remedy ordered would significantly interfere with the division of responsibility between LEA's and SEA's under the Act and would place an

impossible burden on the State to identify cases in which it is required to intervene based on a telephone call. Although Judge Browning tried to limit the State's responsibility by requiring that the denial of services be "significant" and that the State be notified and be given an opportunity to respond, those limits are far from clear cut. The difficulty of their application to this case is illustrative.

The IDEA plainly intends that responsibility for providing a FAPE will generally rest on the District serving the student. It is the District's responsibility to prepare the child's individual education plan, to ensure that the parent is given prior written notice of the District's decisions, and is informed of their right to challenge those decisions by invoking their right to a due process hearing. As the Department points out in its memorandum, 20 U.S.C. § 1415's provisions providing for due process hearings specifically require that most of these requirements be met by the LEA.

The hearing officer expresses no opinion about whether, under the facts in *Chavez*, where the student was denied all access to educational services; where a private out-of-state residential placement was sought based on the District's inability to serve the student; and where the SEA actually intervened in the provision of services to the student and remained involved for an 18-month period, advising the District in a way that directly contributed to the student's exclusion from school; the district court was correct in holding that the SEA contributed to the denial of FAPE and was, therefore, a proper party to that due process hearing. The hearing officer also expresses no opinion about whether the SEA might be a proper party to a due process proceeding where a District has outright refused to accept its responsibility to comply with the IDEA with regard to the student or has conceded its inability to offer necessary services. The facts pleaded here, however, do not raise these issues for decision.

On this basis, the hearing officer denies Parent's request to accept jurisdiction over Parent's claims against the Department.

Timeliness of Request to Include the SEA as a Party

Finally, the hearing officer, in the alternative, denies Parent's request to include the SEA as a party in this due process proceeding because that request was not timely made. As noted above, pursuant to New Mexico regulations (6.31.2.13(I)(3)(d) NMAC), due process complaints against the SEA are not referred to the due process hearing officer. If the parent wishes to challenge this failure to refer the claims to the hearing officer, the Parent has the responsibility to alert the hearing officer.

Here, the Parent did not either alert the hearing officer that they would be requesting a decision on the hearing officer's jurisdiction to hear the claims against the SEA, nor did the Parent file a written request for a ruling, until just days before the hearing dates previously reserved, at the hearing officer's request, by the other parties, by counsel, by the parties' witnesses and experts, and by the hearing officer, for hearing in this matter prior to the beginning of the school year. Because the SEA was not asked early in this proceeding to make arrangements for a hearing on the dates indicated, a decision to include the SEA as a party to this matter would necessarily delay the hearing and decision in this matter significantly. (See the Department's memorandum indicating it would need a delay in the hearing.)

The other parties have already prepared exhibits and witness lists and made all arrangements to proceed. In addition, both parties have indicated that they opposed further delay. School is starting within a few weeks and although the District has agreed that Student will be returned to his in-school program as the stay-put placement pending a decision, the Parent has raised significant concerns about the adequacy of that program. It is plainly in Student's interests and consistent with

the tight time frames in the IDEA for resolution of due process matters to proceed to hearing in this matter.

Therefore, the hearing officer concludes that the Parent's request to include the SEA must be denied as well on the basis that it is untimely. Parent is reminded that, if the hearing officer concludes that the District denied Student a FAPE and the District's ability to provide the remedy ordered is in question, Parents can seek an appropriate remedy at that time through either the state complaint procedure or in court. *See Nelson v. Bd. of Ed. of Albuquerque Public* Schools, 110 LRP 6293 (Jan. 7, 2009).

Conclusion

Parent's request to add the New Mexico Public Education Department as a party to this due process proceeding is denied for the reasons stated above and the claims asserted against the Department are dismissed for lack of jurisdiction.

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Jane B. Yohalem
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Decision* was sent by first class mail on July 23, 2010, to:

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Jane B. Yohalem
Due Process Hearing Officer