STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Shelton Board of Education

Appearing on behalf of the Parent:	Pro se
Appearing on behalf of the Board:	Craig Meuser, Esq. Chinni & Meuser, LLC One Darling Drive Avon, CT 06001
Appearing before:	Patrick L. Kennedy Hearing Officer

FINAL DECISION AND ORDER ON MOTION TO DISMISS

ISSUE:

Should the hearing officer take jurisdiction over a due process hearing request when there is already a proceeding pending on the same set of facts?

PROCEDURAL HISTORY:

Case Number 18-0458 was commenced by the Parent by a request for due process hearing which was received by the Board on May 11, 2018. At the time, the Parent was represented by counsel, but counsel subsequently withdrew and the Parent is currently pro se in that case. The substantive issues in that case, as defined by the Hearing Officer assigned to that matter after a prehearing conference in which both counsel participated, are as follows:

1. Did the Board violate Student's rights under the Individuals with Disabilities Education Act ("IDEA") by denying Student a free appropriate public education ("FAPE") for the 2016-17 and 2017-18 school years?

2. Did the Board violate Student's rights under the IDEA by not offering Student a FAPE for the 2018-19 school year?

3. If the Board did not provide Student FAPE for 2016-17 is the Wise Learning Center the appropriate program?

4. If the Board did not provide Student FAPE for 2017-18 is the Wise Learning Center the appropriate program?

5. If the Board did not provide Student FAPE for 2016-17 school year, should the Student be reimbursed for the tuition and related expenses of the Wise Learning Center?

6. If Board did not provide FAPE for the 2017-18 school year, should the Student be reimbursed for the tuition and related expenses of the Wise Learning Center?

7. If Board did not offer FAPE for 2018-19 school year, is an out of district placement to a therapeutic day school with related services appropriate?

8. Is Student due reimbursement for the expense of the evaluation provided by Dr. Sue Wallington Quinlan and presented at the January 19, 2018 PPT meeting?

9. Is compensatory education an appropriate remedy?

Subsequent to the first prehearing conference, Parent's attorney withdrew and a second prehearing conference was held with the Parent acting pro se. It appears from the motion and response that the Parent verbally stated his wish to add the issue of placement at the residential program at The Glenholme School at the hearing of the case, at which time, the Hearing Officer in that case ruled that the hearing was confined to the issues stated above. Based upon the representations of both parties, it appears that the evidentiary hearing is still proceeding at this time.

On August 13, 2018, the Parent filed the instant due process request and the matter was assigned to the undersigned Hearing Officer. Based upon the date of filing, the decision date was determined to be October 26, 2018. Because of the filing of the instant motion to dismiss, no prehearing conference was scheduled.

The issue as stated in the Parent's request was, "Failure to offer FAPE; Shelton Public Schools inappropriate; Wise Learning (private school) was appropriate; Placement at residential school (Devereux-Glenholme) is appropriate. Have pending and ongoing case already in Shelton under case number 18-0458 but under 'review of issues' section [my] prior counsel (Andy Feinstein) did not include placement at the Glenholme School as one of the issues. As such, the Hearing Officer can not rule on it because it is not on the list. This is the only way to get the issue on the list because the hearing has already begun. I am filing this new request for Due Process and will then ask to consolidate the 2 hearings. Thank you very much." The relief requested was, "Send my son to The Glemholme School for one year minimum and give me back the tuition and transportation money I provided toward the education of my special-needs son from 2016-2018."

SUMMARY OF MOTION:

On August 21, 2018, the Board filed the instant motion to dismiss consisting of six pages of argument and attaching four exhibits. The Parent subsequently filed a four-page response to the motion with three exhibits.[1]

DISCUSSION:

While the Parent disputes the Board's characterization of the proceedings in the pending case, the facts that are most salient to this motion are abundantly clear as contained within the four corners of the due process hearing request, i.e. that the second action is brought as a mechanism for amending the complaint in the first. The question is, then, whether this is in fact a permissible method of proceeding.

34 CFR §300.507(a)(1) provides, "A parent or a public agency may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child." Regulations of Connecticut State Agencies §10-76h-3(a) provides, "A parent, the Commissioner of Children and Families, or a designee of said commissioner, a public agency or an attorney or advocate acting on behalf of any of those parties, may request in writing a hearing regarding a public agency's proposal to or refusal to initiate or change the identification, evaluation, or educational placement of a child or the provision of a free appropriate public education to the child." The use of the singular in both cases implies that parties do not have the right to file multiple requests on the same underlying matter.

As noted by the Board, 34 CFR §300.508(d)(3) provides, "A party may amend its due process complaint only if (i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to §300.510; or (ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins." 34 CFR §300.511(d) further provides, "The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under §300.508(b), unless the other party agrees otherwise."

Therefore, the Parent is attempting to do what the regulations specifically state cannot be done, i.e. amend the complaint in a pending case while the hearing is ongoing. It should be noted, however, that even if a hearing officer denied a motion to amend on a discretionary basis prior to the commencement of the hearing, the circumvention of that

[1]Parent's Exhibit C was an email sent by the Board's attorney proposing a resolution to the issue of amending the list of issues in the pending case. The Board's objection to this exhibit is sustained as, even if relevant, it is an inadmissible statement during settlement negotiations. The Exhibit is retained for identification purposes only and the undersigned does not consider it or other references to discussions between the parties in ruling on the motion.

decision would still be an improper interference by one hearing officer into a case assigned to another.

The courts in Connecticut have recognized the impropriety in bringing identical cases upon the same facts: "[T]he prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction." *Kleinman v. Chapnick*, 131 Conn. App. 812, 815 (2011). A court may dismiss a second case where the two actions are "[V]irtually alike, i.e., brought to adjudicate the same underlying rights of the parties, but perhaps seeking different remedies..." *Id.*

It should be noted that the prior pending action doctrine is not a written rule contained in the Connecticut Practice Book, but arises from the common-law authority of the Court to manage its docket. Likewise, the undersigned concludes that hearing officers have the inherent authority and duty to dismiss redundant cases so as to avoid the impairment of the due process rights of litigants and the compromise of the authority of fellow hearing officers to manage the conduct of the cases before them.

Therefore, the undersigned concludes that the Board's motion to dismiss should be granted.[2]

FINAL DECISION AND ORDER:

The foregoing case is hereby dismissed without prejudice.

[2] The Parent has also filed a motion to consolidate; as the foregoing decision means there is no longer a second case to consolidate with the first, that motion is moot and will not be acted upon.