

In re: Special Education Due Process Case #DP-24-04

ORDER RE: SUPERVISORY UNION'S MOTION TO DISMISS

In this case, the Supervisory Union seeks dismissal of the due process complaint for two reasons. First, the Supervisory Union claims that the complaint was not filed by the Student, who is 18 years old, and was instead filed by Student's parents on Student's behalf. Second, the Supervisory Union claims that because Student's latest Individualized Education Program (IEP) included a plan for Transition Services, Student was provided with a Free Appropriate Public Education (FAPE). For the reasons set forth below, the Supervisory Union's motion is denied, the current scheduling order will be stayed, and the matter will be scheduled for an evidentiary hearing after the Vermont Probate Court has ruled on Student's Guardianship Petition.¹

On August 1, 2023, this hearing officer granted the Supervisory Union's Motion to Dismiss a due process complaint filed by Parents on Student's behalf because Student was 18 years old. VSER §2365.1.12(f) ("Rights afforded to parents under these rules transfer to the student when the student turns 18 years of age").

Student subsequently filed a due process complaint on Student's own behalf. Not surprisingly, Student's due process complaint mirrored Parents' complaint that was dismissed on August 1, 2023. Both complaints alleged that the Supervisory Union denied Student a FAPE because Student had not been provided with Transition Services as set forth in Student's IEP.

¹ The Probate Court's hearing on Student's Petition is currently scheduled to be held on October 25, 2023.

In its Motion to Dismiss, the Supervisory Union alleges that Student was not responsible for filing the second due process complaint. Other than suggesting that Student was not fully engaged in a prior mediation session and a recent telephone conference, the Supervisory Union offers no compelling evidence to support its claim that Student did not file the second complaint. For that reason, the Supervisory Union has failed to meet its burden to prove that the pending due process complaint was filed by someone other than Student.

The Supervisory Union's second argument for dismissal of the pending complaint fares no better than its first. The fact that Student's IEP includes Transition Services does not demonstrate that those services were provided to Student in a timely and/or effective fashion. Student's pending due process complaint alleges that the required services were not provided.

When ruling on a 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).

Because the Student's due process complaint provides sufficient detail that, if true, would support the relief requested, the Supervisory Union's motion to dismiss must be denied.

In light of Student's pending Voluntary Petition to Appoint a Guardian, the current scheduling order is stayed and the prehearing conference now scheduled for October 4, 2023 will be postponed. A conference call will be scheduled for the week of October 2, 2023 so that new dates can be set for the prehearing conference and the due process hearing in this case.

Dated at Montpelier, Vermont, this 22nd day of September 2023.

David J. Williams

Due Process Hearing Office

Vermont Agency of Education