

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

**ORDER RE: SUPERVISORY UNION'S AND SCHOOL DISTRICT'S
MOTIONS TO DISMISS**

In this case, Parent filed a due process complaint and an amended due process complaint that named two Local Education Agencies (a school district and a supervisory union) as defendants. Both Local Education Agencies (LEA) have filed motions to dismiss the complaint. This order will address each of these motions separately.

The Supervisory Union's motion asserts that the complaint (a) fails to state a claim upon which relief may be granted; (b) is moot because Parent seeks prospective relief; (c) seeks relief for claims that are time-barred; and, (d) is insufficient and fails to conform with VSER 2365.1.6.2(c)(4)-(5).

The School District's motion asserts that (a) the complaint is premature because Student was only recently enrolled at a school within the District; (b) Student is not entitled to enroll at Student's previous school in the Supervisory Union; and, (c) the complaint seeks relief for claims that are time-barred.

Because the two motions share a common nucleus of operative facts, this Order will first summarize the factual basis related to Parent's complaint.

FACTS

1. When the 2021-2022 school year began, Student was enrolled at a school in the Supervisory Union based on Student's town of residence.

2. Student had been enrolled in this school for a number of years before the 2021-2022 school year began.
3. Through February 2022, Student continued to be enrolled as a student at a school in the Supervisory Union.
4. Following a school vacation, Student enrolled at a different school in the School District.
5. This change was based on Student's new town of residence, which was not in the Supervisory Union.
6. Student remained in the school in the School District for a period of time until Student transferred back to the school in the Supervisory Union as a tuition student.
7. The amended due process complaint alleges that beginning in 2019, the Supervisory Union failed to fulfill its "duty to 'find' children suspected of having a disability when it received [Student] in the 6th grade."
8. According to the amended complaint, Parent alerted Student's math teacher that Student needed help with Student's assignments. The math teacher then scheduled a meeting to discuss this issue.
9. The first meeting was convened in October 2020. Parent explained that Student needed "many additional supports in order to complete assignments." In addition, Parent shared her suspicion that Student might have ADHD, while acknowledging that these suspicions had not been discussed with Student's physician. In response, Parent asked school officials to test Student to determine the nature of Student's suspected learning disability.
10. According to the amended complaint, the school did not schedule the requested tests.

11. 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."
12. 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.
13. Subsequently, on November 29, 2021, the Supervisory Union received parental consent to initiate a special education evaluation plan.
14. Around this same time, Student's family was planning to move to a different town, one that was outside of the Supervisory Union.
15. The EPT met again on January 12, 2021 to discuss the results of Student's special education evaluation.
16. The Supervisory Union has attached a copy of Student's Evaluation Plan and Report to its motion to dismiss.
17. The Report 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
18. Based on these conclusions, the EPT concluded that Student was not eligible for special education and related services.
19. These conclusions are undermined by the subjective analysis of otherwise objective data.

20. Measure 1 of the mathematics basic skill area, an individually administered nationally-normed achievement test, indicates that Student's performance was below the state standard. VSER 2362(d)(2) ("Significantly below grade norms" means 15th percentile below, or a 1.0 standard deviation or below the mean, or the equivalent, as reflected by performance on at least three of the six following measures of school performance).
21. The Discussion Summary provides this observation: "it is possible that [Student] may have obtained a score higher than 83 if [Student] had put more effort into solving those problems that required sustained effort."
22. If the scoring was based exclusively on the objective data, i.e., a score of 83, Student would have met the adverse effect requirement in three out of six measures for one basis skill level, i.e., mathematics calculation.
23. It is unclear why the evaluator's subjective opinion in the discussion summary explaining why the test score was so low was even considered in determining whether that score evidenced adverse effect.
24. Parent objected to the scoring of this section of the education evaluation and requested an independent education evaluation. The Supervisory Union agreed to have Student independently evaluated.
25. In January 2022, Parent and the Supervisory Union started to discuss the implications of the family's move to a different town outside of the Supervisory Union.
26. On January 3, 2022, the Supervisory Union's superintendent sent Parent an email notifying Parent that Student' "continuation at [the current school] is unchanged as long as you are a resident [of a town in the Supervisory Union]. As your plans to

transition to another town solidify, we can discuss [Student]’s school location. State Law would require [Student] to attend school in [Student’s] town of residence ... Students wishing to attend school in a town other than their residence would be required to pay tuition.”

27. During the school’s February 2022 vacation, Parent enrolled Student in a new school in the School District.
28. 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.
29. On March 16, 2022, while Student was still attending the school in the School District, Parent filed a due process complaint.
30. 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.
31. The 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.
32. 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.
33. 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.
34. 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.

I. DUE PROCESS COMPLAINTS ARE SUBJECT TO SUMMARY DISPOSITION

The Second Circuit has held that due process complaints are subject to summary disposition. *See J.D. ex rel. J.D. v. Pawlet School District*, 224 F.3d 60, 68-69 (2d Cir. 2000). As the Court observed: "the purpose of an adversarial hearing is to resolve disputed issues of fact. Issues of law reside where they always have - with the adjudicator, whether an administrative or judicial officer."

Although the Court in *J.D. ex rel. J.D.* addressed only the application of Rule 56 summary judgment motions to complaints filed under Individuals with Disabilities Education Act (IDEA), there is nothing in the opinion suggesting that summary disposition of due process complaints for failure to state a claim under Rule 12(b)(6) would be inappropriate. After all, resolution of both Rule 12(b)(6) motions to dismiss and Rule 56 motions for summary judgment require an adjudicator to resolve issues of law, not disputed issues of fact.

II. STANDARD OF REVIEW

When ruling on a Rule 12(b)(6) 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).

III. CONCLUSIONS OF LAW

A. The School District's motion to dismiss must be granted because the complaint against the School District is moot

The due process complaint in this case alleges that the School District had an obligation to facilitate the return of Student to the Supervisory Union's school because that school provided Student with the least restrictive educational environment.

The undisputed facts indicate that (a) when Student transferred to the new school in February-March 2022, Student did not have either a 504 plan or an IEP; and, (b) before the new school had an opportunity to make its own determination whether Student was entitled to special education and related services, Student voluntarily transferred to the previous school as an out-of-district, tuition-paying student.

Now that the School District is no longer Student's LEA, the School District no longer has any responsibilities under the IDEA. VSER 2360.2.4 ("Each LEA shall provide a FAPE to any individual with a disability, who is eligible for special education"); VSER 2360.2.11 ("Each LEA shall insure that children receiving special education have available to them the variety of educational programs and services available to nondisabled children in the LEA"); VSER 2363.2 ("Except as otherwise provided by these rules, each LEA shall ensure that an IEP is developed and implemented by the responsible LEA for each eligible child residing and attending public school in that district").

Student's enrollment at a public school outside of the School District renders the issues raised in Parent's due process complaint and the subsequent amended due process complaint against the School District moot. *B.C. v. Mount Vernon School District*, 660 Fed.Appx 93 (2d Cir. 2016) (student's graduation from school district renders Parents' claim for equitable relief

under Rehabilitation Act and IDEA moot). For that reason, the School District's motion to dismiss must be granted and judgment entered in its favor in this matter.

B. Did the Supervisory Union fail to properly identify Student as a child who was entitled to special education and related services?

The IDEA ensures that "all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services to meet their unique needs." *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 68 (1999).

To comply with this statutory requirement, an LEA must establish and implement a comprehensive Child Find system for children and students from birth through twenty-one years of age to ensure that those who are in need of special education and related services shall be identified, located and evaluated. VSER 2360.3(1), (2).

The facts set forth in the complaint and the amended complaint indicate that in the fall of 2020, Student was having trouble keeping track of and completing assignments in Student's math class. In March 2021, the school agreed to provide extra support in math once or twice a week.

In October 2021, Student's math teacher reached out to Parent and explained that Student was "having a good amount of difficulty with [Student's] attention and [Student's] learning." Several weeks later, 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. Student's special education evaluation plan was completed a little over a month later. The evaluation report concluded that Student met the disability determination in the area of Other Health Impairment, but did not meet the adverse effect in three (3) out of six (6) measures for one (1) basic skill level. As a result, Student was not eligible for special education and related services.

The conclusion, however, is at odds with objective data generated by a nationally-normed math calculations skills achievement test. The objective data indicates that Student scored 83 on this test. This score met the state standard for a "significantly below grade norm" set forth in VSER 2362(d)(2). The education evaluation report erroneously concluded, based on the subjective opinion of the person who prepared the report, that this score did not provide sufficient evidence of adverse effect.¹

Had the report properly attributed adverse effect to Student's "significantly below grade norm" performance on this test, Student would have met the adverse effect requirement in three out of six measures for this basic skill level, i.e., mathematics calculation, and Student would have been found eligible for special education and related services in this area.

Based on these facts, Parent has demonstrated that the Supervisory Union may not have complied with its obligation to identify Student as a person who is "in need of special education

¹ Vermont's Special Education Rules do not indicate or otherwise suggest that an evaluator's personal subjective opinion may be relied upon to grade student's score on a nationally-normed achievement test on a "curve." That this was done in this case is particularly troubling because in October 2021 Student's math teacher seemed to have identified the very problem the evaluator was relying upon to find that Student's score did not reflect "adverse effect."

and related services.” VSER 2360.3(1) and (2). For that reason, the Supervisory Union’s motion to dismiss Parent’s due process complaint is denied.

CONCLUSION

For the reasons stated in this order, the School District’s motion to dismiss is granted and judgment is entered in its favor in this matter.

In addition, for the reasons stated in this order, the Supervisory Union’s motion to dismiss is denied. The Agency of Education shall schedule a status conference so that the parties may discuss relevant scheduling issues.

Dated, May 6, 2022

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