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OFFICE OF HEARING AND APPEALS
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Application of

South Carolina Department of Education,

Respondent/Applicant.

Docket No. 13-43-O

Individual with Disabilities Education Act (IDEA)

INITIAL DECISION AND ORDER ON MOTION FOR DISMISSAL

The Office of Hearings and Appeals has current jurisdiction over the above referenced matter pursuant to a July 16, 2013 request for hearing by the Respondent/Applicant, South Carolina Department of Education (SCDE). This action arises from a proposed final determination dated June 17, 2013, by the Office of Special Education and Rehabilitative Services (OSERS) that South Carolina was not eligible for a future Individuals with Disabilities Education Act (IDEA) Part B section 611 grant in the amount of $36,202,909 based on the State's failure to meet the maintenance of State financial support (MFS) requirement in its State Fiscal Year (SFY) 2010. This controversy dates back to February 26, 2010, when the Superintendent for SCDE, in a letter addressed to the Assistant Secretary of OSERS, requested a waiver of "state level maintenance of effort as permitted under 34 C.F.R. §300.163(c)" due to exceptional or uncontrollable circumstances.[1] The procedural history since February 26, 2010 has been protracted.[2]

On September 18, 2015, OSERS, the movant, filed a Motion to Dismiss the current action (Document 56 in the Office of Hearings and Appeals E-File System (OES)). OSERS' Motion is silent as to whether the Motion is to operate as an adjudication on the merits, but includes an attachment dated September 17, 2015 suggesting SCDE will be served with an amended proposed determination as related to FY 2010 and OSERS withdraws the June 17, 2013 notice of

[1] While this letter initially requested a waiver for Fiscal Year (FY) 2009, the request was later clarified indicating the request for a waiver was FY 2010, as well as FY 2009 and FY 2011, found at Document 1, pages 20-21, in the Office of Hearings and Appeals E-File System (OES).

[2] A comprehensive review of the procedural history (from February 26, 2010 through April 30, 2015) can be found in the April 30, 2015 Order on Motion for Extension of Time and Further Governing Proceeding, found at Document 36 in OES.

proposed final determination.[3] OSERS' Motion follows issuance of the Secretary's Decision on Interlocutory Review, dated August 28, 2015 (OES Document 54).

I. Background

The June 17, 2013 letter is a notice of proposed final determination with appeal rights issued following the April 26, 2013 decision by the United States Court of Appeals for the Fourth Circuit (Court), wherein the Court found the Secretary's waiver determination was a determination whether to remove an eligibility condition and a reduction of the State's eligibility for future funding. *South Carolina Department of Education v. Arne Duncan*, 714 F.3d 249, 256 (2013). Based on that finding, the Court further found South Carolina was entitled to notice and an opportunity to be heard before a final determination was made on the waiver request. (*Id.* at 257). On July 24, 2013, the Secretary ordered that a hearing official within the Office of Hearings and Appeals be designated to conduct a hearing under the jurisdiction and procedures of the Individuals with Disabilities Education Act and its implementing regulations[4] (OES Document 17). Shortly after commencement of the hearing, OSERS filed an Unopposed Motion for a Stay of Proceedings so the parities could pursue settlement (OES Document 19).

During the settlement period, and around the same time the Secretary issued the July 24, 2013 Order, OSERS received information from SCDE that raised questions regarding South Carolina's calculation of MFS for State Fiscal Year (SFY) 2011 and 2012 and the method of calculation used for arriving at the MFS for the years 2008 through 2011 (OES Document 32, pp. 106-155). Despite having received this information on and about July 25, 2013 through at least September 2013, OSERS took no affirmative action to modify or amend the June 17, 2013 proposed final determination.

More than one year later, on August 25, 2014, SCDE filed an Unopposed Motion to Lift the Stay (OES Document 28). At a prehearing conference on December 17, 2014, OSERS reported contemplation of filing a motion to dismiss because OSERS was in receipt of "new" evidence, vaguely described as information from a State audit, and the anticipated shortfall in the MFS for FY 2010 was going to be greater than the amount identified in the June 17, 2013 proposed final determination. Given the length of time that had transpired since SCDE first requested a waiver in February 2010, amending the June 17, 2013 proposed final disposition, as an alternative to a motion to dismiss, was discussed in the December 2014 prehearing conference. When OSERS failed to provide a date upon which it would be able to complete evaluation of the contemplated action, this Tribunal granted OSERS a reasonable time to file a Motion to Dismiss or "other appropriate motion considering the reported revelation of the referenced State audit." The Order specifically directed that withdrawal with a Motion to Dismiss without prejudice must be supported by adequate legal reasoning, otherwise prejudice would attach. OSERS took no action by January 15, 2015, the date imposed by this Tribunal.

[3] The September 17, 2015 letter also notifies SCDE that "OSERS will contact SCDE in the future to address issues related to South Carolina's maintenance of State financial support in SFYs 2011, 2012, and 2013." Although not further explained in the Motion or letter, this remark appears contrary to evidence of this record. More specifically, by letter dated July 5, 2011, OSERS advised SCDE that the "shortfall for SFY 2011 is resolved." (OES Document 1, page 69).

[4] Notably the Secretary specifically declined to extend §81.3 of EDGAR or the General Education Provisions Act to this or future proceedings under 34 C.F.R. §300.179 through 184.

On February 18, 2015, OSERS attempted to submit a "Notice of Amended Proposed Determination" along with a February 18, 2015 letter to SCDE advising that South Carolina is not eligible for a future IDEA Part B grant in the amount of $51,336,578.[5] By Order, dated February 23, 2015, this Tribunal precluded the Notice of Amended Proposed Determination and all supporting documentation from the record as not timely filed. However, OSERS was allowed until March 16, 2015 to file any appropriate motion seeking relief from the February 23, 2015 Order.

Thereafter, OSERS timely filed a Motion to Extend Time to File Notice of Amended Proposed Determination[6] (OES document 32). On April 30, 2015, this Tribunal denied the Motion, again precluding the Notice of Amended Proposed Determination (OES Document 36). On May 5, 2015 OSERS filed a Notice of Intent to Submit Petition to Secretary for a Stay of the Proceedings and for Interlocutory Review of the April 30, 2015 Order (OES Document 38) and on May 15, 2015, OSERS filed a Petition for Expedited Stay and Interlocutory Review (OES Document 43). The Petition was forwarded to the Secretary on May 19, 2015 with this Tribunal's primary recommendation that the Petition for Expedited Stay and Interlocutory Review be denied[7] (OES Document 44).

The Secretary, nonetheless, accepted the Petition for Interlocutory Review and eventually affirmed this Tribunal's preclusion of OSERS' Notice of Amended Proposed Determination (OES Document 54).

II. Analysis

Evaluation of the pending Motion to Dismiss must consider due process because due process standards guide and limit the acts and proceedings of agency tribunals. *See, Benedict v. Super Bakery, Inc.* 665 F.3d 1263, (Fed. Cir., 2011). While versatile, due process is designed to assure justice to anyone from whom the state, or someone using the machinery of the state, wishes to take life, liberty, or property. *See, Lane Hollow Coal Co. v. Director, Office of Workers' Compensation Programs,*137 F.3d 799, 806 (4th Cir. 1998). It is well settled that due process is fully applicable to adjudicative proceedings conducted by administrative agencies and administrative proceedings (*Id., citing, Richardson v. Perales,* 402 S.Ct. 1420, 1427 (1971)). While transgressions of certain rules implicate due process, unless the transgressions render the trial unfair there is no violation of due process. *See, Lane Hollow Coal Company,* at 808 *citing Donnelly v. DeChristoforo,* 94 S.Ct. 1868, 1871 (1974). If there was a fair day in court and a reliable verdict then the due process that has been guaranteed has been received. *See, Lane Hollow Coal Co.,* at 808. Due process mandates that an administrative hearing will constitute "a fair trial, conducted in accordance with fundamental principles of fair play and applicable

[5] Interestingly, this February 18, 2015 letter provided Notice and Opportunity for a Hearing and advised SCDE the hearing is pending before the designated Hearing Official (OES Document 31). There is no evidence the February 18, 2015 correspondence was served upon SCDE consistent with the regulatory requirement.

[6] SCDE was allowed to file a response to any motion filed by OSERS. The issue was fully briefed by the parties and considered by this Tribunal.

[7] This recommendation was based on a prior Order of the Secretary that this hearing procedure was governed by the regulations related to IDEA, which do not provide procedures for interlocutory review, and specifically denied the application of EDGAR and GEPA, the only implementing regulations that provide for interlocutory review.

procedural standards established by law." *Precious Metals Associates, Inc. v. Commodity Futures Trading Commission*, 600 F.2d. 900, 910 (1st Cir. 1980), *citing Swift & Co. v. United States*, 308 F.2d, 308 F.2d. 849, 851 (7th Cir 1962). Due process is the means to achieve the end, which is "justice" and "fundamental fairness." *See*, *Lane Hollow Coal Co.* at 806.

The controlling regulations that govern this hearing require the hearing official to regulate the course of the proceedings and to take steps necessary to conduct a fair and impartial proceeding. 34 C.F.R. §300.181(c). The regulations further provide an extensive list of procedures the hearing officer may impose to conduct a fair and impartial proceeding. *See*, 34 CFR §300.181 (d) to (q). While the applicable regulations do not require adherence to standardized rules of civil procedure, like the Federal Rules of Civil Procedure, the concepts represented in the applicable regulations reference general concepts of law, including the applicability of due process, and general concepts of procedure that are described in specific rules like the Federal Rules of Civil Procedure. Therefore, the analysis of the current issue will be based not only on the applicable regulations but also on general concepts of law and general concepts of procedure found in standardized rules of civil procedure that are consistent with the applicable regulations requiring a fair and impartial hearing.

Justice and fundamental fairness first requires that "there must be a process of some kind; a just result is not enough." *Lane Hollow Coal Co*, at 806, *citing Carey v. Piphus, 435 U.S. 247 (1978).* Second, the process must be at least what is "due," i.e. it must be adequate to the task at hand. *Lane Hollow Coal Co.* at 806. In relation to motions to dismiss, the degree of due process owed to the non-moving party should be determined based on the stage of the proceeding. Due process generally permits a notice of withdrawal early in the proceeding but when a motion to dismiss is pursued later in the proceeding, more scrutiny is demanded to insure due process for the non-moving party. *See*, FED. R. CIV. P. 41.

In this administrative matter, withdrawal or amendment of the June 17, 2013 proposed final determination at any time prior to the filing of a request for hearing would most likely only require issuance of a notice with intent to withdraw or amend. However, once a request for a hearing was filed and the hearing was commenced, the Tribunal has the obligation to evaluate and approve any motion to withdraw or amend. More importantly, the Tribunal must do so in a manner that results in a fair trial conducted in accordance with fundamental principles of fair play. In accordance with the principles of fair play, and with the authority to preside over a proceeding that is fair and impartial, this Tribunal must determine whether the motion should be granted without prejudice or whether prejudice should attach.[8] While the Secretary's August 28, 2015 Decision suggests the import of a dismissal with prejudice is unclear and concludes there is no consequence of OSERS' voluntary withdrawal of the June 17, 2013 proposed final determination at any time in the proceeding, he arrives at that decision based on OSERS' unsupportable report of "new" evidence[9] and not based on evaluation of due process or other

[8] The Secretary's Decision on Interlocutory Review affirmed this Tribunal's preclusion of OSERS' untimely attempt to amend the notice of proposed final determination dated June 17, 2013. The Secretary's decision did not further consider due process. Instead he noted the hearing officer is not vested with authority to prevent OSERS from carrying out future programmatic decision making and he noted OSERS no longer supports the decision reflected in the June 17, 2013proposed final determination.

[9] As discussed earlier the evidence that was characterized as "new" was in the possession of OSERS since at least July 2013. The characterization of "new" as presented at the December 2014 prehearing conference, and thereafter,

principles of fair play, which are clearly within the authority of the appointed hearing official.

Looking more specifically at the timing of OSERS' Motion to Dismiss, the events of this proceeding must be reviewed. By Order dated December 18, 2014, OSERS was allowed until January 15, 2015 to file a Motion to Dismiss or "other appropriate motion considering the reported revelation of the referenced State audit." OSERS failed to so move for dismissal until September 18, 2015.[10] Blatantly disregarding reasonably imposed deadlines without any consequence undermines the most basic principles of due process and fair play. Here, the disregarding of a reasonably imposed deadline/scheduling order resulted in the preclusion of an amended notice of proposed determination that increases the liability of the Respondent by $15,133,669. Had OSERS timely filed a Motion to Amend, in January 2015, due process analysis would have most certainly allowed the amendment as the prejudice to the Respondent would have been negligible at that point in time. The error by counsel for OSERS in failing to follow the reasonably imposed deadline/scheduling order resulted in a different legal analysis, one that resulted in the fair preclusion of the amended notice. It is well understood that every litigant in every suit and every administrative proceeding is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. *See Magala v. Gonzales*, 434 F.3d 523, 535(7th Cir. 2005).

Evaluating the application of prejudice in the context of due process requires the court (or as in this case the administrative tribunal) to assess the request for voluntary dismissal, and to freely grant, *so long as no other party will be prejudiced*. *Nesari v. Taylor*, 806 F.Supp. 2d 848, 860 (E.D.Va. (2011) *citing, LeCompte v. Mr. Chip, Inc.* 528 F.2d 601, 604 (5th Cir. 1976). Factors to be considered in determining prejudice are many. *See, Nesari* at 861, *citing, Miller v. Terramite Corp.*, 114 Fed.Appx. 536, 539 (4th Cir. 2004).

First, the opposing party's effort and expense in preparing for trial must be considered. Here, the effort and presumably expense has been considerable as evidenced by the long and complex procedural history, including an appeal to the Court of Appeals simply to secure the right to a hearing.

Second, there must be a consideration of excessive delay and lack of diligence on the part of the movant. This too is present when considering the time that elapsed from OSERS' awareness of the reportedly "new" evidence in mid to late 2013 and the first indication in December 2014 of the possible need to amend the notice of proposed final determination. Delay and lack of diligence in failing to move prior to the reasonable deadline imposed by the December 18, 2014 scheduling order is clearly established.

Third, the motivation or explanation of the need for the voluntary dismissal must be considered. Here the explanation and motivation is abundantly clear: OSERS is attempting to circumvent the adverse result of the Order precluding the amended notice significantly increasing SCDE's

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is a mischaracterization, if not entirely misleading.

[10] Although the Secretary suggests that OSERS faces no adverse consequences from voluntarily withdrawing the June 17, 2013 notice of proposed final determination, the Secretary did not consider if SCDE will be prejudiced by OSERS voluntary withdrawal. Furthermore, the Secretary made it clear a hearing official has the authority to manage administrative proceedings. Based on the circumstances of this case, OSERS was allowed until January 15, 2015 to file a Motion to Dismiss or other appropriate motion.

liability in the FY 2010 grant.

Fourth, the present stage of the litigation should be considered. Here, this matter dates back to February 2010, when SCDE first requested a waiver due to exceptional or uncontrollable circumstances. When the Respondent's right to a hearing was ordered by the Court of Appeals, an administrative hearing was commenced. Shortly thereafter, the parties requested a stay for settlement which extended for about twelve months. In December 2014, a prehearing conference was scheduled and followed by issuance of a scheduling order/Order Governing Proceeding on December 18, 2014. A subsequent Order Governing Proceeding, dated April 30, 2015, not only precluded OSERS from amending the June 17, 2013 proposed final determination but it established a scheduling order whereby SCDE was to submit a brief in support of the request for a waiver on or before May 22, 2015. SCDE promptly met this deadline with their brief, which is in the record (OES Document 46). Following the Secretary's affirmation of the preclusion of the amended proposed final determination filed by OSERS, and lifting of the stay previously imposed by the Secretary, a scheduling order was issued to reestablish the hearing procedure. By that Order, dated September 1, 2015, OSERS was to proceed with submission of a responding brief on or before September 18, 2015. OSERS decided to proceed with filing the pending Motion to Dismiss. Clearly this proceeding is in the advanced stage of litigation. Extreme prejudice is not required where the proceeding is in an advanced stage of litigation. *See S.A. Andes v. Versant Corporation* 788 F.2d 1033, 1036 (4th Cir., 1986).

Generally, a voluntary dismissal should be granted unless it appears the non-moving party will suffer from plain legal prejudice. *Estate of Williams-Moore* 355 F.Supp.2d 636, 645 (M.D.Md. 2004) *citing,* 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §2366 (2d ed. 1995). The prejudice must be more than the mere prospect of confronting a second hearing (*Eaddy v. Little,* 234 F.Supp. 377, 379 (E.D.S.C. (1964)). In the present proceeding, the harm to SCDE is manifestly prejudicial. In the course of this matter, and at about the same time SCDE requested a hearing, both parties became aware of circumstances that might have an effect on the calculation used by South Carolina in determining the maintenance of State effort. In the context of this proceeding, that information was partially disclosed to this Tribunal in December 2014. OSERS was granted time to determine the best course of action, given the known information. Whether through strategy or lack of diligence, OSERS did nothing. OSERS lack of action resulted in a justifiable preclusion of a legal claim. Although SCDE still had the burden of proof to establish it was entitled to a waiver for the shortfall in the amount of $36,202,909, SCDE gained a substantial legal right in the preclusion of the claim for an additional $15,133,669. To disregard that substantial legal right and allow OSERS, at any time in this proceeding, to change the course of this proceeding by simply withdrawing from a pending hearing, with no legal consequence, undermines the very notion of a fair and impartial hearing.[11]

[11] The Secretary's Order on Interlocutory Review justifies OSERS right to terminate this proceeding at any time by since the hearing officer is not vested with authority to prohibit OSERS from carrying out any future programmatic decision making, including issuing a new proposed decision based on new evidence. If in fact there was new evidence; that might influence the evaluation of due process in this proceeding. However, the allegation that evidence is "new" when it was known to OSERS shortly after the issuance of the June 17, 2013 notice, defeats the claim of "new" evidence. Furthermore, the legal application of prejudice in this proceeding is not a prohibition on OSERS from taking any future programmatic action. OSERS is free to take any programmatic action within its authority, however, once a fair and impartial proceeding is commenced and in an advanced stage, as it is here, OSERS must comport with the rules of fair play.

Allowing withdrawal at this time without prejudice renders an unfair result in this administrative hearing.

THEREFORE, IT IS ORDERED, the matter on the request for hearing by the Respondent/Applicant, SCDE challenging the proposed final determination dated June 17, 2013, by OSERS that South Carolina was not eligible for a future Individuals with Disabilities Education Act (IDEA) Part B section 611 grant in the amount of $36,202,909 based on the State's failure to meet the maintenance of State financial support requirement in its State Fiscal Year (SFY) 2010, is DISMISSED with prejudice.

__/s/ Angela J. Miranda_____
Angela J. Miranda
Administrative Law Judge

Dated: October 1, 2015

SERVICE

A copy of this Order was filed with the OFFICE OF HEARINGS & APPEALS (OHA) Electronic Filing System (OES) and available electronically to the parties, consistent with the voluntary agreement by the parties to use OES. Additionally, service by U.S. Mail, certified return receipt was made upon:

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