94-76-0

UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

Application of the	)	
	)	*Proposed Withholding Proceeding*
Virginia Department	)	*Docket No. 94-76-0*
of Education,	)	
	)	
Applicant	)	
	)	
	)	

Decision of the Secretary

This matter comes before the Secretary on "comments" filed by both parties on specially appointed Hearing Officer Robert D. Dinerstein's Initial Decision, issued April 6, 1995. See 34 C.F.R. § 300.585 (a), (f), (j). In his decision, Hearing Officer Dinerstein concluded that Part B of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA" or "IDEA-B") requires State educational agencies to assure the Secretary in their state plan that all eligible children are receiving a free appropriate public education, *including continued education services for students with disabilities expelled or suspended long-term for conduct unrelated to their disabilities* (emphasis added). Initial Decision ("Init. Dec.") at 37. I agree. The Hearing Officer further found that to the extent Virginia's regulations, as implemented, do not require the provision of continued education services to all students with disabilities expelled or suspended long-term for conduct unrelated to their disabilities, such regulations are inconsistent with the IDEA-B's requirement that such educational services be continued. For the reasons explained below, again, I agree.[1]

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[1] The Hearing Officer further found that the Department of Education's ("the Department") interpretation of IDEA-B's requirement is an "interpretive rule" not subject to the notice and comment requirements of the Administrative Procedure Act ("APA"); and that the Department's December 17, 1993, decision to add the "new condition" of compliance with IDEA-B after conditionally approving Virginia's state plan was an appropriate response to a citizen complaint. Init. Dec. at 37.

The Hearing Officer also found that the Department's enforcement of IDEA-B, while neither uniform nor constant, was not arbitrary or capricious in this case and, that it is within the Assistant Secretary's discretion, under 20 U.S.C. § 1416, to seek the withholding of all unobligated fiscal year ("FY") 1995 IDEA-B funds, and any future such funding, until such time as the state of Virginia comes into compliance with the requirements of the statute. Init. Dec. at 38. The Department and the state of Virginia timely filed comments, pursuant to 34 C.F.R. § 300.585 (d), on May 2, and May 8, 1995.

The Department urges the Secretary to uphold the Initial Decision and to order that Part B funding to Virginia be withheld until such time as Virginia complies with the IDEA. The Assistant Secretary recommends, however, that should Virginia appeal the Secretary's decision, the Secretary stay such withholding pending a final decision on the matter. Responsive Comments of the Assistant Secretary ("Resp. Com. of Asst. Sec.") at 2.[2]

Virginia argues, *inter alia*, that the Initial Decision displaces state educational policy choices and that the Department fails to give this matter the priority the Fourth Circuit accorded it in its April 29, 1994, decision. Virginia Comments and Recommendations Upon the Initial Decision ("Virginia Comments") at 2. Further, Virginia questions whether the Initial Decision's reference to OSERS' position as "'ED's policy'" portends the Secretary's prejudgment of this matter, and whether the Initial Decision is merely a "'ready-made' version of the final decision." Id. at 5.

Before I address the merits of the Initial Decision, let me comment on the above points. The issues surrounding the appropriate educational setting for disabled children, the placement of disabled children in a classroom poorly situated to meet their special educational needs, and the discipline of disabled children for misconduct both related and unrelated to their disability, are some of the most complex and the most impassioned issues with which educators and parents have had to struggle.

Certainly, there are no easy answers. So, I assume the state of Virginia's implication that the Department of Education has failed to recognize the weight of these issues, or has purposefully delayed the resolution of these issues, or that I will not give this case the thoughtful, objective review it deserves merely reflects the difficulty and intensity of the debate. But, lest there be any question, let me be clear. I have long demonstrated my commitment to working through these challenges, with all interested parties. And, as a former governor, I take very seriously the critical necessity that the federal government respect and, where appropriate, defer to the states on those issues that are clearly the province of states and localities. My consideration of and reflection on these matters anticipate the very thing the state of Virginia questions -- and the disability and educational communities deserve -- my thoughtful consideration of "both sides of the debate . . ." Virginia Comments at 4. And, my decision contemplates the explicit direction of the Fourth Circuit -- that the Department deal fairly with the state of Virginia.

I. BACKGROUND AND PROCEDURAL HISTORY

Part B of the IDEA provides federal financial assistance to state and local education agencies for the special educational needs of disabled children. The IDEA-B is administered

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[2] The Assistant Secretary proposes a similar strategy for handling the issue under Virginia's new Part B state plan for 1996-1998. See Resp. Com. of Asst. Sec. at 19-21.

by the Department's Office of Special Education Programs ("OSEP"), within OSERS. In order to receive Part B funding, a state must submit to the Secretary of Education a comprehensive "state plan" effective for a period of three fiscal years. See 20 U.S.C. § 1413; 34 C.F.R. § 300.110. Failure to maintain an "approved" plan can result in loss of Part B funding. See 20 U.S.C. § 1416.

In August 1992, the Virginia Department of Education ("VDOE") submitted to OSEP its state plan for fiscal years 1993-1995. Init. Dec. at 22. Virginia's plan included a copy of the state's regulations governing special education programs, outlining its rule that where there is no causal connection between the misconduct and the disability, a disabled child may be disciplined the same as any non-disabled child. See Virginia Dept. of Educ. v. Riley, 23 F.3d. 80, 82-83 (4th Cir. 1994).

On October 29, 1992, then OSERS Assistant Secretary Robert Davila "conditionally" approved VDOE's plan. This "conditional" approval permitted Virginia to receive its grant for FY 1993, commencing July 1, 1992. The Department's "conditional" approval also provided that the State would receive "full approval" of its three-year plan if it took certain specific actions, *unrelated* to the continuing education issue here, set out in the Department's October 29, 1992, approval letter. Id.; Virginia Exhibit 12, Attachment 1.
On November 23, 1993, Virginia received notification of the conditional release of FY 1994 funds. Id.; Virginia Exhibit 12, Attachment 3.

On November 12, 1993, OSEP received a complaint that the proposed 1994 Regulations Governing Special Education Programs for Children with Disabilities in Virginia contained a provision that appeared to allow cessation of education services for eligible children whose misconduct was not causally related to their disabilities. Init. Dec. at 23; Department of Education Exhibit ("ED Exhibit") 3.

On December 17, 1993, OSEP notified Virginia that the referenced regulation was inconsistent with IDEA-B's requirement to provide a free appropriate public education and requested that the regulations and the state plan be revised to reflect that long-term suspended and expelled students must continue to receive education services. Init. Dec. at 24. In the months that followed, VDOE and state officials attempted to persuade the Department to release over $50 million dollars in FY 1994 funds. Despite their efforts, however, the parties failed to agree and on March 4, 1994, the Department's current Assistant Secretary Dr. Judith Heumann notified the VDOE that the Secretary proposed to disapprove its current three-year plan. While the parties continued to meet and exchange proposals until March 28, 1994, on March 21, 1994, Virginia sought the administrative hearing that constitutes this proceeding.

Despite the pendency of the administrative hearing, the Department refused to release the FY 1994 funds. In April 1994, VDOE filed an interlocutory appeal in the Fourth Circuit. Pursuant to the rarely used All Writs Act, 28 U.S.C. § 1651, (which permits interlocutory relief to a party aggrieved by administrative action when the court would have full appellate

jurisdiction following final agency decision), the Fourth Circuit granted Virginia relief on grounds that irreparable harm was likely. On April 29, 1994, the Fourth Circuit held that 20 U.S.C. § 1416(a) required the Department to provide Virginia a hearing before IDEA Part B funds could be withheld. Virginia Dept. of Educ. v. Riley, supra. The Court also set out some ground rules for the administrative hearing, the most relevant of which was that Virginia "be permitted to express its various challenges to the Secretary's proposed withdrawal of funding." Id. at 87. The court made certain to note that while it expressed no view on the merits of the questions, it recognized that *"[a]mong those challenges, undoubtedly, will be Virginia's contentions concerning the validity of the Secretary's policy with regard to students expelled from school for reasons unrelated to a disability as well as the way in which that policy was adopted and imposed."* Id. (emphasis added).

After days of testimony and the submission of numerous memoranda, on April 6, 1995, Hearing Officer Robert Dinerstein found in favor of the Department. Between April 24 and May 8, 1995, initial and responsive comments were timely filed by the Department's Assistant Secretary and, on behalf of the state, the Assistant Attorney General.

II. DISCUSSION

A. Part B of the IDEA Requires the Continued Provision of Educational Services to Eligible School Children Who Are Suspended Long-term or Expelled from Their Current School Settings When Their Misconduct Is Not Caused by Their Disability.

Unquestionably, as a general matter, student discipline is a state and local concern. The national interest in supporting and encouraging the advancement of American education has always been governed by a clear recognition that education is a state and local responsibility. I am a firm believer in the 10th Amendment and I have long recognized the practical and substantive benefits of state and local control of issues uniquely within their province.[3]

However, when students with disabilities are involved, the requirements of Part B of the IDEA, as interpreted by the Department and the courts, apply. And, states and localities must comply with these requirements.

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[3] The VDOE argues that "[t]his case concerns a . . . policy which protects student behavior from fair and appropriate discipline, on even terms, when disability is not the cause . . ." and that this policy is ". . .contrary to the longstanding state and local right to determine appropriate school discipline." Virginia Comments at 2. I believe Virginia's interpretation misstates the Department's policy. The Department's policy does not "determine" school discipline. The state of Virginia and its localities may discipline their students, whether they are disabled or non-disabled, in any legally cognizable manner they choose. What they may not do, however, is simply ignore the requirement that they continue to provide educational services to disabled children who are suspended long-term or expelled for misconduct unrelated to their disability.

Prior to the IDEA's enactment, federal courts recognized that all children with disabilities have a constitutional right to a free appropriate public education. The IDEA was enacted to help states and localities meet their constitutional obligation to educate these children. It was meant to ensure that all children with disabilities have available to them the constitutionally mandated free appropriate public education designed to meet their special needs; to assure that the rights of children with disabilities and their parents or guardians are protected; and to assess the effectiveness of efforts to educate children with disabilities. The IDEA changed the role of government from one of caretaker of dependent individuals to one that helped open the door to education and empower people with disabilities to live full and independent lives.

Subsequent case law interpreting the IDEA reflects the challenging circumstances attendant with the provision of such educational services and the courts' attempts to clarify and support the statute's purpose. For example, in S-1 v. Turlington, 635 F.3d. 342 (5th Cir. 1981) (Unit B), cert. denied, 454 U.S. 1030 (1981), the court held that an expulsion was a change in placement which invoked the procedural requirements of the IDEA-B. The court also held that in appropriate cases, students with disabilities were subject to expulsion, but noted that it could not authorize "the complete cessation of educational services during an expulsion period." S-1 v. Turlington, 635 F.3d. at 348. In Honig v. Doe, 484 U.S. 305 (1988), the Supreme Court held, *inter alia*, that unilateral suspensions of children whose misconduct was related to their disability for over ten days violated the IDEA-B's "stay-put" provision, 20 U.S.C. § 1415 (e) (3).

As Hearing Officer Dinerstein correctly points out, the IDEA does not contain explicit language which precludes the cessation of education services for disabled children who are suspended long-term or expelled for misconduct unrelated to their disability. But, as courts have noted, the IDEA is a remedial statute whose provisions must be read broadly to effect its critical purpose. See., e.g., S-1 v. Turlington, supra. I believe that the IDEA-B, its interpretive guidance, and the case law require the continuation of education services to eligible disabled school children who are suspended long-term or expelled from their current school setting when their misconduct is unrelated to their disability. I agree with Hearing Officer Dinerstein that the statutory requirement that all children with disabilities be provided a free appropriate public education must be interpreted in the context of case law that allows for no exceptions, cf. Honig, supra, the historical underpinnings of IDEA, and the recent Congressional action in the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (enacted October 20, 1994) ("IASA").[4]

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[4] In IASA, Congress acknowledged and referred to the Department's final guidance concerning state and local responsibilities under the Gun-Free Schools Act of 1994 which restates OSERS' policy that students may be expelled or suspended long-term for behavior unrelated to their disabilities as long as they are provided continued educational services. See Init. Dec. at 11-12.

B. The Department's Interpretation of IDEA-Part B is an Interpretive Rule Not Subject to the Notice and Comment Provisions of the APA.

Virginia argues that OSERS was required to go through the Administrative Procedure Act's ("APA") notice and comment procedures before promulgating its interpretation of IDEA, Part B. Specifically, Virginia argues that Metropolitan Sch. Dist. of Wayne TWP. v. Davila, 969 F.2d 485 (7th Cir. 1992), cert. denied, 113 S. Ct. 122 (1993), which concluded that the exact interpretation[5] at issue here was an interpretive rule exempt from the APA's notice and comment provisions, is inapplicable to this case. Virginia concludes that the Department's interpretation should, even now, be promulgated under the APA and made subject to the APA's notice and comment requirements. Virginia Comments at 16-18. I disagree. Metropolitan Sch. Dist., supra, specifically addressed the IDEA and the Department's interpretation of this rule. It not only clearly found the New Inquiry to be an interpretive rule, but specifically noted that while an interpretive rule states what an agency thinks a statute means (rather than creating new law, rights or duties), id. at 490, even if it does create a new obligation, it should not be construed as a legislative rule invoking the notice and comment provisions of the APA. The court noted that the New Inquiry, a response to Honig, supra, was a responsible effort by the Department to clarify the continued services requirement in the case where the conduct was unrelated to the disability -- the circumstance left unaddressed by Honig, supra. As such, it was clearly an interpretive rule designed to clarify then present law.

C. The Fourth Circuit's Rejection of the Department's Argument That It Did Not Impose Upon Virginia an Impermissible New Condition Was Cured Below.

Virginia also argues that the Department's action on December 17, 1993, and thereafter in raising questions about Virginia's 1993-1995 state plan compliance with IDEA-B, imposed upon it an impermissible new condition. Virginia Comments at 14-15. Virginia argues that even if through the New Inquiry the Department provided generally adequate notice, the Department's conditional approval of Virginia's 1993-1995 plan precluded the Department's later efforts to require compliance with the continuing education requirements of the statute. Virginia Comments at 14. Virginia further argues that the Fourth Circuit specifically rejected the Department's argument that it was not imposing a new condition upon Virginia, (but merely implementing an established policy), and this is the law of this case. Id. at 15.

Virginia's reliance on the Fourth Circuit decision notwithstanding, the Fourth Circuit's rejection of the Department's argument was cured by the provision of the hearing below.

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[5] In response to Honig, supra, The New Inquiry 213, Educ. Handicapped Rep. (CRR) 258 (OSERS September 15, 1989), outlined OSERS' position that IDEA-B required the continued provision of special educational services to children with disabilities suspended long-term or expelled for misconduct unrelated to their disability.

There, not only was Virginia granted the procedural requirements to which the Fourth Circuit referred[6] but it was permitted to present its "various objections to those new conditions[,]" including contentions concerning the validity of the Department's interpretation of IDEA Part B, as a policy matter, fully and completely. That is all the Fourth Circuit required.

D. Withholding of all Virginia's Remaining FY 1995 Funds is Permissible in this Case.

Virginia insists that the Initial Decision "completely ignored all testimony produced by Virginia, and instead adopts, without question, the statements of OSERS' legal counsel as [sic] basis for a withholding remedy." Virginia Comments at 20. In fact, however, the Hearing Officer permitted all Virginia's general policy arguments to be introduced, and also requested and considered specific alternative remedies to withholding. The Hearing Officer then set out such alternative remedies in his decision for review. See Init. Dec. at 32-37.

The federal government has an important legitimate federal interest in states complying with its statutory requirements. Moreover, the Supreme Court has specifically addressed this issue in consideration of the IDEA. In Board of Educ. v. Rowley, 458 U.S. 176, 183, the court held that while the IDEA leaves to the states the primary responsibility for designing their educational programs for disabled children, compliance with statutory requirements is mandated and assured by "provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act . . . ."

Indeed, 20 U.S.C. § 1416(a) provides, in pertinent part,

> Whenever the Secretary, after reasonable notice and opportunity for hearing to the State educational agency involved . . . , finds --
>
> > (1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or
> >
> > (2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or immediate educational unit approved by the State educational agency pursuant to the State plan, the Secretary --

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[6] The Fourth Circuit held that the obligation to provide educational services to children expelled for reasons wholly unrelated to a disability was a new condition "necessarily requir[ing] some procedural protections for the state involved." Virginia Dept. of Educ. v. Riley, supra, 23 F.3d at 85-86.

> (A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter . . . .

Thus, it is clear that withholding all Virginia's remaining FY 1995 funds is permissible under the penalty provisions of the IDEA.

There are two exceptions to IDEA-B's authorized withholding -- one which permits the Secretary to withhold only funding allocable to the programs, projects under the State plan, or parts thereof that are in non-compliance with the statute -- and another which allows the Secretary to limit the withholding to the local education agency or intermediate educational units affected by the non-compliance. 20 U.S.C. § 1416 (a). However, I agree with counsel for the Department that neither exception applies here. The state of Virginia is refusing to provide statutorily required educational services to all affected children, thus, its non-compliance is not program or project specific. Similarly, Virginia's non-compliance is not geographically or administratively specific -- the state's failure to comply with the statute is each locality's failure, as well.

Finally, while Virginia argues it is harmed by a withholding decision, Virginia continued to have access to its FY 1994 funding and will, as the Assistant Secretary has recommended in this matter, have access to its FY 1995 funding pending any appeal of my decision in this matter. Thus, I will not disturb the Hearing Officer's ruling that the withholding of unobligated FY 1995 IDEA Part B funds and any future funding under IDEA-B is the appropriate remedy in this matter, but that such ruling be stayed pending any appeal of this matter.

Accordingly, I affirm the Hearing Officer's Initial Decision with exception as noted herein.

So ordered this 3rd day of July, 1995

Richard W. Riley

Washington, D.C.

SERVICE LIST

A copy of the attached document was sent to the following, Certified Mail, RRR.

Suzanne Sheridan, Esq.
Ronald B. Petracca, Esq.
Office of the General Counsel
U.S. Department of Education
600 Independence Avenue, S.W.
FB-10, Room 5442
Washington, D.C. 20202-2110

Joan W, Murphy, Esq.
Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
101 North Eighth Street
Richmond, VA 23219