Before the
Administrative Hearing Commission
State of Missouri

, by and through his mother, , Petitioners, vs. SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, Respondent.	)	No. 13-1290 ED

DECISION

We dismiss the due process complaint, filed under the Individuals with Disabilities Education Act ("IDEA"), of ("Student") and his mother, ("Parent") (collectively, "Petitioners"), for lack of jurisdiction.

Procedure and Parties

Petitioners filed their due process complaint on July 18, 2013 against Hazelwood School District ("HSD"). On July 19, 2013, the attorneys for Special School District of St. Louis County ("SSD"), Thomeczek & Brink, LLC, entered their appearance. On August 15, 2013, SSD filed a request for leave to file a motion for involuntary dismissal, along with the motion. We granted the request on August 19, 2013 and deemed the motion filed as of August 15, 2013. Although we gave Petitioners until September 3, 2013 to respond to the motion, they failed to respond.

SSD is the proper respondent in this case because, under the Missouri State Plan for Special Education (2013 Rev.), Reg. IX, § D(5)(a), where a special school district is involved, that district, as a subgrantee for the local educational authority (usually a school district) under IDEA, has responsibility for defending a due process complaint.[1]

Findings of Fact[2]

1. During and prior to May 2013, Student was enrolled in 5th grade at Jamestown Elementary School ("Jamestown") in HSD.

2. A plan created pursuant to § 504 of the Rehabilitation Act of 1973[3] had been created for Student at Jamestown.

3. In May 2013, Jamestown created a team to review information regarding Student's transfer from Jamestown to middle school.

4. HSD proposed that Student enroll at Hazelwood Central Middle School ("HCMS").

5. HCMS was identified as a school "identified for school improvement" for purposes of the No Child Left Behind Act of 2001.[4]

Conclusions of Law

Our jurisdiction over cases arising under the IDEA arises from § 162.961.1, which provides in relevant part:

> A parent, guardian or the responsible educational agency may request a due process hearing before the Administrative Hearing

[1] *See also* § 162.825 RSMo 2000 regarding the creation of special school districts "for the education and training of handicapped and severely handicapped children." Statutory references are to RSMo 2012 Supp. unless otherwise indicated.

[2] Most of these findings of fact are based on the allegations contained in the complaint which, for purposes of a motion to dismiss for failure to state a claim, we assume to be true. ***Bosch v. St. Louis Healthcare Network***, 41 S.W.3d 462, 463 (Mo. banc 2001).

[3] Pub. L. 93-112 as amended.

[4] Pub. L. 107-110 as amended. 20 U.S.C. § 6313(a)(2)(E) of that Act allows students enrolled in a "school identified for improvement" to transfer to another school that has not been identified for improvement. We discuss the No Child Left Behind Act below.

> Commission with respect to any matter relating to identification, evaluation, educational placement, or the provision of a free appropriate public education of the child.

Those matters are the same ones stated in 20 U.S.C. § 1415(b)(6), part of IDEA. In this case, two of the three grounds raised by SSD for dismissal are based on allegations that we lack jurisdiction: under § 504 of the Rehabilitation Act of 1973 and the No Child Left Behind Act of 2001. We discuss those allegations first.

Section 504 of the Rehabilitation Act

SSD alleges that, to the extent that the complaint is governed by § 504 of the Rehabilitation Act of 1973,[5] we lack jurisdiction. It raises this argument because the complaint alleges the creation and participation of a "504 team" at Jamestown. It was this team, Petitioners further allege, that ultimately "failed to consider my request [to transfer Student to another school]. My input and concerned (sic) were not considered from the 504 team members when voicing my concerns about [Student] attending a failing team."

We agree with SSD that we lack jurisdiction of § 504 cases. Section 162.961.1 limits our jurisdiction to due process hearings under IDEA.

No Child Left Behind Act

The No Child Left Behind Act ("NCLBA") of 2001[6] was enacted "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[7] However, NCLBA does not provide a private right of action.[8] Further, actions arising under the NCLBA are not among the matters over which the legislature has granted us jurisdiction.

---

[5] Pub. L. 93-112.
[6] 20 U.S.C. § 6301 et seq.
[7] 20 U.S.C. § 6301.
[8] ***Horne v. Flores***, 557 U.S. 433, 456 n.6 (2009).

We agree with SSD that Petitioners' assertion that HCMS was a "school identified for school improvement" invokes the NCLBA. Once a local education agency has identified an elementary or secondary school that fails to make adequate yearly progress under a state's plan for two consecutive years, that school is "identified for school improvement."[9] When the school is thus identified, the local educational agency shall "provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency[.]"[10] We further agree that, to the extent the complaint sounds under NCLBA, we lack jurisdiction.

Does the complaint demonstrate IDEA compliance by Hazelwood and SSD?

SSD also claims that the complaint demonstrates that SSD and Hazelwood have fulfilled their IDEA obligations. In support, SSD points out that, while the complaint alleges that the 504 team at Jamestown failed to consider Parent's request to have Student transferred to another school due to HCMS's status as a "school identified for school improvement," the complaint also quotes Parent as saying that she "freely and meaningfully participated in the meeting with my views heard and considered by the team."

SSD appears to take this statement as an admission that Hazelwood and SSD complied with IDEA—an admission that contradicts Parent's allegation that the 504 team did not consider her request regarding relocation. However, neither this nor anything else in the complaint demonstrates such compliance.

Furthermore, to the extent that the complaint contains contradictory allegations, we acknowledge case law holding that, if the substantive allegations of a petitioner are mutually contradictory, the petition states no cause of action.[11] However, our Regulation 1 CSR 15-3.350(1) provides that we "shall construe the provisions of this rule liberally if petitioner has

[9] 20 U.S.C. § 6316(b)(1)(A).
[10] 20 U.S.C. § 6316(b)(1)(E).
[11] ***DeVault v. Truman***, 194 S.W.2d 29, 32 (Mo. 1946).

prepared the complaint without legal counsel." Given that liberal construction, we will not hold the complaint, which was prepared *pro se*, to so exacting a level of scrutiny.

No jurisdiction over this case because it is not governed by § 162.961.1

We may raise the issue of jurisdiction *sua sponte*,[12] which we do here. As set out above, cases brought under IDEA are limited to matters relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.[13]

In this case, the complaint can be read as seeking an alternative educational placement for Student. The term "educational placement," however, is not defined in the governing statutes. A recent case analyzed the issue this way:

> The term ["educational placement"] means more than the physical school building that a child attends. The Fifth Circuit defined "educational placement" as a term of art meaning "educational program—not the particular institution where that program is implemented." The Second Circuit agreed, noting that educational placement refers to the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school.[14]

(internal citations omitted) Following this analysis, we conclude that "educational placement" for IDEA purposes is best seen as not determining what school generally performs better, but whether Student's educational program provides some educational benefit. However, Petitioners only want to transfer Student to another school on the basis of HCMS being a school identified in need of school improvement.

---

[12] ***State Tax Comm'n v. Administrative Hearing Comm'n***, 641 S.W.2d 69, 72 (Mo. banc 1982).

[13] 20 U.S.C. § 1415(b)(6); Section 162.961.1.

[14] ***D.K. ex rel. Klein v. District of Columbia***, 2013 WL 4518207 at *5; 113 LRP 34711 (D.D.C. Aug. 26, 2013).

Because the complaint fails to identify a cause of action cognizable under IDEA, we lack jurisdiction to hear it. Because we lack jurisdiction to hear the case, we do not discuss the merits of SSD's motion to dismiss for failure to state a claim.

Summary

We dismiss the complaint.

SO ORDERED on September 18, 2013.

_____

SREENIVASA RAO DANDAMUDI
Commissioner