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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

ROBERT SMITH JOHNSON, et al.,	)	
Plaintiffs,	)	
v.	)	C.A. NO. 3:92CV621
WETSMORELAND COUNTY SCHOOL BOARD, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant Virginia Department of Education's (the "Department's") motion to dismiss, pursuant to Rule 12(b)(6) of the Fed. R. Civ. P. The Court's jurisdiction to hear this action is based on the federal questions presented. For the reasons stated below, the Defendant's motion is GRANTED.

BACKGROUND:

This is a civil action brought by a multi-handicapped child, Robert Smith Johnson ("Johnson"), and his parents, arising from the child's placement in a residential facility by Defendant Westmoreland County School Board ("School Board"). While not disputing their son's need for special education, his parents assert that he can be educated in the local public school. Plaintiffs thus allege that the defendants failed to provide Johnson, first, a free and appropriate public education in the least restrictive environment, and second, a timely resolution of complaints regarding his special education program.

On August 30, 1991, in accordance with federal and state administrative procedures, a Special Education Hearing Officer ("hearing officer") conducted a Special Education Due Process Hearing, subsequently ruling in favor of the School Board. Plaintiffs appealed this ruling on September 23, 1991, and on May 13, 1992, the Administrative Special Education Reviewing Officer affirmed the hearing officer's decision. Plaintiffs now appeal to the Court, under the rubric of the Individuals with Disabilities Education Act ("IDEA"). In addition to the School Board, the Department is named in the suit on the basis that the state hearing officer's decision was issued eight months late.

DISCUSSION:

The IDEA requires all states and school districts that receive funds under the Act to take affirmative steps to identify, evaluate and provide appropriate educational programs and services to all handicapped children within their jurisdiction. 28 U.S.C. § 1331, 29 U.S.C. § 794, and 20 U.S.C. § 1401, et seq. Virginia receives such federal assistance and is thus required to mandate all of its public schools to provide handicapped children with an individually designed and free education in the least restrictive environment appropriate to his or her needs. See 20 U.S.C. § 1401(a)(18).

Federal regulations implementing the IDEA also require local educational agencies to develop and implement an "individualized education plan" ("IEP") for each child, a plan that the parents are permitted to participate in. See 34 C.F.R. §§300.341,

300.344. If the parents cannot come to agreement with the local agency over their child's IEP, they may appeal to the state educational agency, which must provide "an impartial review." Id. Virginia accomplishes this review requirement by providing an administrative officer who is appointed by the state supreme court and whose decision may be reversed by court action. 34 C.F.R. § 300.510(c), 20 U.S.C. § 1415(e). However, federal law precludes a state from taking any position or in intervening in any other way in the administrative hearings. See Antkowiak v. Ambach, 838 F.2d 635 (2d Cir.), cert. denied sub nom. Doe v. Sobol, 488 U.S. 850 (1988).

In considering a motion to dismiss, Plaintiff's allegations and their reasonable inferences must be taken as true. See Hospital Bldg. Co. v. Trustee of Rex Hospital, 425 U.S. 738, 740 (1976). Dismissal is only appropriate if Plaintiff is "entitled to no relief under any state of facts which could be proven to support its claim." Advanced Health-Care Services, Inc. v. Radford Community Hospital, 910 F.2d 139, 143-144 (4th Cir. 1990). The moving defendant appears to have met this rigorous standard here.

The Complaint seeks no specific relief against the Department. It alleges, and the state concedes, that the hearing officer failed to file her decision within the required time. See Va. Code §22.1-214. The case cited by the plaintiffs on the propriety of naming the Department as a party herein does not really shed much light on the issue. Cordero v. Pennsylnania

Dep't of Educ., 18 IDELR 1099 (1:91CV0791, M.D. Penn. June 23, 1992) was a class action charging pervasive problems and neglect in that state's special education system, notably the unreasonable delays encountered by children with disabilities in need of private placement. The court admonished the defendant, noting that its responsibility to provide special education placements under the IDEA "amounts to more than creating and publishing some procedures and then waiting for the phone to ring." Id. at 1100.

Here, Plaintiffs have not shown that the delay rises to the level of "a pattern of neglect." More importantly, they have not shown how this delay harmed the child, insofar as he remained in the public school while the decision was pending. The effect of delays where a child in need of private placement is left in the public school is clearly different from a situation where a child who is argued to belong in the public schools is left there while the decision is pending. No other allegations of harm or wrongdoing are alleged in the Complaint. Accordingly, dismissing this action, as to the Department, is appropriate under Rule 12(b)(6).

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

DATE

SENIOR UNITED STATES DISTRICT JUDGE