

VIRGINIA:

DUE PROCESS HEARING DECISION



NAME OF PARENT:
NAME OF CHILD:
PARENT'S COUNSEL: N/A

SCHOOL DIVISION :
COUNSEL : Andrea D. Gemignani, Esq.

VIRGINIA DEPARTMENT OF EDUCATION: Dr. Judith Douglas
OFFICE OF THE ATTORNEY GENERAL: Anthony P. Meredith, Esq.

PARTY INITIATING HEARING: Parent
HEARING OFFICER: Morgan Brooke-Devlin, Esq.

DECISION

STATEMENT OF THE CASE:

THIS MATTER arises from a request for a due process hearing on behalf of [redacted], requested by Mother, [redacted] on January 7, 2005. A pre-trial hearing was held in the office of Morgan Brooke-Devlin, Hearing Officer, on January 25, 2005. Motions to Dismiss [redacted] request for a due process hearing had been submitted prior to the pre-trial hearing by the [redacted] Public Schools and the Virginia Department of Education on the grounds that the request was time barred. Counsel for the Virginia Department of Education also moved to dismiss on the grounds that the Hearing Officer lacked subject matter jurisdiction in regard to the claims asserted against the Department of Education. Briefs and supporting documentation were submitted by the parties on the issue of the applicable statute of limitations, and whether the request for a due process hearing was time barred.

FINDINGS OF FACT AND LAW:

1. The Rehabilitation Act of 1973 does not contain any statute of limitations or notice of claims provisions.

2. The Fourth Circuit and the U.S. District Courts in Virginia require the Virginia tribunal to "borrow" and apply the most analogous Virginia statute of limitations to cases brought under § 504 of the Rehabilitation Act of 1973. Wolsky v. Medical College of Virginia, 1 F.3d 222 (4th Cir. 1993), cert denied, 410 U.S. 1073 (1994).

3. The Fourth Circuit and the U.S. District Courts in Virginia have held that the most analogous state statute to borrow from for a statute of limitations for § 504 causes of action is the Virginia Rights of Persons with Disabilities Act, Va. Code §51.5-40 to §51.5-46. Smith v. Isle of Wight County School Board, 284 F. Supp. 2d 370 (E.D. Va. 2003).

4. A one year statute of limitations from the date of the alleged discriminatory event is to be applied to cases brought under § 504 which is borrowed from the Virginia Rights of Persons with Disabilities Act. (§51.5-40 to §51.5-46). Smith v. Isle of Wight, Id..

5. The one year statute of limitation applies to proceeding brought before a judicial forum or in an administrative one. Manning v. Fairfax County School Board, 176 F. 3d 235 (4th Cir. 1999).

6. A § 504 cause of action accrues under federal law when the Complainant knows or has reason to know of the injury which is the basis of the action. Richards v. Fairfax County School Board, 798 F. Supp. 338, 343 (E.D. Va. 1992) and R.R. v. Fairfax County Public Schools, 338 F.3d 325, 332 (4th Cir. 2003).

7. The last act of alleged retaliation and discrimination that form the basis for Ms request for a Due process hearing occurred on or before December 7, 2002.

8. Ms failed to request a due process hearing within one year from the date of the alleged retaliation and discrimination.

9. Ms January 7, 2005 request for a Due process hearing is time barred by the one year statute of limitations.

10. The Fourth Circuit and the U.S. District Courts in Virginia require the Virginia tribunal to "borrow" and apply the most analogous Virginia 180 day notice requirement to cases brought under § 504 of the Rehabilitation Act of 1973.

11. The Fourth Circuit and the U.S. District Courts in Virginia have held that the most analogous state statute to borrow from for the purpose of giving notice in § 504 claims is the Virginia Rights of Persons with Disabilities Act, Va. Code §51.5-40 to §51.5-46, that requires that a claimant, within 180 days, either commence action on his or her claim or file by registered mail a written statement of the nature of the claim. . Smith v. Isle of Wight County School Board, 284 F. Supp.2d 370 (E.D. Va. 2003).

12. Ms did not commence an action on her claim nor did she file by registered mail a written statement of the nature of her claim with Public Schools within 180 days of December 7, 2002.

13. Ms January 7, 2005 request for a Due process hearing is barred by her failure to either commence action on her claim or file by registered mail a written statement of the nature of the claim within the 180 day notice period.

14. Ms May 2004 request for a Due process hearing did not include a § 504 claim for alleged retaliation and discrimination arising from the criminal action brought against her in December of 2002.

15. The provisions of § 504 do not require the school system to notify or inform parents of the statute of limitations for requesting a Due process hearing. R.R. v. Fairfax County Public Schools, 338 F.3d 325, 332 (4th Cir. 2003).

CONCLUSION OF LAW:

The request for a Due process hearing filed by Ms [redacted] on January 7, 2005 is time barred by the applicable one year statute of limitations and by her failure to commence a claim or provide written notice by registered mail to [redacted] Public Schools within the 180 day notice period. A review of the request for a Due process hearing made by Ms [redacted] in May of 2004 fails to reveal any mention of a claim that she was the victim of retaliation from the [redacted] Schools or any claim of discrimination against her [redacted]. However, even if she had made her claim at that time it still would have been time barred. Any request for a Due process hearing under § 504 would have to have been made by December 7, 2003.

ORDER

The Motions to Dismiss Ms [redacted] request for a due process hearing made by the [redacted] Public Schools and the Department of Education is granted and Ms [redacted] due process request is hereby dismissed. Since the request for a due process hearing is dismissed the Motion to Dismiss on the grounds that the Hearing Officer lacks subject matter jurisdiction over claims made against the Department of Education in a due process hearing against the Virginia Department of Education are moot.

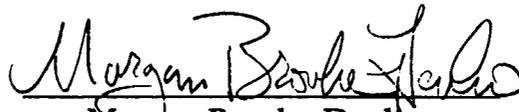
APPEAL INFORMATION:

8 VAC 20-80-76 (O) Right of Appeal

A decision by the hearing officer in any hearing... shall be final and binding unless the decision is appealed by a party in a state circuit court or in a federal district court within one year of issuance of the decision.

1. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy.
2. If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change of placement is appropriate in accordance with subsection E of this section. In those cases, the hearing officer's order must be implemented while the case is being appealed.

ENTERED this 9th day of March, 2005.


Morgan Brooke-Devlin
Hearing Officer

CERTIFICATE OF SERVICE

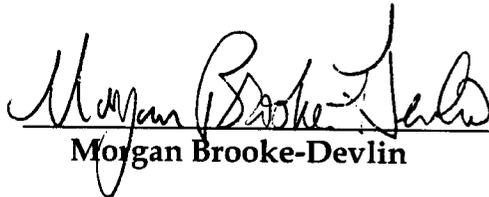
I hereby certify that a true copy of the foregoing Decision was sent by facsimile mail and by first class mail, postage pre-paid this 9th day of March, 2005.
to:

Ms Andrea Gemignani, Esq.,
BLANKENSHIP & KEITH
4020 University Drive, Suite 300

Fairfax, Virginia 22030
Via facsimile: 703-691-3913

Mr. Anthony P. Meredith, Esq.
Office of the Attorney General
Commonwealth of Virginia
900 E. Main Street, 4th Floor
Richmond, Virginia 23219
Via facsimile: 804-786-2650

Dr. Judith Douglas, Director
Office of Dispute Resolution
Commonwealth of Virginia
Department of Education
P.O. Box 2120
Richmond, Virginia 23218
Via facsimile: 804-786-8520



Morgan Brooke-Devlin