10-069

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: **, Child**

Findings of Fact and Decision

Parent:

Counsel for the Parent: , *Pro se*
Street,
, Virginia

Counsel for City Public Schools: Derek A. Mungo, Esquire
City of Norfolk, Department of Law
810 Union Street
900 City Hall Building
Norfolk, Virginia 23510

School Division: Public Schools ("LEA")

School Representative: Senior Director of Special Education Services
Public Schools

Hearing Officer: Sarah Smith Freeman, Esquire
210 East Road
Portsmouth, Virginia 23707

Hearing Location: School
Avenue
, Virginia

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: Child

Expedited Due Process Hearing

Findings of Fact and Decision

Counsel for Parent:

., *Pro se*
Street,
., Virginia

Counsel for City Public Schools:

Derek A. Mungo, Esquire
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900 City Hall Building
Norfolk, Virginia 23508

This matter came to be heard upon the complaint for due process filed on April 26, 2010, by the Parent, ("Parent"), against City Public Schools, ("the LEA") under the Individuals with Disabilities Education Act, ("the IDEA"), 20 U.S.C. 1400, *et seq.*, and the regulations at 34 C.F.R., Part B, Section 300, *et seq.*, and the Virginia Special Education Regulations, ("Virginia Regulations"), at 8 VAC 20-81-10, *et seq.*

This due process hearing was held before the undersigned hearing officer on May 20, 2010, in a conference room at the LEA, in City, Virginia. The hearing was open to the public and transcribed by a court reporter.

Parent represented the Child at the hearing. A Special Education Senior Director, ("the LEA Representative"), and counsel represented the LEA, ("LEA

counsel").[1]

This decision is timely and within the 30 day limitation period for expedited due process hearing requests under the IDEA. [2]

The record includes: the due process request, LEA exhibits and witness list, Parent's exhibits and witness list, the hearing transcript, and the written decision.

Burden of Proof

In this case Parent challenges the LEA's proposed change of placement for her son prior to his removal, for student conduct disciplinary infractions, from the regular classroom. Parent alleges a denial of FAPE in the LRE for her son. Parent alleges that the Manifestation Determination Review, ("MDR"), was faulty.

In *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof, in an administrative hearing challenging an IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Id.* at 537.

Accordingly, I find that the burden of proof is on the Parent at this due process hearing.

Factual Background

1. The Child is 13 years of age.[3] The Child qualified for special education services

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[1] Parent indicated on the due process request that a family friend represented her. Later, the family friend declined representation.

[2] "[The special education hearing officer has the authority to...] 13. Hold an expedited hearing when a parent of a child with a disability disagrees with any decision regarding a change of placement for a child who violates a code of student conduct, or a manifestation determination, or a local education agency believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others. a. The hearing shall occur within 20 school days of the date the due process notice is received. The special education hearing officer shall make a determination within 10 school days after the hearing." *See also* 8 VAC 20-81-210(P)(13); 8 VAC 20-81-210(P)(13)(a) (2010).

[3] The hearing officer obtained this information from Parent's due process request.

under the IDEA, classified as Other Health Impairment, ("OHI"), on July 26, 2006. He attends eighth grade at this LEA. The LEA plans to change the Child's placement after he was suspended from school for more than ten (10) days this year. [4] The LEA conducted an MDR on April 28, 2010 for the Child. The MDR committee determined that the Child's disability has no nexus to his disciplinary infractions. The IEP team subsequently recommended the Child's removal from school and changed his educational placement to a disciplinary setting. R-39.

2. The hearing officer sent written notice of the hearing, set for May 20, 2010, to the Parent on April 28, 2010. The hearing notice advised the Parent of the submission date, May 13, 2010, in writing, for exhibit and witness list delivery to LEA counsel and to the hearing officer. Parent indicated that she knew that the IDEA required her to exchange documents and witnesses with LEA counsel at least five (5) business days before May 20, 2010. [5] Parent was verbally advised again of the mutual exchange date and LEA counsel's office location during a pre-hearing conference on May 7, 2010. Parent delivered her witness list and exhibits to this hearing officer on May 13, 2010. But Parent did not deliver the witness list and exhibits to LEA counsel's office on May 13, 2010. Nor did Parent deliver the items to LEA counsel at a later date. LEA counsel fully complied with the five (5) business day rule by delivering all LEA documents and the witness list to the Parent and to the hearing officer on May 13, 2010.

3. Parent verbally advised this hearing officer on May 17, 2010 of her error. Parent

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[4] These facts were taken from the LEA's exhibit binder. LEA exhibits are marked, "R."

[5] "[The special education hearing officer has the authority to...] 1. Exclude any documentary evidence that was not provided and any testimony of witnesses who were not identified at least five business days prior to the hearing; [and] 2. Bar any party from introducing evaluations or recommendations at the hearing that have not been disclosed to all other parties at least five business days prior to the hearing without the consent of the other party;" *See also* 8 VAC 20-81-210(P)(1) & (2) (2010).

requested a continuance and moved that this case be converted to the conventional IDEA timeline of forty-five (45) days. This hearing officer attempted to arrange another pre-hearing conference but available time could not be coordinated between LEA counsel and the Parent. This hearing officer then requested that Parent make her continuance request in writing. Parent delivered her written request, via e-mail, to this hearing officer and to LEA counsel on May 19, 2010.

4. On May 20, 2010 the parties convened for a the due process hearing in an LEA conference room - school witnesses, Parent, the Child, the maternal grandmother, the Virginia Department of Education reviewer, LEA counsel, the LEA Representative and this hearing officer. The court reporter was sworn in. Both parties were provided a written copy of the pre-hearing report. Both parties indicated they understood its contents. Then this hearing officer heard preliminary motions. Parent verbally reiterated her written request for extension of this case, conversion of the expedited timeline and for time to acquire legal representation. Parent stated again that she did not understand the necessity for the "expedited" timeline. Parent then requested dismissal, without prejudice, of this case. TR.[6]

5. Again this hearing officer confirmed the background for the LEA's expedited IDEA timeline request. LEA counsel outlined the factual basis of this case. This hearing officer again ruled that the facts of this case do conform to an IDEA expedited timeline pursuant to 8 VAC 20-81-210(P)(13). LEA counsel objected to Parent's general continuance request, to conversion of the expedited timeline and to extension of the timeline to obtain legal representation. LEA counsel did not consent to the suggestion that school witnesses be deemed joint witnesses. Then LEA counsel moved to

[6] "TR" refers to the hearing transcript taken on May 20, 2010.

exclude Parent's witnesses and documentary evidence for violation of the five (5) business day rule under 8 VAC 20-81-210(P)(1) & (2). The LEA Representative testified on May 20, 2010. She refuted Parent's assertion that Parent did not understand the reason for the IDEA's expedited timeline. The LEA Representative asserted that she personally explained to Parent, prior to Parent's due process request filing, the IDEA's "accelerated" timeline for expedited cases. Parent denies that the LEA Representative related any of these to facts to her. TR.

Decision

Parent claims that her Child's educational placement is at issue. Parent asserts, in her due process request, that the LEA denies the Child a FAPE by wrongfully planning to remove him to a disciplinary setting. Parent asserts that the MDR committee and IEP team have not made sound educational decisions concerning the Child.

On the date scheduled for hearing, May 20, 2010, Parent requested that the hearing officer exercise discretion by converting the expedited status of this case to a forty-five (45) day IDEA timeline. Parent then requested an extension to obtain legal counsel. Parent also requested alternative relief by requesting that this hearing officer dismiss this case, without prejudice. This hearing officer ruled against a continuance, extension, or dismissal, without prejudice. This hearing officer then indicated that a written decision, supporting the oral ruling, would be delivered by June 3, 2010. For the following reasons, I find that Parent has not met the burden of proof at this due process hearing. TR.

1. Parent Is Not Entitled To An Extension Of The Expedited IDEA Timeline.

Parent is not entitled to the relief she seeks. Parent was timely advised orally and in writing of the hearing date. Parent has made no assertion indicating that an extension serves the best interest of this child. The IDEA provides the Parent with an expedited due process hearing because Parent disagrees with the LEA's change of placement for the Child. When the student conduct code is violated by a disabled student, the LEA conducts a manifestation determination. If the MDR committee determines there is no causal connection between the Child's disability and the infractions, the LEA may move for an expedited due process hearing if maintaining the Child's current placement is dangerous, under 8 VAC 20-31-210(P)(13).

In an expedited hearing, the exigency of the Child's educational placement is paramount. Thus, the IDEA provides for a quicker hearing officer resolution - within 10 school days after the hearing. The IDEA timeline is "accelerated" to expeditiously resolve the Child's placement. This hearing officer explained these aspects of an expedited hearing to the Parent.

Parent stated earlier, at the due process hearing, that she became overwhelmed with the expedited IDEA timeline. Parent's frustration with meeting the IDEA timeline is understandable. But this hearing officer's empathy for Parent's situation does not alter the outcome of this case. Parent's requests for extension of this matter are denied. Parent has had sufficient time to hire counsel and has elected not to do so. Thus, I find that Parent did not comply, in good faith, with the IDEA five (5) business day rule.

Thus, this hearing officer grants the LEA's Motion To Dismiss, with prejudice, to serve the best interest of the Child, by moving this case promptly toward a conclusion,

under 8 VAC 20-81-210(P)(10). [7]

2. The Motion To Dismiss Is Granted With Prejudice.

This case is dismissed with prejudice because the LEA has no information from which the school may derive any insight about Parent's complaint. There are no witnesses to examine or documents to dispute. Parent has provided no clarity for the LEA to support or oppose Parent's stance in this case. The LEA has no ability to defend against Parent's case. The LEA must receive substantive notice that a parental complaint exits or the LEA cannot be charged later with actual knowledge of its existence. *Thompson v. Board of Special Sch. District No 1,* 144 F.3d 574 (8th Cir. 1998), *Combs v. Sch. Bd. of Rockingham Co.* 15 F.3d 357 (4th Cir. 1994). (School boards must be given adequate notice of a problem to be charged with knowledge of it). Parent's non-compliance has made it impossible for the LEA to proceed at the due process hearing. The IDEA does not require the LEA to proceed if the Parent provides no objective basis for the Parent's complaint.

Thus, Parent does not meet the burden of proof at this expedited due process hearing. Parent is unable to present any evidence on any IDEA issues at hand.

The LEA is the prevailing party in this due process hearing.

Right of Appeal Notice

This decision shall be final and binding unless either party appeals in federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.

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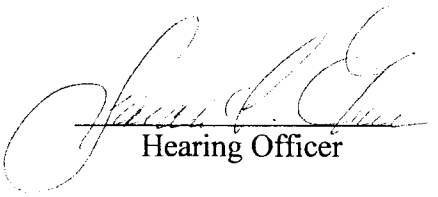
[7] "[The special education hearing officer has the authority to ...] 10. Take action to move the case to a conclusion, including dismissing the pending proceeding if either party refuses to comply in good faith With the special education hearing officer's orders;" *See also* 8 VAC 20-81-210(P)(10) (2010).

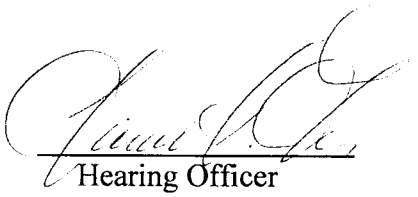
Date of Decision: June 3, 2010



Hearing Officer

Certificate

I do hereby certify that I have mailed the above Findings of fact and decision to the parent and to LEA counsel on this date.



Hearing Officer

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