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Dispute Resolution &
Administrative Services

VIRGINIA:

DEPARTMENT OF EDUCATION

Due Process Hearing

	:
Student,	:
	:
v.	:
	:
Public Schools	:

ORDER OF DISMISSAL

This cause came on to be heard on October 29, 2007 on the Motion to Dismiss filed by _____ Public School and pursuant to the decision of the Hearing Officer dated November 2, 2007

It is accordingly **ORDERED** that the Request for a Due Process Hearing be and it hereby is, dismissed with prejudice.

AND THIS ORDER IS FINAL

ENTERED: November 2, 2007



 George C. Towner, Jr.
 Hearing Officer

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**Dispute Resolution &
Administrative Services**

VIRGINIA:

DEPARTMENT OF EDUCATION

Due Process Hearing

Student

v.

Public Schools

DECISION

Statement of the Case

This matter came on to be heard before the undersigned Hearing Officer upon the Second Amended Request for a Due Process Hearing filed by the parents of _____ on October 9, 2007, and upon the Response of _____ Public Schools (hereinafter PS) dated October 19, 2007. The Response asserted that the claims of the parents for reimbursement of private school tuition for the school years 2005-2006 and 2006-2007 were barred by the applicable two-year statute of limitation found in Va. Code Sec. 8.01-248. Counsel appeared before the Hearing Officer on October 29, 2007, and argued their respective positions.

Statement of Facts

_____ was initially found by PS to be eligible for special education in 2001

with a classification of other health impairments. On March 31, 2005, the Elementary School IEP team met with Mrs. [redacted] and conducted the IEP meeting. The IEP team presented an IEP. (PS Ex. 1) [redacted]'s special education services were to be provided at [redacted] Elementary. Mrs. [redacted] was unwilling to consent to the IEP. The IEP contained the notation that Mrs. [redacted] intended to review the IEP with her husband.

On May 2, 2005, the principal of [redacted] wrote a letter to the [redacted] advising the parents that in accordance with provisions of IDEA the school division was required to provide the parents with written notice when a school division

“... proposes to initiate or change the identification, evaluation or educational placement of a child ...” (PS Ex. 2)

The May 2nd letter described (1) the actions proposed at the IEP meeting, (2) the other options considered, (3) the information used as a basis for the proposed action, and (4) provided a list of the factors relevant to the decision.

The [redacted] wrote PS a letter dated June 24, 2005, which “... raised some specific concerns and ... made suggestions ...” (PS Ex. 5) The letter made specific objections to the classroom accommodations proposed in the IEP.

On July 25, 2005, the principal of [redacted] wrote a letter to the [redacted] stating that in view of the concerns expressed in the June 24th letter she requested that an IEP meeting be held and requested that the [redacted] contact school staff to establish as date and time for the IEP team to meet. The parents did not seek an IEP meeting.

In a letter dated July 20, 2005, the _____ wrote to the principal of _____ that

“We do not feel that _____ PS is willing or capable of implementing a program that is appropriate for _____’s needs. At this time we intend to remove our son, _____; from the _____ PS system and place him at _____ School”

In a letter dated August 25, 2005, the principal of _____ wrote a letter to the _____ stating that she had been advised that the parents had planned to withdraw from _____ PS (_____ PS Ex. 7). She stated that _____ PS was still prepared to offer special education services and that if the parents want to reconvene a new IEP meeting they should call _____ Elementary.

_____ PS introduced as Ex. 8 a Registration Contract with _____ School for _____’s enrollment dated May 12, 2005 and in addition provided an invoice from _____ school which recited the payments made in May, June and July 2005. It is alleged by the parents that _____ physically commenced his education at _____ School on September 6, 2005.

The initial Request for a Due Process hearing (dated August 31, 2007) was received by _____ PS on September 4, 2007.

Decision

The Hearing Officer is of the opinion that the claims of the parents for reimbursement of 2005-2006 and 2006-2007 private school tuition are barred by the applicable two-year statute of limitation found in Va. Code Sec. 8.01-248 as asserted by _____ PS on the following grounds:

1. The IEP of March 31, 2005, was a valid proposal by PS. The parents had their choice to accept or reject it. While PS may have thought that the consented to the IEP, the failed to confirm their acceptance by signing the IEP so it remained a proposal. By their letter of July 20, 2005, the parents rejected the IEP. Parents' counsel construes the IEP process as an ongoing negotiation where nothing firm exists. The Hearing Officer disagrees. The creation of the IEP on March 31st is a valid starting point. Naturally, if the parents sought some modification of the proposed IEP,

PS had expressed a willingness to pursue some accommodations by convening a new IEP meeting. However, the pursuit of those accommodations did not alter the status of the March 31st IEP as a valid proposal and a valid starting point. Only a new IEP meeting and a new IEP could alter that status. Counsel for the parents asserts that the cause of action accrues at the point where the parties "... have failed to reach an agreement." This argument is clearly flawed. Such an argument could lead to a situation where, if the parents elected never to agree to the IEP, that there never would be a time when the limitation period was tolled. As stated above the statute began to run on March 31, 2005. All of the subsequent correspondence and actions by the parents did not alter that fact.

2. The parents contend that the letter dated May 2, 2005, does not constitute the prior written notice as required by Sec 300.503. The Hearing Officer disagrees. The form and content of the letter clearly indicate that the author was attempting to comply with

the itemized requirements of Sec 300.503 and to provide the data in the notice required by that section. It was based on the March 31st IEP as it should have been.

3. The parents also contend that there was an affirmative requirement on the part of PS to offer objections or alternatives in response to the comments made by the parents. The Hearing Officer does not accept this argument. PS did what it was required to do by IDEA which was to provide an IEP which purported to provide with a free appropriate public education (FAPE). With that proposal before them it was the parents' choice as to how to proceed. As stated by Mr. Cafferky in argument, PS was stuck with its IEP. If in fact the IEP didn't provide FAPE for [redacted] and the parents had privately placed [redacted] into a situation which did provide an appropriate education, then PS would be obligated to pay for that placement.

4. The parents also contend that because they couldn't know whether [redacted] would be able to provide appropriate services the statute did not begin to run until they had enough information to make that decision. This argument mistakes the vital nature of the IEP in the educational process. It either does or does not provide FAPE. Whether the parents get reimbursed for their private placement is of secondary import and does not even come into play unless the parents can show that FAPE was not provided. There is a two-year time limitation for the parents to challenge the IEP and the parents did not meet that limitation.

5. The parents also argued that the May 2nd letter from PS acknowledges that

the [redacted] were in agreement with the IEP. In order for the parents to be in agreement with the IEP they needed to sign the IEP indicating their consent which they did not do.

6. The parents also argued that by the August 25th letter [redacted] PS had agreed with the parents' placement of [redacted] at [redacted]. A review of that letter makes it clear to the Hearing Officer that the letter of August 25th expresses no such agreement. Why would [redacted] PS want to convene a new IEP meeting if they understood that they had agreed to [redacted]'s placement at [redacted]? The clear answer is that there was no such agreement.

7. Counsel for the parents also contended that the July 20th letter was not a rejection of the IEP but simply an entreaty to negotiate. The plain English of the letter refutes that notion.

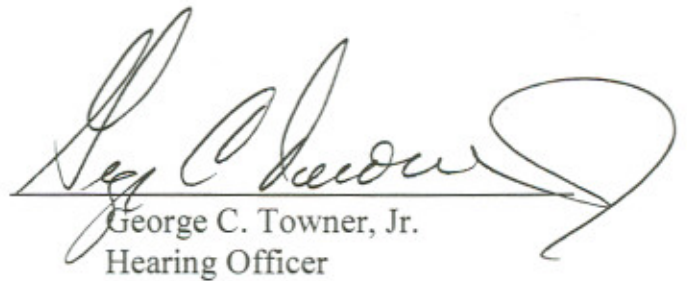
“At this time we intend to remove our son, [redacted], from the [redacted] PS system and place him at [redacted] School”

is surely not saying we accept your IEP nor is it saying we want to negotiate. If in fact the parents wanted to negotiate, they could have requested a new IEP meeting. This they did not do.

For the above reasons the Motion to Dismiss filed by [redacted] PS is granted as to the claims of the parents for reimbursement of 2005-2006 and 2006-2007 private school tuition.

And this decision is final.

Dated November 2, 2007



George C. Towner, Jr.
Hearing Officer

APPEAL NOTICE

The parties are hereby notified pursuant to 8 VAC 20-80-76 O that a decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision or in a state circuit court within one year of the date of this decision..