

08-051

Received

MAR 27 2008

CASE CLOSURE SUMMARY REPORT

Dispute Resolution & Administrative Services

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

Public Schools
School Division

Name of Parent(s)

Name of Child

March 25, 2008
Date of Decision or Dismissal

G. Rodney Young, Esq.
Counsel Representing LEA

Pro se
Counsel Representing Parent/Child

Parents
Party Initiating Hearing

School Division
Prevailing Party

Hearing Officer's Determination of Issues(s):

Whether child was denied FAPE after he was discharged by private school; Whether the IDEA and Virginia provide due process remedy against private school.

Hearing Officer's Orders and Outcome of Hearing:

Private school is not subject to jurisdiction of due process hearing officer.

School Division provided FAPE to child.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Peter B. Vaden
Printed Name of Hearing Officer

 3/25/08
Signature

cc: Maximilian A. Grant, Esq.
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Jason Burt, Esq.
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Counsel representing

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: _____ } Findings of Fact
Due Process Hearing } and
_____ } Decision

Parents:

_____, _____ and
_____, *Pro se*

Public Schools:

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This matter came to be heard upon the complaint for due process filed by the parents, _____, _____ and _____, (“the Parents”) under the Individuals with Disabilities Education Act (the “IDEA”), 20 U.S.C. §1400 et seq., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia (“Virginia Regulations”). This due process complaint arises out of a private school’s discharge of the child, _____ (“_____”), from its school for children with autism in Charlottesville,

Virginia. The Parents named as respondents the private school, _____ of the _____ (“_____”), and the local educational agency (“LEA”), _____ Public Schools (“_____”). The Parents allege that _____’s discharge of _____ was unlawful and request relief against the private school, including, *inter alia*, compensatory education services.

_____ seeks its dismissal as a party to the due process proceeding on the grounds that as a private school, it is not subject to the jurisdiction of the hearing officer and that the relief requested by the Parents against _____ cannot be granted. _____ takes no position on whether _____ is subject to the hearing officer’s jurisdiction, but moves for dismissal of the complaint as to it. The requirements of notice to the Parents have been satisfied.

The due process hearing was held before the undersigned hearing officer over two days, on February 28, 2008 and March 10, 2008, at the _____ Administration Building in _____, Virginia. The hearing, which was closed to the public, was transcribed by a court reporter. The Parents appeared at the hearing *pro se*. The LEA was represented by _____, Director of Special Services, and by counsel. _____ declined to appear for the first day of the hearing. On March 10, 2008, _____ appeared and was represented by its Executive Director, _____, and by counsel. The Parents and _____ made opening statements. In lieu of making closing statements, all parties submitted post-hearing written argument.

Prior Proceedings in this Case and in Related Federal Court Action

_____ received the Parents’ complaint for due process on December 26, 2007. Although the Parents named _____ and _____ as respondents, all of the specific relief¹ the Parents

¹ Original relief requested by Parents in their complaint:

The hearing officer should find and grant relief on this complaint as followed:

's discharge of _____ was intentional and in violation of the law and applicable regulations, the Principal Contract and PSO with _____ CPMT, contractual obligations with _____, contractual obligations and the course and conduct of dealings among _____, _____ and _____'s parents, and was dishonorable.

's refusal to provide educational services provided for by _____'s current IEP placement was intentional and in violation of the law and applicable regulations, the Principal Contract and PSO with _____ CPMT, contractual obligations with _____, contractual obligations and the course and conduct of dealings among _____, _____ and _____'s parents, and was dishonorable.

's discharge of _____ was done for discriminatory purposes to avoid accommodating disabilities of _____ and certain behavioral challenges of which _____ was aware when _____ was admitted.

's refusal to accommodate _____'s disability should be remedied by all available relief, including continued monitoring by the Virginia Department of Education of _____'s conduct and dealing with all its students.

_____ should be granted his parents' request for a functional behavior assessment in the classroom setting.

_____ should attend and participate in IEP Team meetings relating to _____.

_____ should hire and train the Behavior Support Specialist it was recruiting at the time _____ was discharged, with the offered funding from _____.

_____ should provide _____ compensatory services.

_____ should be bound by the disclosure of documents to _____'s parents as requested by them, and not allowed to rely on any documents not disclosed on December 13 to _____'s parents.

_____ should accept _____'s placement pursuant to the stay-put requirements.

_____ 's management and Board should pledge to operate pursuant to the law and governing regulations and not discriminate against students based on their disabilities.

_____ 's Executive Director and Acting Director of Education should gain additional training necessary to support disabled students at _____.

_____ should be ordered to comply with all Regulations Governing the Operation of Private Day Schools for Students with Disabilities, including the requirement of providing a copy

originally requested was directed against _____.

On January 3, 2008, the Parents filed a request with the previous hearing officer² for a stay-put order pursuant to 20 U.S.C. § 1415(j) directed to _____. On January 4, 2008, the hearing officer granted the Parents' request and ordered _____ to grant the placement (at _____) provided in _____'s most recent (August 28, 2007) Individualized Education Program ("IEP"). _____ promptly filed a motion to rescind the stay-put order on the grounds that as a private facility, _____ was not a proper party to the due process proceeding and that _____ was not subject to the § 1415(j) stay-put requirement. The hearing officer denied _____'s motion. The same day, _____ filed a supplemental pleading to request an alternative interim placement for _____, because of its belief that maintaining _____ at _____ was substantially likely to result in injury to _____ or to others. On January 10, 2008, the hearing officer denied _____'s motion, holding that as a private school, _____ did not have standing to seek application of the dangerousness exception to the stay-put requirement.

On January 22, 2008, _____ filed a complaint in the United States District Court for the _____
of the Parent Manual to all placing LEAs.

_____ should be ordered to comply with 8 VAC 20-80-70: "All procedural safeguards required by regulations governing the education of students with disabilities shall apply for eligible students."

_____ should be required to have its facilities inspected by experts in the environmental accommodation of children with the disability of autism to insure that reasonable and appropriate modifications are made to protect those children.

_____ should be granted any and all other relief appropriate on this complaint.

² _____ initially appointed hearing officer John R. Hooe, III to conduct this due process hearing. Mr. Hooe withdrew for personal reasons and the present hearing officer was appointed on January 29, 2008.

Eastern District of Virginia (Richmond Division) against the Virginia Department of Education, and the hearing officer, seeking, *inter alia*, a declaratory judgment that as a private school, was not bound by the hearing officer's stay-put order.³ On March 7, 2008, U.S. District Judge Henry Hudson, relying on the abstention doctrine articulated in *Younger v. Harris*, 401 U.S. 37 (1971), dismissed 's federal complaint without prejudice. See *Virginia Institute of Autism v. Virginia Dept. of Educ. et al.*, 2008 WL 631207 (E.D.Va. 2008). During the pendency of its federal court action, refused to participate further as a party in the due process proceedings in this case. As a result, did not appear for the first day of hearings in this case on February 28, 2008. did appear on the second day of hearings, March 10, 2008, reserving its objection that, as a private school, it is not a proper party to the due process proceedings.

BURDEN OF PROOF

The substance of the Parents' claim in this case is that has been denied a Free Appropriate Public Education ("FAPE") as a result of 's wrongfully discharging the child from its school. 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. *Id.*, 546 U.S. at 62, 126 S.Ct. at 537. Although the Parents are not challenging an IEP in this hearing, they are the parties seeking relief. I find therefore that the Parents bear the burden of proof to establish that they are entitled to the relief they request.

FINDINGS OF FACT

³ did not name the Parents as parties in its federal court complaint.

Mr. and Mrs. testified in support of their complaint and called as additional witnesses 's Director of Special Services, , and personnel, including Executive Director , board of directors president , teacher and instructor . called as witness , a lead teacher at the school. Mr. was re-called as a defense witness by . The hearing officer excluded the testimony of employees and , who were not disclosed as witnesses before the hearing. Numerous documents were offered by the parties and received into evidence. I make the following findings of fact based upon the preponderance of the evidence adduced at the hearing:

, was born on October 22, in . For the first two years of his life appeared to meet all developmental milestones appropriately. Beginning at about two years of age, 's speech regressed and his behavior became more difficult. In March 2000, was diagnosed with Autism Spectrum Disorder. has received special education programming under IEPs in several school systems in and Virginia.

is private day school for children with autism located in , Virginia. Generally the staff at works with students on a one-on-one basis in individual "classrooms." All of 's 26 students are placed there under IEPs developed by the child's home public school system. The Parents made repeated applications to for . 's Executive Director, , encouraged the Parents to reapply in late 2005. On January 30, 2006, accepted as a full-time student to enroll on April 12, 2006. At the time, the family resided in , Virginia. is an easy commute from 's location. Mr. recommended that the move to

because he knew that [redacted] did not have its own program for autistic children like [redacted] and [redacted] would not balk at paying for [redacted]'s IEP placement at [redacted]. The Parents bought a house in [redacted] and completed the move in time to enroll [redacted] at [redacted] on April 12, 2006. [redacted] initially attended [redacted] under his [redacted] IEP. In the summer of 2006, the [redacted] Community Policy and Management Team ("CPMT") entered into an umbrella contract "the Principal Agreement" with [redacted] and took over payments for [redacted]'s tuition. [redacted] developed its IEP for [redacted], based on the [redacted] IEP, and placed him at [redacted] under the CPMT Principal Agreement. [redacted] was the only [redacted] child placed at [redacted] under the Principal Agreement. [redacted]'s most recent IEP, completed on August 28, 2007, provides for his continued placement at [redacted] for the 2007-08 school year.

[redacted] personnel were responsible for drafting much of [redacted]'s August 28, 2007 IEP, including the Present Level of Performance ("PLP") section. In the PLP narrative, [redacted] observed that [redacted] had exhibited tantrum behavior since his start at [redacted], including crying, head-butting, throwing or breaking objects, hitting his own head with his hand or against an object, and running away from instructors. The PLP narrative states that after [redacted] implemented a "behavioral contract" in May 2007, there was a dramatic decrease in those problem behaviors. The PLP report concluded that "[w]ith behavioral supports and a supportive and structured setting, [redacted] is clearly an environment where [redacted] will continue to excel."

Contrary to the PLP prediction, in the fall of 2007, [redacted]'s problem behaviors at [redacted] increased in seriousness. Now almost twelve-years old, [redacted] had grown to be a five foot-eight, 185-pound adolescent. On September 13, 2007, [redacted] allegedly injured a staff member after he pushed her across the classroom and into the edge of an open door. On November 7, 2007,

became upset about not being permitted to enter the school through a locked door. allegedly became agitated, chased after staff and head-butted one of the staff members in the jaw. On November 8, 2007, injured his head and face after he allegedly repeatedly banged his head against walls, his desk and other objects when he was prevented from leaving his classroom. All parties agree that 's problem behaviors were a manifestation of his autism disability.

After the incident on November 8, 2007, 's teacher at , , telephoned Mrs. and asked her to keep at home while made repairs to 's classroom. The following day, 's Executive Director, , telephoned Mrs. and recommended that the parents take for inpatient evaluation at an appropriate facility. Also on November 9, 2007, 's Acting Director of Education, , telephoned Special Services Director and advised him that wanted to suspend 's in-school programing while reviewed its program for .

The week after suspended , submitted to a list of additional support elements the school would require in order to resume 's in-school placement. These elements included a full time instructional assistant with Mandt⁴ training who could physically restrain , Mandt training for one existing staff member for back up purposes, intensive behavior management and student supervision and additional in-home training and support.

agreed to 's requests and committed to provide the necessary funding.

⁴ testified that the Mandt system is a system of de-escalation and, if needed, restraint used at to de-escalate students who are becoming agitated and pose a risk of harm to others or themselves.

Mr. _____ requested an in-school functional behavioral assessment (“FBA”)⁵ of _____ on November 13, 2007. When _____ declined to arrange a full scale FBA, _____ obtained the assessment by _____, M.Ed., who observed _____ at _____ on January 16, 2008. Ms. _____ recommended a number of strategies and changes in procedures to help reduce _____’s disruptive behavior at _____ and improve his learning. By the time Ms. _____ assessed _____, he had already been discharged by _____’s board of directors. Her recommendations were not implemented.

From November 8, 2007 to December 3, 2007, _____ provided in-home instruction for _____. _____ supplied two instructors at the _____’ home who worked with _____ from around 9:00 a.m. to 2:00 p.m. The instructors reported back to _____ that _____’s problem behavior was increasing and that they had safety concerns over _____’s behavior at home. They reported to Mr. _____ that while they were providing services, _____ had twice thrown himself over an upstairs balcony in the home and he had charged into a second story window. _____’s administrators decided that the school could go no further in providing additional accommodations to _____ and that _____ was not an appropriate placement for him. On December 3, 2007, _____’s board met to review _____’s placement. The Parents and _____ were not invited to the meeting and were not alerted until November 30, 2007 that the board would discuss discharging _____. The directors voted to discharge _____ from _____ and to discontinue all services to him, including in-home services, effective December 4, 2007.

⁵ Under the IDEA, in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team shall consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3)(B)(i). This may include a functional behavioral assessment. *See* 71 Fed.Reg. 46721 (2006).

After [redacted] discharged [redacted], the IEP team next met on December 19, 2007 and began a search for other placements for [redacted]. In the meantime, the Parents submitted their due process complaint which [redacted] received on December 26, 2007. On January 7, 2008, the previous hearing officer, on request of the Parents, ordered [redacted] to grant stay-put placement to [redacted] through the conclusion of the due process proceedings. Constrained by the stay-put order, [redacted] allowed [redacted] to return to school on January 8, 2008. On January 15, 2008, [redacted] had another self-injury incident at [redacted]. While being instructed in a numbers activity, [redacted] folded up the instructional materials. When the instructor unfolded the papers, [redacted] became progressively upset to the point where he banged his head against the wall multiple times and left head-sized holes in the drywall. He also hit his head repeatedly with his hand. Ms. [redacted] called Mrs. [redacted] who picked [redacted] up from the school. [redacted] evidently was not seriously injured and he returned to [redacted] the day after the incident. [redacted]'s last day at [redacted] was on January 24, 2008. On January 28, 2008, [redacted] stopped providing stay-put services to [redacted] on advice of its current counsel.

After [redacted] suspended [redacted] on November 8, 2008, [redacted] convened several IEP meetings to address services to [redacted]. The Parents would not consent to changing [redacted]'s IEP placement from [redacted]. Since December 4, 2007, [redacted] has worked with the Parents to identify a suitable alternative placement for [redacted]. [redacted] has not found a suitable day program for [redacted] within a reasonable commuting distance to the [redacted]'s home. At a February 8, 2008 meeting, [redacted]'s IEP team agreed that [redacted] needed a temporary evaluative placement at a residential facility to attempt to stabilize [redacted]'s behavior and to provide information to the Parents and the LEA that will be used to develop a long term IEP for the child. The Parents approved this IEP team

decision. As of the last day of the due process hearing, and the Parents were investigating residential placement options.

After discharged on December 3, 2007, offered to provide , on an interim basis, 10 hours weekly of in-home services, in addition to speech services and occupational therapy. The Parents have generally declined to take advantage of those services because of resistance from and because of their concerns about 's behavioral issues in the home.

On January 18, 2008, , exercising a thirty day written notice clause, gave notice to that it was terminating the Principal Agreement with the CPMT effective no later than February 17, 2008. does not contest 's right to terminate the Principal Agreement.

DECISION

In this unusual proceeding the Parents seek to have the hearing officer assert his IDEA authority over the private school where the child was placed under his IEP. The private school, , has consistently maintained that it is an improper party because it believes that the IDEA and Virginia's special education regulations do not authorize a hearing officer to exercise jurisdiction over a private entity. The LEA, Public Schools, takes no position on whether the hearing officer has jurisdiction over , but has moved to dismiss the due process complaint as to it, because the parents seek relief only against .

Over the course of these proceedings, the Parents have narrowed the scope of their requested relief. It appears from the Parents' closing brief, that the Parents now seek the

following relief:

- A finding that [redacted] 's discharge from [redacted] was "wrongful";
- That [redacted] be awarded appropriate compensatory education and services;
- Additional evaluations, including "a parents' functional behavior assessment," a full evaluation of the physical environment in which [redacted] was educated at [redacted] and a full evaluation of [redacted] 's educational program at [redacted];
- Disclosure of documents by [redacted]; and
- That [redacted] be required to participate in ongoing IEP meetings.

The Parents stated at the hearing on March 10, 2008 that they do not seek an order to return to [redacted].

[redacted] contends that the Parents do not seek any relief against it. However, the Parents do allege in their due process complaint that [redacted] failed (i) to require that [redacted] honor its obligations to [redacted] and (ii) to require that [redacted] comply with applicable laws and regulations. The Parents seek an order that [redacted] should be granted any and all other relief (not only relief against [redacted]) appropriate on their complaint.

HEARING OFFICER'S JURISDICTION OVER [redacted]

In order to reach the merits of the Parents' claims, it is necessary first to address [redacted] 's contention that the hearing officer lacks jurisdiction over it.⁶ [redacted] argues that the IDEA statutory scheme dictates that private entities such as [redacted] are not proper parties to, nor subject to the

⁶ In its first written response to the complaint on January 7, 2008, [redacted] argued that it was not a proper party. In an Order entered on January 7, 2008, the previous hearing officer found that [redacted] was a proper party. "[B]y contracting with [redacted] Public Schools [redacted] agreed to comply with the requirements of IDEA and the student's IEP, thereby placing [redacted] fully under the authority of the Hearing Officer to enforce the IDEA regulations and safeguards." [redacted] has reserved its objection to this ruling.

jurisdiction of, due process proceedings. The Parents respond that as a state-licensed private school that accepts placement of children protected by the IDEA and Virginia Department of Education regulations, is a proper party. Whether there is an IDEA due process remedy against a private school appears to be an issue of first impression in Virginia. Court decisions from the Fourth Circuit Court of Appeals and other jurisdictions suggest a two-step analysis to address this question: First, does the IDEA require that a state provide the parents a due process remedy against a private school such as ; and second, does Virginia law subject private schools to special education due process proceedings?

In *Gadsby by Gadsby v. Grasmick* 109 F.3d 940 (4th Cir.1997), the Fourth Circuit Court of Appeals addressed a related question, whether a state educational agency (“SEA”) (as opposed to an LEA) may ever be held liable where there is a failure to provide a free appropriate public education to a particular child within its jurisdiction. Analyzing the language of the IDEA, the court noted that the statute’s remedial provisions do not explicitly state what governmental entity shall be responsible for remedying a particular violation. However the court found specific language in the IDEA to support holding an SEA responsible if the state fails to comply with its duty to assure that IDEA’s substantive requirements are implemented. *Id.*, 109 F.3d at 952.

As in *Gadsby*, the starting point for the analysis of whether a private school is subject to due process proceedings is the IDEA statutory language. “[W]e begin as we must by examining the statutory language.” *Gadsby, supra*, 109 F.3d at 652 (citation omitted.) The IDEA requires that the state special education plan provide that children with disabilities and their parents are

afforded the procedural safeguards required by IDEA § 1415. *See* 20 U.S.C. § 1412(a)(6).⁷ It is clear in section 1415 that the parents must have a due process remedy against the LEA. *See, e.g.*, 20 U.S.C. § 1415(c)(2)(B)(i)(1) (LEA shall within 10 days of receiving the complaint send response to the parent.) By contrast, the Parents have not cited and I do not find a requirement in Section 1415 that the procedural safeguards include a due process remedy against a private school. Instead, the IDEA explicitly holds the state responsible to ensure that children with disabilities in private schools are provided FAPE.

A State is eligible for assistance under this subchapter . . . if the State submits a plan that provides assurances . . . that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

* * *

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency . . .

20 U.S.C. § 1412(a)(10)(B).

Although the IDEA statutory language does not require a state to provide a due process remedy against private schools, a state is not barred from doing so. For example, New Jersey's regulations implementing the IDEA are expressly made applicable to private entities providing publicly funded educational programs and services to students with disabilities. *See P.N. v.*

⁷ In the IDEA, the right to an impartial due process hearing is only accorded to the parents and the LEA.

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

20 U.S.C. § 1415(f)(1)(A) (emphasis supplied).

Greco, 282 F.Supp.2d 221, 236-237 (D.N.J. 2003) (Error for Administrative Law Judge to conclude she did not have jurisdiction over claims against private school.) *But cf.*, *St Johnsbury Academy v. D.H.*, 240 F.3d 163 (2nd Cir. 2000) (Vermont does not provide for due process action against a private school); *J. v. The School District of Philadelphia*, 47 IDELR 297, n.6 (E.D.Pa. 2007) (Pennsylvania law does not impose IDEA liability on private entities).

The next step of this jurisdiction inquiry, therefore, is to examine whether Virginia goes beyond the requirements of the IDEA and authorizes due process proceedings against a private school. The parties have not cited any decisions from the Fourth Circuit or the Virginia courts on point. So, it is necessary again to examine the statutory language. In Virginia, the General Assembly has delegated responsibility to the Virginia Board of Education “to prescribe procedures to afford due process to children with disabilities and their parents.” *See* Va. Code Ann. § 22.1 - 214(B). The Board of Education’s procedures, adopted pursuant to Code § 22.1-214(B), are contained in *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* (the “Virginia Regulations”), 8 VAC 20-80-10, *et seq.* The Virginia Regulations are clear that only a parent or an LEA may request a due process hearing, *See* 8 VAC 20-80-66(b)(1), but the regulations do not state explicitly whether any other person or entity may be named as a respondent. Examining the applicable sections of the regulations as a whole, I conclude that the Virginia Regulations do not authorize due process proceedings against private schools.

The Virginia Regulations provide for the initiation of a due process proceeding in Section 20-80-76:

Basis for due process hearing request.

1. Either a parent or parents or a local educational agency may request a due process hearing when a disagreement arises regarding any of the following:

- a. Identification of a child with a disability;
- b. Evaluation of a child with a disability (including disagreements regarding payment for an independent educational evaluation);
- c. Educational placement and services of the child; and
- d. Provision of a free appropriate public education to the child.

8 VAC 20-80-76(B)(1). As noted above, this section grants the right to request a due process hearing only to parents and LEA's. This section also is instructive to the jurisdiction inquiry because the Virginia Regulations elsewhere hold the LEA expressly responsible for each of the four matters which may be the subject of a due process hearing. *See, e.g.*, 8 VAC 20-80-50(A)(1) (LEA shall maintain child find program); 8 VAC 20-80-54 (Responsibility of LEA to ensure evaluation); and 8 VAC 20-80-62 (Requirement that LEA shall ensure that IEP is developed and implemented). Most significantly for this case, the Virginia Regulations state expressly that, except for children in state residence or custody⁸, the LEA remains responsible in all cases for providing FAPE to children with disabilities – including children placed in private schools. *See, e.g.*, 8 VAC 20-80-40(B); 8 VAC 20-80-66(A)(1)⁹; 8 VAC 20-80-66(A)(6)¹⁰

⁸ *See* 8 VAC 20-80-160.

⁹ When a child with a disability is placed by a local school division or is placed for noneducational reasons by a Comprehensive Services Act team that includes the school division in a private special education school or facility that is licensed or has a certificate to operate, the local school division shall be responsible for ensuring compliance with the requirements of this chapter. 8 VAC 20-80-66(A)(1).

¹⁰ If the private school or facility implements a child's IEP, responsibility for compliance with the requirements regarding procedural safeguards, IEPs, assessment, reevaluation, and termination of services remains with the local school division. 8 VAC 20-80-66(A)(6).

Other sections of the Virginia Regulations bolster the conclusion that only parents and public education agencies are subject to due process hearings. In the Procedure for Requesting a Due Process Hearing, the written complaint for due process is made only to the LEA and the Virginia Department of Education. *See* 8 VAC 20-80-76(C). If other entities could also be named as parties, a provision for service of process would be expected. *Cf. Virginia Administrative Process Act*, § 2.2-4020(B) (Requirement of notice to parties to formal proceedings). The Virginia Regulations state in detail the respective responsibilities of the SEA, the Parents, the LEA and the hearing officer in the conduct of the due process proceeding, but omit any reference to responsibilities of any other party. *See* 8 VAC 20-80-76, subsections (G), (H), (I) and (J). The Virginia Regulations authorize the parents, but not any other party, to petition for attorneys' fees. *See* 8 VAC 20-80-76(N). Lastly, the authorizing statute expressly provides for the right of the parents and the school division (but not other parties) to be represented by legal counsel or other representative before the hearing officer. *See* Va. Code Ann. § 22.1-214(C). In sum, from an examination of the Virginia Regulations and Title 22.1 of the Virginia Code, I find that Virginia law does not contemplate or authorize the naming of a private school as a respondent to a special education due process hearing.¹¹

¹¹ This conclusion does not mean that _____ is unaccountable under IDEA and the Virginia Regulations. To the contrary, _____ is presumably subject to regulation and discipline under the *Regulations Governing the Operation of Private Day Schools for Students with Disabilities*, 8 VAC 20-670-10, *et. seq.* These regulations incorporate all procedural safeguards required by regulations governing the education of students with disabilities. *See* 8 VAC 20-670-110(C)(10). The Virginia Board of Education is empowered to deny, suspend or revoke the license of any covered private school that violates state law or Board of Education regulations. *See* 8 VAC 20-670-350.

'S MOTION TO DISMISS

After the hearing was concluded, Public Schools submitted a motion to dismiss the Parents' complaint against it because it believes the Parents do not allege any violation of the IDEA by or seek relief against the LEA. This is incorrect. The Parents allege in their complaint that " has failed to require that honor its obligations to and to comply with applicable laws and regulations, including 8 VAC 20-80-70." *Parents' Exhibit 1*, p. 3. As previously noted in this decision, the LEA bears responsibility for ensuring compliance with the Virginia Regulations when a child is placed in a private school. *See* 8 VAC 20-80-66(A)(1). Because the Parents have based their request for a due process hearing, in part, on their disagreement over 's alleged failure to require that comply with the IDEA and the Virginia Regulations, they have stated a valid claim for a due process hearing against . seeks dismissal of the complaint also on the grounds that the evidence does not establish that deprived of FAPE. The hearing officer must make findings of fact and his ultimate decision solely upon the preponderance of the evidence presented at the hearing and applicable state and federal law and regulations. *See* 8 VAC 20-80-76(J)(15). In effect, seeks a finding against the Parents on the evidence. Such a disposition, if merited, should be part of the final decision. *See, e.g.,* 8 VAC 20-80-76(K)(11). 's motion to dismiss is denied.

HAS PROVIDED FAPE TO THE CHILD?

In every due process decision, it is a responsibility of the hearing officer to make a determination of whether the:

- a. Requirements of notice to the parent or parents were satisfied;

- b. Child has a disability;
- c. Child needs special education and related services; and
- d. Local educational agency is providing a free appropriate public education.

See 8 VAC 20-80-76(J)(17).

I have already found in this decision that the requirement of notice to the Parents was satisfied. It is undisputed, and I find, that [redacted] has a disability, Autism, and by reason thereof needs special education and related services. For the following reasons, I further find from the preponderance of the evidence that [redacted] has provided FAPE to [redacted] at all times concerned in this due process proceeding.

The Parents have not suggested that [redacted]'s August 28, 2007 IEP was not reasonably calculated to provide [redacted] with a FAPE under the IDEA. *See, e.g., A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 318 (4th Cir. 2004). Neither do the Parents allege that [redacted] was not receiving FAPE at [redacted] before he was unilaterally suspended by the private school on November 8, 2007. The Parents do allege that [redacted] has failed to require that [redacted] comply with IDEA and the Virginia Regulations after November 8, 2007. Implicit in this complaint is the allegation that [redacted] has been denied FAPE because of [redacted]'s not requiring [redacted] to comply with applicable law or as a result of other LEA omissions after November 8, 2007.

I find that under the facts in this case, [redacted] cannot be held responsible for failure to implement [redacted]'s IEP after November 8, 2007. In its guidance on implementing the IDEA, the U.S. Department of Education Office of Special Education Rehabilitative Services ("OSERS") notes that the IDEA regulations require that "as soon as possible" following development of an IEP, services must be made available to the child in accordance with the IEP. 34 CFR §

300.323(c)(2). However, OSERS contemplates the possibility that an LEA may not be able to timely comply with the IEP it has developed for a child. The agency commentary to the predecessor regulation states:

However, with very limited exceptions, IEPs for most children with disabilities should be implemented without undue delay following the IEP meetings described in § 300.342(b)(2). There may be exceptions in certain situations. It may be appropriate to have a short delay (e.g., (1) when the IEP meetings occur at the end of the school year or during the summer, and the IEP team determines that the child does not need special education and related services until the next school year begins); or (2) when there are circumstances that require a short delay in the provision of services (e.g., finding a qualified service provider, or making transportation arrangements for the child).

64 Fed. Reg. 12579 (1999), commenting on 34 CFR § 300.342(b)(2) (1999).

This case is a paradigm of “circumstances that require a short delay in the provision of services.” Since the summer of 2006, [redacted] has (through the CPMT) paid for the cost for [redacted] education at [redacted]. [redacted]’s IEP team renewed [redacted]’s IEP to attend [redacted] in August 2007. Without any advance notice to [redacted], [redacted] suspended [redacted] after the November 8, 2007 problem behavior incident. After [redacted] suspended [redacted], [redacted] made every reasonable effort to secure [redacted]’s return to [redacted], including offering to pay for an additional aide for the child. When [redacted]’s board of directors met on December 3, 2007, the school rebuffed [redacted]’s efforts. [redacted] made itself “functionally unavailable” as a placement for [redacted] when its board discharged the child. Since January 25, 2008, [redacted] has refused to provide even stay-put services. *See Wagner v. Board of Educ. of Montgomery County*, 335 F.3d 297, 301 (4th Cir. 2003). Clearly these circumstances, which were beyond the LEA’s control, required a delay in [redacted]’s provision of IEP services to [redacted].

Of course, an LEA’s responsibility to provide FAPE does not end because a private

provider withdraws services. An LEA is obligated to ensure that the IEP team reviews and revises a child's IEP when needed. *See* 34 CFR § 300.324(b)(ii); 8 VAC 20-80-62(B)(6). After [redacted] suspended [redacted] on November 8, 2007, [redacted] convened several IEP meetings to address services to [redacted]. However, the Parents refused at all times to consent to a change in placement from [redacted].¹² Furthermore, on January 3, 2008, after filing their due process complaint in this case, the Parents invoked stay-put placement. Thereafter, [redacted] could not change [redacted]'s placement from [redacted] even though [redacted] had become functionally unavailable. *See Honig v. Doe*, 484 U.S. 305, 323 (1998). (IDEA section 1415(j) is unequivocal, stating plainly that a school board shall not change the current educational placement unless or until it can agree on an alternative placement with the parents, or until the issue is resolved through the administrative hearing process.)

In summary, I find that the evidence establishes that since [redacted] first suspended educational services to [redacted], [redacted] made every reasonable effort to secure [redacted]'s readmission, including offering to pay for an additional aide for the child. [redacted] properly convened the IEP team to review [redacted]'s services after he was suspended and later discharged from [redacted], but [redacted] could not change [redacted]'s placement during the pendency of these proceedings because the Parents withheld consent. Therefore, [redacted] has complied with the IDEA, and has not denied FAPE to [redacted].

OTHER ISSUES

¹² Since December 3, 2007, [redacted] has made interim in-home services available to [redacted], but the Parents have generally declined the services. By all accounts, [redacted] and the Parents still enjoy an excellent working relationship. As of the date of the due process hearing, [redacted] and the Parents were investigating and pursuing residential placement opportunities for [redacted].

In light of my decision that the hearing officer lacks jurisdiction over _____, the relief sought by the Parents against _____ must be denied, including the request that I find that _____'s discharge from _____ was wrongful; that _____ disclose additional documents; the request for a full evaluation of the physical environment in which _____ was educated at _____ and a full evaluation of _____'s educational program at _____; and that _____ be required to participate in _____'s IEP team meetings. Also having found that _____ has not failed to provide FAPE, I find that _____ is not entitled to compensatory education from _____.¹³ *Cf. G. ex rel. Ssgt RG v. Fort Bragg Dependent Schools*, 324 F.3d 240, 254 (4th Cir. 2003) (Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student.) Finally I find that in January 2008, _____ appropriately obtained a functional behavioral assessment of _____ at _____ by Ms. _____. _____ is not required to provide additionally the "parent's functional behavior assessment" requested in the Complaint.¹⁴

ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. The _____ is dismissed from this due process proceeding;

¹³ Since the hearing officer lacks jurisdiction over _____, _____ cannot be ordered to provide compensatory education to _____.

¹⁴ In their post hearing memorandum, the Parents request a continuance of this due process proceeding to address compensatory education following _____'s completion of a re-evaluation program which was scheduled to begin on March 24, 2008. I find that it is not in the child's best interest to grant a further extension of the timeline to render a decision in this case. *See* 8 VAC 20-80-76(L).

2. The relief requested by the parents _____, _____ and _____, herein is denied in its entirety.

3. _____ Public Schools shall develop an implementation plan within 45 calendar days of the date of this decision which must state how and when this decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing, the hearing officer and the Virginia Department of Education.

4. _____ Public Schools is the prevailing party in this due process hearing.

Right of Appeal Notice

This decision is final and binding unless a party appeals in a federal district court within 90 calendar days of this decision, or in a state circuit court within one year of the date of this decision.



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Date of Decision: March 25, 2008