

APR 20 2006

Dispute Resolution &
Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

CASE CLOSURE SUMMARY REPORT

<u>PUBLIC</u>	
School Division	Name of Parent(s)
	APRIL 18, 2006
Name of Child	Date of Decision or Dismissal
<u>KATHLEEN MEHFOUD, ESQUIRE</u>	HILARY K. JOHNSON, ESQUIRE
Representing LEA	<u>JAMES T. CURTISS (Presenter)</u>
	Representing Parents/Child
Parties Initiating Hearing	<u>NONE</u>
	Prevailing Party

HEARING OFFICER'S DETERMINATION OF ISSUES:

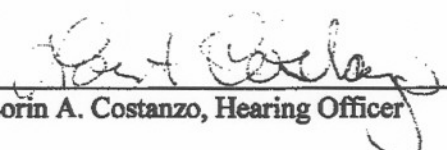
No due process hearing was held and no issues in the Request for Due Process Hearing were determined.

HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:

This matter was *dismissed* upon finding that there were no issues for determination at due process hearing. No due process hearing was held and no issues were determined. There is no prevailing party.

This certifies that I have completed this matter in accordance with the regulations and have advised the parties of their appeal rights in writing. The "Decision on Motions and Final Report" in this cause is attached. I have advised the LEA in writing of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days of the rendering of a decision or the withdrawal of a hearing request.

April 18, 2006


Lorin A. Costanzo, Hearing Officer

Copies of this Case Closure Summary Report mailed this date to:

1. Dr. Judith A. Douglas, Office of Dispute Resolution and Admin. Services
2. James T. Curtiss
3. Kathleen S. Mehfoud, Esq.
- 4.

Received

APR 20 2006

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

**Dispute Resolution &
Administrative Services**

DECISION ON MOTIONS AND FINAL REPORT

PUBLIC SCHOOLS
School Division

Name of Parent(s)

Name of Child

KATHLEEN MEHFOUD, ESQ.
Representing LEA

HILARY K. JOHNSON, ESQ.
JAMES T. CURTISS, (Presenter)
Representing Parents/Child

LORIN A. COSTANZO
Due Process Hearing Officer

Parties Initiating Hearing

ISSUES AND PURPOSE OF HEARING:

A "Request for Due Process Hearing" dated 1/20/06 consisting of 6 pages and signed by _____, grandmother and guardian of _____, together with a letter from James T. Countiss dated March 8, 2006 and with a stamped "Received" date of March 10, 2006 was provided the hearing officer in this cause.

Tentative Issues: Denial of FAPE.
Procedural and substantive violations alleged re IDEA and 504.

**NOTIFICATION OF INSUFFICIENT DUE PROCESS HEARING REQUEST
AND MOTION TO DISMISS**

On March 24, 2006 counsel for the _____ Public Schools filed a "Notification of Insufficient Due Process Hearing Request and Motion to Dismiss". The "Determination of the Hearing Officer" was tendered to the parties on March 28, 2006 finding, on the face of the notice, the notification met statutory requirements.

AMENDED TIMELINE:

March 10, 2006 Request for Due Process received.
March 15, 2006 Hearing Officer appointed.
March 21, 2006 Initial Pre-Hearing Conference via telephone held with Mr. Countiss and Ms. Mehfood.
March 24, 2006 Notice of Insufficient Request for a Due Process Hearing and Motion to Dismiss received.
March 28, 2006 Determination of Hearing Officer tendered in writing.
March 28, 2006 Written Clarification of Issues, Status and Authority to Act, and Motion to Quash Subpoenas issued March 22, 2006 filed by Mr. Countiss.
March 30, 2006 Motion for an Order Embodying the IEP and IEP Addendum and Opposition to [redacted]'s Motion to Dismiss filed by Mr. Countiss.
March 31, 2006 Second Pre-Hearing Conference via telephone held this date.
April 03, 2006 Objection in writing to the issuance of subpoenas filed by Mr. Countiss.
April 04, 2006 Motion to Dismiss filed this date by the LEA.
April 05, 2006 Motions (in writing) due by this date.
April 09, 2006 30 day resolution period concludes.
April 11, 2006 Responses (in writing) to Motions filed due by this date.
April 11, 2006 Due Process Hearing initially set this date but not held. Due Process Hearing was continued to May 10, 2006.
April 11, 2006 [redacted] Public Schools' Opposition to the Guardian's Motion for an Order Embodying the IEP and IEP Addendum filed this date.
April 18, 2006 Decision on Motions due this date.
May 03, 2006 Exchange of witness lists and documents to be admitted at hearing due this date.
May 10, 2006 Due Process Hearing continued to this date from 4/11/06.
May 24, 2006 Final Decision Due Date.

MOTIONS, RESPONSES, AND OTHER MATTERS:

At the second pre-hearing telephone conference of 3/31/06 the Hearing Officer requested all motions be reduced to writing. A timeline was established for motions to be filed and for any responses to the motions.

Clarification and other matters

On March 28, 2006, in response to the Hearing Officer's request, Mr. Countiss provided a letter clarifying issues and containing other matters. This letter provided the Written Clarification of Issues requested, a statement of authority to act, and a Motion to Quash the Subpoenas issued March 22, 2006. It was stated in this letter that:

1. "We agree with the IEP (already signed by [redacted]) and the IEP Addendum (signed by [redacted], March 23, 2006 at the Resolution Session) as providing FAPE. Our position is that there are no remaining issues re FAPE."
2. "We have no remaining issues as to procedural violations of IDEA, as amended, /504, as the law in the 4th Circuit provides no remedies for procedural violations that do not result in a

denial of FAPE. Compensatory educational services provided in the IEP Addendum provide adequate compensation for past denials of FAPE due to procedural and substantive violations.”

3. “We are requesting that the hearing officer issue an order/decision incorporating the IEP and IEP Addendum, which will decide all issues in the request for due process hearing.”

This letter also moved to quash the 3/22/06 subpoena issued to _____ relating to _____ as the child who is subject to this proceeding is _____, and not _____ who is the child’s father. The Hearing Officer was also asked to not issue any identical/similar subpoena to Ms. _____ relating to the student involved in this case. In support it was stated that:

1. “There are no issues of fact or law as to his eligibility for Special Education Services under IDEA, or that the IEP and IEP Addendum do not provide FAPE, and compensate the student for past procedural and substantive violations of IDEA/504”, and
2. “The subpoena, in that it requests: “records of any nature, including e-mails, letters and notes that you have taken,” is overly broad, not calculated to lead to the discovery of relevant evidence, and a violation of Ms. _____’s and the student’s privacy rights. Contesting, on behalf of her legal guardian and grandson, _____ Public School’s compliance with IDEA/504, does not give the school or its attorneys the right to every written record, notation, e-mail, or document concerning her grandson for the past three years.”

The authority of James T. Countiss to act without the presence of _____ was additionally provided within this letter. _____ retained the law officers of Hilary K. Johnson, P.C. for whom Mr. Countiss works. It is further noted that the Request for Due Process Hearing indicates Hilary K. Johnson, Esq./James T. Countiss, Advocate.

Motion for an Order Embodying the IEP and IEP Addendum and Opposition to _____’s Motion to Dismiss

On March 30, 2006 the guardian, by Hillary Johnson, Esquire, filed a “Motion for an Order Embodying the IEP and IEP Addendum and Opposition to _____’s Motion to Dismiss”. It was presented that that the proper procedure where a settlement is reached is to incorporate that settlement into the decision of the hearing office. It was moved for an order to be entered that the IEP and IEP Addendum be implemented and that 90 hours of compensatory educational services be provided.

The Motion confirmed there is an agreement on the issues of whether the IEP and IEP Addendum provides “FAPE”. This Motion provided:

- a. "There are no other issues for the hearing officer to decide."
- b. "The only issue before the hearing officer is to issue an order embodying the IEP and IEP Addendum so that the school cannot formulate a new IEP giving less than the 90 hours of compensatory education it agreed to."
- c. "Since there are no factual issues for determination in this hearing this issue the should be decided on motions, and no hearing should be held, and a decision should issue."

The Hearing Officer was requested to disregard the arguments relating to the sufficiency of the request for due process hearing as the Hearing Officer's Determination had been received.

Motion to Dismiss

On March 31, 2006 [redacted] Public Schools moved to dismiss the due process hearing request. The Motion to Dismiss was tendered in response to the clarification of issues submitted March 28, 2006. This Motion contended there is no appropriate basis for a due process hearing and the Hearing Officer does not have authority to enter an order where there are no rights to adjudicate. It was argued that the due process hearing must be based on a disagreement regarding the identification, evaluation, educational placement and services or the provision of a FAPE and there is no such dispute in this cause. And, it was contended, that because there are no issues for determination there is no authority for the Hearing Officer to incorporate the IEP and IEP Addendum into an order or decision.

Objection to the Issuance of Subpoenas for Production of Documents

By the letter of April 3, 2006 Mr. Countiss objected to the issuance of additional subpoenas for production of documents requested by [redacted] Public Schools and received on March 31, 2006. It was argued that there are no issues of fact or law as to eligibility for Special Education Services under IDEA or that the IEP and IEP Addendum do not currently provide FAPE and compensate the student for past procedural and substantive violations of IDEA/504, as long as [redacted] cannot change the number of hours of such services in a later IEP.

It is further argued that the subpoenas request confidential information that should be required to be produced only when clearly relevant or calculated to lead to discovery of relevant evidence. Objection is made that the subpoena to Ms. [redacted] is overly broad, not calculated to lead to discovery of relevant evidence, and a violation of privacy rights.

Opposition to the Guardian's Motion for an Order Embodying the IEP and IEP Addendum

On April 11, 2006 _____ Public Schools filed an "Opposition to the Guardian's Motion for an Order Embodying the IEP and IEP Addendum" and argued that the clarification and motion by the guardian indicated no dispute exists regarding identification, evaluation, educational placement and services or the provision of FAPE. _____ Public Schools further argued that:

- a. no dispute exists which may be heard and determined by the hearing officer;
- b. there is no hearing entitlement and no appropriate basis for a due process hearing;
- c. there are no issues to be decided;
- d. there is no authority for the Hearing Officer to incorporate the IEP and IEP Addendum into an order or decision; and
- e. the hearing officer is asked to approve an IEP and IEP addendum without a hearing and there is no legal basis or authority for hearing officer to do so.

_____ Public Schools moved for an order denying the guardian's motion and for a dismissal of the due process hearing.

DISCUSSION:

Incorporation

The Hearing Officer has been provided the above indicated written motions/responses and a copy of an IEP and IEP Addendum for _____. The IEP of 1/24/06 is signed by _____ (dated 2-22-06) with the box checked indicating permission is given to implement the IEP and placement decision and for the disability category identification. An IEP Addendum signed by _____ (dated of 3/23/06) and with the box checked indicating consent to implement the IEP Addendum has also been provided the hearing officer.

The Hearing Officer is asked to enter an order/decision incorporating the IEP and the IEP Addendum. Concern is expressed in the *Motion for an Order Embodying the IEP and IEP Addendum and Opposition to _____ Motion to Dismiss* that, "Since the IEP addendum says it is not a part of a stay put IEP, the school could adopt a new IEP that provides less than 90 hours of compensatory education _____ agreed to".

The *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* ("Regulations") provides that a local educational agency ("LEA") shall insure that an IEP is developed and implemented for each child with a disability served by that LEA. (8 VAC 20-80-62

(A) If services provided for within the IEP were not provided this may result in a due process hearing. Changes to an IEP must involve a IEP meeting and a parent has a right notice and to participate as an IEP team member. Per 8 VAC 20-80-70 (E)(1)(c) parental consent is required to any revision of the child's IEP services or, as per 8 VAC 20-80-76 (B)(2), the LEA would have to initiate a due process hearing to resolve a disagreement when the parent(s) withhold consent for an action that requires parental consent.

Hearing Officer's Decision 04-046 is presented as indicative of the proper procedure being, when a settlement agreement has been reached, to incorporate that settlement into a decision of the hearing officer. Several factors distinguish that cause. In reviewing that decision it appears the parties in that case had entered into a formal written agreement. However, there is no formal written agreement presented in this cause. The present cause involves an IEP which was signed by Ms.

indicating her consent to implement the IEP and placement decision and for the disability category identification. The IEP Addendum was signed indicating a consent to implement the IEP Addendum. While the Hearing Officer's Decision 04-046 does not indicate if there was objection or agreement to the incorporation there is a specific objection to the incorporation of the IEP and IEP Addendum in this cause.

In the present case an IEP and IEP Addendum are asked to be incorporated over the objection of one of the parties without evidence taken in a due process hearing. There are concerns in this cause about the issuing of a decision/order incorporating the IEP and IEP Addendum as requested. The Hearing Officer is reluctant to incorporate an IEP and IEP Addendum into a Decision or Order based upon the information presented, over the objection of one party, and without a hearing being conducted and evidence taken.

Due Process Hearing

Mr. Countiss states in the letter of April 3, 2006 that there are *no issues* of fact or law as to eligibility for Special Education Services under IDEA and that there are *no issues* that the IEP and IEP Addendum do not currently provide FAPE as long as PS cannot change the number of hours of such services in a later IEP.

The *Regulations* provide 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))

IDEA further provides that a party can present a due process hearing request "with respect to any matter relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child. (20 U.S.C. §1415(b)(6)(A))

No issues have been raised concerning identification or evaluation. As stated in the *Motion For an Order Embodying the IEP and IEP Addendum and Opposition to Motion to Dismiss* there is not a disagreement relating to the identification, evaluation, educational placement and services, or the provision of a free appropriate public education.

The Hearing Officer addresses matters currently before him. Before him is an IEP and an IEP Addendum signed by Ms. . As provided in the letter of April 3, 2006 there is no issue of fact or law as to eligibility or that the IEP and IEP Addendum do not currently provide FAPE. If there were to be a change in the IEP and/or IEP Addendum that matter would have to be addressed in a separate due process complaint and hearing.

It is stated in the motions and responses filed herein a.) there are no issues of fact or law as to eligibility for Special Education Services or as to the provision of FAPE, b.) there are no remaining issues as to procedural violations of IDEA, as amended, or 504, and c.) the only matter requested is an order/decision incorporating the IEP and IEP Addendum.

The *Regulations* provide that the hearing officer has the authority to enter a disposition as to every issue presented for decision and identify and determine the prevailing party on each issue that is decided. (8 VAC 20-80-76(K)(11)) However, there are no issues in conflict or disputed as to matters of identification, evaluation, educational placement and services, or the provision a FAPE presented in this cause and therefore is no basis for a due process hearing.

DECISION AND ORDER:

For the reasons stated above it is the decision of the Hearing Officer and so Ordered that:

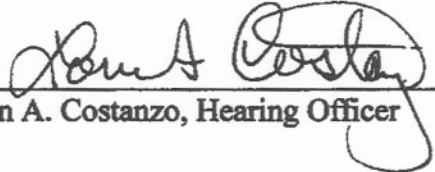
1. The Hearing Officer denies the motion to incorporate or embody the IEP and IEP Addendum into a decision/order. The *Motion for an Order Embodying the IEP and IEP Addendum* is hereby *denied*.
2. There being no other issues for determination in this cause the *Motion for Dismissal* is granted and this cause is hereby *dismissed*. No due process hearing was conducted.
3. This cause being dismissed, there being no need for further subpoenas to be issued, none will be issued and the subpoenas previously issued in this cause are hereby quashed.

APPEAL AND IMPLEMENTATION:

1. **Appeal rights:** The hearing officer's decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of the decision, or in a state circuit court within one year of the date of the decision.

2. **Implementation Plan:** The local educational agency shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision or the withdrawal of a hearing request with the following exception: the appeal or consideration of an appeal of the decision by the local school division and the decision is not an agreement by the hearing officer with the parent or parents of the child that a change in placement is appropriate.

April 18, 2006


Lorin A. Costanzo, Hearing Officer

Copies faxed and mailed to:

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