



CASE CLOSURE SUMMARY REPORT

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

School Division

Name of Parent

Name of Child

Counsel Representing LEA

. Esq.

Counsel Representing Parent/Child

None

Party Initiating Hearing

Hearing Officer's Determination of Issue(s):

(1) The Matter did not require and Expedited hearing; (2) Filing of CHINS petition by LEA was not a change of placement; (3) Hearing Officer had no authority to compel withdrawal of CHINS petition

Date of Decision

Prevailing Party

Hearing Officer's Orders and Outcome of Hearing: See above

This certifies that I have completed this matter in accordance with regulations. The written decision is attached.

Printed Name of hearing Officer

Signature

cc: Parent(s); School Division; State Education Agency

DUE PROCESS HEARING

RE:



Decision

Statement of the Case

This matter was initiated by _____, parent of _____, by letter dated _____ Ex. 1). In his letter _____ asserted

On _____ an officer and employee of _____ Public Schools (PS) filed a petition in _____ County Juvenile and Domestic Relations Court naming my _____, as a defendant and alleging that _____ is a "child in need of supervision". Among the possible dispositions of this action are changes in _____ educational placement exceeding 45 days and imposition of a more restrictive learning environment. Either (a) the Individualized Education Program (IEP) Review or Revision for _____ dated _____ which indicated that _____ emotional disturbance contributed significantly to _____ school-attendance problem, stands as a manifestation determination; or (b) there has been no manifestation determination, as is required by law. In either case, the filing of the petition violates _____ legal rights and my parental rights. Further, _____ County Public schools did not provide me with the written prior notice required by law prior to filing the petition, nor did the person who filed the petition provide the Court with _____ IEP as required by law.

I have asked the IEP Team to require that the petition be withdrawn immediately but the IEP Team has not done so. Therefore I request emergency due process to determine whether the IEP Team has erred in not requiring the petition to be withdrawn and to determine whether the filing of the petition is contrary to _____ IEP.

On _____ the undersigned was designated as an impartial Hearing Officer by the Supreme Court of Virginia. A telephone prehearing conference call was arranged between _____ to and counsel for _____ County Public Schools (CPS) and the prehearing conference was held on _____. _____ testified and reiterated the arguments made in _____ letter. Counsel for the CPS asserted that the Hearing Officer had no authority to take the actions requested by _____ and in addition since no disciplinary action had been taken by the CPS no expedited hearing was warranted citing 8 VAC § 20-80-76 (J)(20), (K)(12)-(13). The Hearing Office orally advised the parties that _____ ruling was that _____ did not have the authority to take the action requested by _____. _____ then requested leave to file a memorandum of points and authorities which was granted. The statement was received on _____.

The response of _____ County Public Schools was received on _____. Due to injury the Hearing Officer's written decision has been delayed.

Statement of Facts

Insofar as this matter is concerned the facts before the hearing officer are that _____ age _____ was determined to be a child entitled to receive special education services because of emotional disability which services were spelled out in a Individualized Education Program (IEP) dated _____. The IEP was consented to, as is required under IDEA, by _____. During the prehearing conference _____ conceded that the IEP developed for _____ was appropriate and was being followed.

As noted in _____ letter, on _____ the attendance officer for CPS filed, pursuant to Virginia Code Sec 16.1-278.4 and 16.1-278.5, a so called

"CHINS", (Child in Need of Supervision) Petition, with the Juvenile and Domestic Relations Court of _____ County. The exact text of the Petition was not before the Hearing Officer. At the time of the prehearing conference it was represented to the Hearing Officer that no action had been taken with respect to the Petition by the Juvenile and Domestic Relations Court.

Decision

As can be seen from _____ letter and _____ statement of points and authorities, _____ asserts (a) that under the facts _____ is entitled to an expedited hearing. (b) the CPS is precluded by IDEA from filing the CHINS petition asserting that this action by _____ CPS constitutes a change in placement, (c) the Hearing Officer is authorized to compel _____ CPS to withdraw the Petition, and

It is the Hearing Officer's decision that _____ claim fails on all three grounds.

The Filing of a "CHINS" Petition is not Disciplinary Action

Requiring an Expedited Hearing

Counsel for _____ CPS has spelled out in _____ statement of points and authorities the grounds under IDEA which call for an expedited hearing. Counsel wrote

"A disabled student may receive an expedited hearing in three circumstances, each of which relates to discipline. First, a student automatically receives an expedited hearing when the parent appeals a determination in a disciplinary proceeding that a child's behavior was not a manifestation of the child's disability. 20 U.S.C. § 1415 (k)(6)(A)(ii), (B)(I). Second, a student automatically receives an expedited hearing when a parent requests an appeal of the child's placement in an interim alternative setting pending the outcome of a manifestation determination conducted in connection with

discipline. 20 U.S.C. § 1415 (k)(6)(A)(ii), (B)(ii); 20 U.S.C. § 1415 (k)(1)(A)(ii). Finally, a hearing officer may hold an expedited due process hearing, upon request by the school system, when the school system maintains as part of disciplinary proceedings that the current placement of the child is substantially likely to result in injury to the child or others. 20 U.S.C. § 1415 (k)(2); 34 CFR § 300.521; 8 VAC § 20-80-68; 8 VAC § 20-80-76 (J)(20), (K)(12)-(13).

In this case, [redacted] is not subject to any discipline. The school has not made, nor is attempting to make, a manifestation determination. The school has not placed, and is not attempting to place, [redacted] in an interim alternative placement while disciplined. The school is not attempting to remove [redacted] from school due to a substantial likelihood that [redacted] will injure herself or others. In fact, the school, through its attendance officer [redacted], would like [redacted] to attend school in order to receive the education set forth in [redacted] IEP. [redacted] is not proceeding to discipline [redacted] and remove [redacted] from school. Rather, it wants [redacted] to attend school pursuant to the agreed-upon IEP.

The hearing officer agrees with this analysis of IDEA requirements for an expedited hearing. Discipline by definition involves the suspension or modification of special education services whereas in the instant case CPS is trying to restore those services for [redacted]. Filing the "CHINS" petition is not discipline.

The Filing the CHINS Petition by CPS

Does Not Constitutes a Change in Placement.

[redacted] asserts that an LEA such as CPS may not make what [redacted] describes as an "end run" around the protections and safeguards of IDEA by requesting judicial intervention to address the conduct of a student in special education. The Hearing Officer does not construe the filing of a CHINS petition as an "end run" around its IDEA

obligations. Quite to the contrary the filing of the petition satisfies its obligations both under IDEA and under Virginia law to provide with FAPE by seeking to have return to school.

What will happen as a result of the actions of the Juvenile and Domestic Relations Court is at best mere speculation. correctly states "Whether a Virginia CINS petition entails a change of placement depends on the circumstances of the particular case." If the actions of the Juvenile and Domestic Relations Court do in fact seek to impose some modification on IEP then the requirements of IDEA would have to be met. But as the matter stood at the time of the prehearing conference such is not the case.

In statements during the prehearing conference stated unequivocally that CPS was complying with IEP yet in Memorandum of Points and Authorities states that CPS "... has not provided services fully in accordance with Complainant's IEP since that time." is Memorandum cites no facts to support change in position. Accordingly the Hearing Officer accepts the oral statement made in the prehearing conference as being accurate.

The Hearing Officer has No Authority to Compel

CPS to withdraw its CHINS Petition

The authority of the Hearing Officer is spelled out in Regulation 8 VAC § 20-80-76 (J) and (K). As such the Hearing Officer is limited to in jurisdiction. In summary has to ascertain whether the child in question has a disability, whether the child needs special education and related services and whether the local education agency is providing a free appropriate public education.

None of the allegations made by _____ relate to the questions which a hearing officer must decide. There is no dispute that _____ has a disability, that _____ needs special education and related services and as noted above that _____ does have an IEP which properly provides those services.

At this stage of the proceedings there has been no impact on education. Should the Juvenile and Domestic Relations Court take action which would impact on _____ IEP the CPS will then have to respond.

Other authorities are in support of this view. In the case of *Hartfield v. East Grand Rapids Public Schools*, 960 F. Supp 1259 USDC WD Michigan (1997) the Court stated

“Plaintiffs final claim is that defendants violated their rights to equal protection and due process by transmitting to the prosecutor a truancy complaint on the basis of the continuing absence from school of the Hartfield children. Plaintiffs have alleged that they did not return their children to East Grand Rapids schools following LaQuan's suspension because the district failed to provide what plaintiffs perceived as adequate assurances that racial discrimination within the district would cease. Plaintiffs allege that they were threatened with the filing of a truancy complaint and that, in October 1993, the school forwarded their children's attendance records to their attorney and that subsequently a complaint for truancy was issued against plaintiffs. As a result, plaintiffs allege that they were harassed, both by school warnings that a complaint for truancy would be filed and by the subsequent charge and conviction for truancy.

In addition, even had plaintiffs stated a section 1983 claim, that claim essentially amounts to a challenge to the truancy charge pending at the time they filed the instant lawsuit. Federal courts generally are required to abstain from exercising jurisdiction over claims involving pending state criminal proceedings. See *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971). A claim may be dismissed pursuant to Fed.R.Civ.P.

12(b)(6) if the matter is appropriately within the principles of *Younger* abstention. See *Kelm v. C. Hyatt*, 44 F.3d 415, 418 (6th Cir. 1995). Under *Younger*, a federal court must abstain from adjudicating federal claims where: (1) state proceedings are pending; (2) the state proceedings involve an important state interest; and (3) the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims. *Kelm*, 44 F.3d at 419. As the Sixth Circuit has held, "if a state proceeding is pending at the time the action is filed in federal court, the first criteria [sic] for *Younger* abstention is satisfied." *Id.* (quoting *Federal Express Corp. v. Tennessee Pub. Serv. Comm'n*, 925 F.2d 962, 969 (6th Cir.), cert. denied, 502 U.S. 812, 112 S.Ct. 59 (1991)). Plaintiffs do not dispute that the truancy action was pending at the time they filed the instant complaint. ...

In sum, because the state truancy proceeding meets the test for *Younger* abstention, this court must abstain from litigating plaintiffs' challenges to the institution of truancy charges against them. Plaintiffs' claims based on the truancy proceeding therefore are dismissed.

For the above reasons the Hearing Officer determines that [redacted] has no jurisdiction over how CPS conducts its attendance policies and thus has no authority to direct CPS to withdraw its Petition.

Final Action

The requests made in [redacted] letter dated [redacted] [redacted] be and they hereby are denied.

Dated: [redacted]

[redacted]
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 the decision is appealed by a party within one year of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under Section 1415 of the Individuals with Disabilities Education Act (20 USC Sec 1400 et seq) without regard to the amount in controversy.