04-077

CASE CLOSURE SUMMARY REPORT

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

Public Schools
School Division

Ms.
Name of Parents

Name of Child

May 17, 2004
Date of Decision

Wendell C. Roberts, Esquire
Counsel Representing LEA

Edward S. Whitlock, III, Esquire
Counsel Representing Parent/Child

Parent
Party Initiating Hearing

Parent
Prevailing Party

Hearing Officer's Determination of Issue(s):
On February 26, 2004, the parent filed with the SEA a Request for Due Process Hearing dated February 22, 2004. The parent challenged disciplinary action taken by the LEA against her disabled child following an incident at the high school which occurred on February 12, 2004.

Hearing Officer's Orders and Outcome of Hearing:
As discussed in the decision, the LEA's change of placement of the child from her collaborative English class to the regular education English class and the LEA's concomitant failures (the "Failures") to notify the parent of the IEP meeting and, indeed, to even hold any IEP meeting regarding the change of placement and the modification of the IEP, seriously hampered the parent's rights and opportunity to effectively participate in the development of her disabled child's IEP and to protect her disabled child's educational opportunities and rights. The Failures were not merely technical or de minimis but led the disabled child to suffer a loss of educational opportunity and actually interfered with the provision of a FAPE to the disabled child. In relationship to the behavior subject to disciplinary action, the child's February 6, 2004 IEP and the child's placement were inappropriate. Concerning the Failures, the LEA failed to meet its burden of showing upon a preponderance of the evidence that in relationship to the behavior subject to disciplinary action, the child's February 6, 2004 IEP and placement were appropriate. Accordingly, pursuant to 8 VAC 20-80-76(J)(19), the child's behavior must be considered a manifestation of the child's disability.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties to their appeal rights in writing. The written decision from this hearing is attached in which 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.

John V. Robinson
Printed Name of Hearing Officer

John V. Robinson
Signature

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

, et als. Complainants

v.

PUBLIC SCHOOLS Respondent.

DECISION OF THE HEARING OFFICER

I. Introduction

On February 26, 2004, the parent filed with the Virginia Department of Education (the "VDOE" or the "SEA") a Request for Due Process Hearing dated February 22, 2004. The parent challenges disciplinary action taken by Public Schools (the "School District" or the "LEA") against her 9th grade, year old, disabled child following an incident at the high school which occurred on February 12, 2004. The hearing officer was appointed to this administrative due process proceeding on February 27, 2004.

An administrative due process hearing was held on partial days on March 22, 24, April 19 and April 29, 2004. The hearing officer has copies of the transcripts of the hearing and renders his decision based on the sworn testimony of the various witnesses, the numerous exhibits admitted into evidence and the argument of counsel.

II. Findings of Fact

1. Ms. is the parent of the child.

2. The child was born on and her disability is classified by the School District as "Other Health Impairment."[1] JE 35; SE 41.

3. The child's clinical diagnoses include Attention Deficit/Hyper Activity Disorder, Combined Type ("ADHD") and Oppositional Defiant Disorder ("ODD"). Dr. Markowitz, a Board

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1 References to the first volume of joint exhibits will be designated JE followed by the exhibit number. References to the Supplemental Joint Exhibit Notebook will be designated SE followed by the exhibit number. References to exhibits from the hearing officer will be designated HO followed by the exhibit number. The transcripts of the 4 days of hearings will be cited "TR" followed by 1 through 4, depending on the number of the hearing day, and a page number.

certified child and adolescent psychiatrist, has followed the child in his practice for medication management since May 1999. JE 45; TR 2, p. 158.

4. The child was first found eligible by the School District for special education and related services on February 12, 1997 under the classification of Other Health Impaired. JE 12.

5. The child is now and currently attends the School District's High School where she is in the ninth grade. JE 35.

6. On January 9, 2004, the School District sent to the Parent a Notice of Individualized Educational Program (IEP) Meeting. SE 41.

7. This IEP meeting was scheduled for January 13, 2004 at 3:45 p.m. at High School. SE 41.

8. , Principal/Designee, , General Education Teacher, , Special Education Teacher and the parent were invited to attend and participate in the IEP meeting. SE 41.

9. The parent indicated that she did not wish to attend this IEP meeting. SE 41.

10. Accordingly, an IEP team meeting was duly held on January 13, 2004, by , Principal/Designee, , General Education Teacher, and , Special Education Teacher, to develop an IEP for the child's 9th grade year.

11. The IEP team, in accordance with applicable state and federal procedures and laws, developed for the child an IEP which, amongst other things, placed her in collaborative Math and collaborative English. SE 41.

12. The parent gave her permission to implement the January 13, 2004 IEP and the placement decision. SE 41.

13. On February 6, 2004, without holding an IEP team meeting as envisaged by applicable state and federal rules and regulations and without any notice to the parent, as envisaged by applicable state and federal rules and regulations, the School District changed the child's placement from her collaborative English class to a regular education English class. TR 2, pp. 163-167, 199-204; TR 4, pp. 101-102, 106-107, 112, 133, 190.

14. The parent was misinformed by the School District that the reason for the change in placement was because the child doing well in her collaborative English class and was not being challenged in her collaborative English class. TR 4, pp. 108, 111, 127.

15. In fact, the child was struggling with the curriculum in her collaborative English class, was not performing well and was barely passing with a "D" grade. TR 4, pp. 108, 150.

16. While the parent signed the School District's Prior Notice/Consent on February 6, 2004, giving her permission to the implementation of the February 6, 2004 IEP and to the change in placement, the parent was not fully informed of all information relevant to the modification of the child's January 13, 2004 IEP and to the change of the child's placement effected by the February 6, 2004 IEP.

17. On February 12, 2004, the child brought at least 13 Adderall pills, a Schedule 2 prescription narcotic, to High School. The child took the pills out of her purse during the regular English class in which she had just been placed by the February 6, 2004 IEP. The child then proceeded to discuss with two (2) students in the regular education English class whether or not she should sell the pills and then gave at least one student one of these pills. JE 42.

18. The child was given an out of school suspension beginning on February 12, 2004. JE 42.

19. After due notice, the child's IEP team convened on February 13, 2004 to conduct a manifestation determination review. JE 42.

20. Numerous persons, including the parent, attended the manifestation determination meeting on February 13, 2004. JE 42.

21. The IEP team conducted the analysis mandated by 8 VAC 20-80-76(J)(19) and determined that the behavior of the student was not caused by the student's disability, and that relevant disciplinary procedures applicable to students without disabilities could be applied. JE 42.

22. The parent disagreed with the determination of the IEP team at the manifestation determination meeting and instituted this administrative due process proceeding to challenge the determination and the action taken by the IEP team.

23. Concerning the disabled child's change of placement from her collaborative English class to the regular education English class, the School District's failures (the "Failures") to notify the parent of the IEP meeting and, indeed, to even hold any IEP meeting regarding the change of placement and the modification of the IEP, seriously hampered the parent's rights and opportunity to effectively participate in the development of her disabled child's IEP and to protect her disabled child's educational opportunities and rights.

24. The Failures lead the disabled child to suffer a loss of educational opportunity.

25. The Failures were not merely technical or de minimis but actually interfered with the provision of a FAPE to the disabled child.

26. In relationship to the behavior subject to disciplinary action, the child's February 6, 2004 IEP and the child's placement were inappropriate.

27. The School District is not currently providing a FAPE to the disabled child.

III. Conclusions of Law and Decision

The parties do not dispute that the child had a disability, that the child needed special education and related services and that the child was entitled to a free appropriate public education pursuant to the Individuals with Disabilities Education Act ("IDEA" or the "Act") 20 U.S.C. §§ 1400 et seq., and Va. Code Ann. § 22.1-213-221 (1950), and the regulations promulgated thereunder. Because this is an administrative due process proceeding concerning disciplinary action taken by the School District against a disabled child, the burden of proof falls squarely on the School District. 8 VAC 20-80-76(J)(19) provides in relevant part:

> [The hearing officer shall] [d]etermine in a hearing regarding a manifestation determination whether the local educational agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the following requirements:
>
> a. The IEP team first considered, in terms of the behavior subject to disciplinary action, all relevant information, including:
>
> (1) Evaluation and diagnostic results, including such results or other relevant information supplied by the parents or parents of the child;
> (2) Observations of the child; and
> (3) The child's IEP and placement; and
>
> b. The IEP team then determined that:
>
> (1) In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
> (2) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
> (3) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.
>
> c. If the IEP Team determined that any of these standards were not met, the

behavior must be considered a manifestation of the child's disability.

The hearing officer is also required to include in his written findings a determination of whether the School District is providing the disabled child with a FAPE. 8 VAC 20-80-76(17)(d).

Inevitably, any analysis of the standard of FAPE must begin with Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). The Rowley Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education. The Rowley analysis provides that the disabled child is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. Rowley, *supra*, 206-7 (1982); Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990); Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987); Gerstmyer v. Howard County Public Schools, 20 IDELR 1327 (1994).

A small violation of IDEA's procedural requirements does not, without evidence of an actual loss of educational opportunity, constitute a failure to provide the disabled child with a free appropriate public education. Rowley, *supra*; Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997); MM v. School District of Greenville County, 303 F.2d 523 (4th Cir. 2002); Dibuo v. Board of Educ., 309 F.3d 184 (4th Cir. 2002); Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985); Tice, *supra*; Doe v. Alabama Department of Education, 915 F.2d 615 (11th Cir. 1990); W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Evans v. School District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988). Technical violations of IDEA procedures that do not deny the student FAPE are considered de minimis. See, e.g., Fairfax County Sch. Bd. v. Doe, Civil Action No. 96-1803-A (April 24, 1997); see also Roland v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990); Spielberg v. Henrico County Sch. Bd., 853 F.2d 256, 259 (4th Cir. 1988); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633-635 (4th Cir. 1985); and Board of Educ. v. Brett Y, 155 F.3d 557 (4th Cir. 1998).

The hearing officer finds that the Failures were not merely de minimis or technical but that the nature of the procedural violations by the LEA were sufficiently serious and severe as to constitute a denial of FAPE to the disabled child because the Failures seriously infringed upon the parent's rights and opportunity to effectively participate in the IEP process and in the formulation of an appropriate IEP for her disabled child. The parent was effectively denied the opportunity to protect her disabled child's educational opportunities and rights and this and the failure of the LEA to even hold an IEP meeting concerning the subject change of placement also resulted in the child herself suffering a loss of educational opportunity. The Failures concerning the February 6, 2004 IEP led to a defective IEP and to an inappropriate placement for the child and have resulted in a loss of educational opportunity for the disabled child. See also, Shapiro by Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 38 IDELR 91 (9th Cir. 2003).

As the Supreme Court has stated:

> [W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

Board of Educ. v. Rowley, 458 U.S. 176, 205-206 (1982).

One of the main themes of the Individuals with Disabilities Education Act Amendments of 1997 (the "IDEA Amendments") appears to be strengthening parental participation in the educational process. The notice provisions and other procedural protections contained in the IDEA are designed to make the parents an integral part of the educational process concerning their disabled children. Honig v. Doe, 484 U.S. 305, 311-312 (1988). Courts, including the Fourth Circuit Court of Appeals, have long recognized how important the procedural requirements of IDEA are to protecting the rights of disabled children to a free appropriate public education, "We have previously held that the failure to comply with IDEA's procedural requirements, such as the notice provision, can be a sufficient basis for holding that a government entity has failed to provide a free appropriate public education." Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985).

Neither the School District nor the parent elected to submit any briefs to the hearing officer in this proceeding. However, the School District does rely on Dibuo, *supra*. However, the School District's reliance on Dibuo in this proceeding is misplaced. In Dibuo, the Court recognizes:

> "We have no doubt that a procedural violation of the IDEA (or one of its implementing regulations) that causes interference with the parents' ability to participate in the development of their child's IEP will often actually interfere with the provision of a FAPE to that child."

Dibuo, *supra*, at 191.

In Dibuo, the Court merely reaffirms the law in our circuit that not every procedural violation of the IDEA warrants granting the relief requested. Before any relief can be afforded, the Court (or hearing officer) must proceed beyond the finding of any procedural violation of the IDEA to further analyze whether the procedural violation actually interfered with the provision of a FAPE to a child:

> Most recently, in MM, we relied upon our decision in Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997) to reiterate that [HN6] "when . . . a procedural [violation of the IDEA] exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a

mere technical contravention of the IDEA." MM, 303 F.3d 523, 533, 2002 WL 31001195 at *7.

Dibuo, *supra*, at 190.

This proceeding is both similar and dissimilar to Dibuo in certain respects. On appeal, in Dibuo, the School District did not challenge the district court's determination that it violated certain procedural requirements of the IDEA. Similarly, in this proceeding the School District does not appear to contest (1) that it changed the child's placement on February 6, 2004 (TR 4, p. 86) requiring an IEP team meeting (TR 4, p. 86) and modification to the child's January 13, 2004 IEP (TR 4, pp. 86-87); (2) that it was required to give the parent prior notice of the IEP meeting in accordance with state and federal rules and regulations (TR 4, p. 87); (3) that parental notice was provided only after the purported IEP team meeting was held; and (4) that, in fact, there was no IEP team meeting, as envisaged by the IDEA, to change the child's IEP and placement.

However, this proceeding is also distinguishable from Dibuo, because the ALJ in that proceeding found that the School District's procedural violations did not actually interfere with the provision of a FAPE to the disabled child whereas this hearing officer has made the opposite finding in this proceeding.

The Regulations Governing Special Education Programs for Children With Disabilities in Virginia (effective March 27, 2002) (the "Virginia Regulations") and the generally corresponding federal regulations evidence the importance attached by the law to affording every opportunity for parental involvement in the education of their disabled children and, particularly, in the development of any IEP, the cornerstone of the IDEA. For example, the Virginia Regulations provide:

> D. Parent participation.
>
> 1. Each local educational agency shall take steps to ensure that one or both parents of the child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including:
>
> a. Notifying the parent or parents of the meeting early enough to ensure that they will have an opportunity attend, and
>
> b. Scheduling the meeting at a mutually agreed on time and place.
>
> 2. Notice.
>
> a. General notice. The notice given the parent or parents:
> (1) Should be in writing, but may be given by telephone or in person with proper documentation;

(2) Shall indicate the purpose, date, time and location of the meeting, and who will be in attendance; and

(3) Shall inform the parent or parents of the provisions relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child as noted in subdivision C 1 f of this section. . .

c. A copy of the procedural safeguards available to the parent or parents of a child with a disability must be given to the parent or parents upon each notification of an IEP meeting in accordance with 8 VAC 20-80-70.

3. If neither parent can attend, the local educational agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

4. A meeting may be conducted without a parent or parents in attendance if the local educational agency is unable to convince the parent or parents that they should attend. In this case, the local educational agency must have a record of the attempts to arrange a mutually agreed on time and place, such as:

a. Detailed records of telephone calls made or attempted and the results of those calls;

b. Copies of correspondence sent to the parent or parents and any responses received; or

c. Detailed records of visits made to the parent's or parents' home or place of employment and the results of those visits.

5. The local educational agency shall take whatever action is necessary to ensure that the parent or parents understand the proceedings at the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

8 VAC 20-80-62(D).

The LEA apparently does not dispute the Parent's unrefuted testimony that she was only provided with "notice' of the purported February 6, 2004 IEP team meeting after the meeting ostensibly occurred. The written notice of the IEP team meeting is itself dated the same day as the purported meeting, February 6, 2004. JE 35.

Clearly, providing notice after the fact is not "notice" at all and the LEA did not even remotely comply or attempt to comply with its obligations under federal and state law to provide the parent adequate notice of the purported February 6, 2004 IEP team meeting and to obtain parental

participation at such IEP meeting. The LEA's failure in this regard it exacerbated by the LEA's failure to timely send the parent a procedural safeguards notice, as required by 8 VAC 20-80-70(D)(1)(b).

The record reveals that there are several major irregularities on the face of the February 6, 2004 IEP. The parent is named as a participant in the purported February 6, 2004 IEP team meeting. In fact, the parent did not participate in any such IEP meeting. Ms. , a special education teacher of the child's, was the only other so-called participant in the purported IEP team meeting to testify at the hearing. At first, Ms. testified unequivocally that the IEP team convened and met concerning the revision to the January 13, 2004 IEP and the child's placement (TR 2, pp. 159-160). However, upon further questioning regarding this so-called IEP team meeting, it became apparent that the named participants never actually congregated together at the same time in the same place to discuss the child, her disabilities, her educational needs, her proposed change in placement, etc. Rather, Ms. seriatim told Ms. , the Principal/Designee, the regular education teacher and Ms. , the guidance counselor, of the proposed changes to the January 13, 2004 IEP and each of these individuals signed off concerning the revisions.

Another irregularity appears on the third page of the February 6, 2004 IEP, titled "Present Level of Educational Performance." Here, the document incorrectly states that the child is currently being served in a collaborative setting in Math and History. In fact, it was Math and English or Language Arts.

The federal and state regulations mandate that IEP teams must convene "not less than annually" to review and revise each eligible student's IEP. The School District does not dispute that the child's change in placement to the regular education English class required the IEP team to convene and meet to revise the child's January 13, 2004 IEP. The IDEA provides a definition of "IEP Team" in 20 U.S.C. § 1414(d)(1)(B), listing the parents at the top of a group of individuals. See also, 8 VAC 20-80-62(C).

8 VAC 20-80-62(E)(4) specifically defines the responsibility of the regular education teacher as a member of the IEP team:

> 4. The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in the determination of:
>
> a. Appropriate positive behavioral interventions and strategies for the child; and
> b. Supplementary aids and services, accommodations, program modifications or supports for school personnel that will be provided for the child.

See also, 34 C.F.R. § 300-346(d).

The concept behind the IEP team and the IEP team meeting is that the invited skilled and qualified participants with the requisite knowledge of the child, including her disabilities and her educational needs, actually convene to discuss the child and to develop an IEP tailored to her unique educational needs. The regulations afford some latitude to the IEP team and the IEP team meeting process as, for example, evidenced by the answers to Questions 24, 25 and 26 in Appendix A to 34 C.F.R. Pt. 300. See also, Federal Register, Vol. 64, No. 48, p. 12583 (March 12, 1999).

However, as the School District apparently acknowledges, the state and federal regulations do not permit a School District to entirely bypass the IEP meeting requirement altogether, with its attendant pooling of knowledge, experience and skills and joint deliberations and determinations concerning the unique facts and circumstances of the disabled child.

For example, 8 VAC 20-80-62(E)(6) requires the IEP team at the IEP team meeting to work together toward consensus. See also, 34 C.F.R. § 300, Appendix A, Question 9; Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, *supra*.

The Virginia Regulations clarify that "consent" means, amongst other things, that "[t]he parent or parents or eligible student has been fully informed of all information relevant to the activity for which consent is sought in the parent's, parents', or eligible student's native language, or other mode of communication." While the parent did sign the February 6, 2004 IEP, she had been misinformed by the LEA of the progress the child was making in the collaborative English class and certainly was not fully informed of all information relevant to the activity for which consent was sought. Accordingly, the parent's consent in this context was not knowing, voluntary and intentional and does not in any way eliminate or diminish the hearing officer's findings. Additionally, the serious nature of the Failures vitiate any consent by the parent. While the parent could have been more vigilant in this proceeding, the rights of the disabled child should not and do not depend on the vigilance of the parent.

Concerning the Failures, the School District has failed to meet its burden of showing upon a preponderance of the evidence that in relationship to the behavior subject to disciplinary action, the child's February 6, 2004 IEP and placement were appropriate. Accordingly, pursuant to 8 VAC 20-80-76(J)(19) the child's behavior must be considered a manifestation of the child's disability.

The LEA is reminded of its obligations concerning 8 VAC 20-80-76(I)(16) to develop and submit an implementation plan to the parties, the hearing officer, and the SEA within 45 days of the rendering of this decision.

Right of Appeal. 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 in a state court within one year of the issuance of the decision or in a federal district court. 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 § 1415 of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) without regard to the amount in controversy. 8 VAC 20-80-76(O)(1).

ENTER: 5 / 17 / 04

John V. Robinson

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail, facsimile and/or e-mail, where possible)