

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS



CASE CLOSURE SUMMARY REPORT

Public Schools
School Division

Mr.
Name of Parent

April 26, 2004
Date of Decision or Dismissal

John F. Cafferky, Esq.
Counsel Representing LEA

NA
Counsel Representing Parent/Child

Parent
Party Initiating Hearing

Public Schools
Prevailing Party

Hearing Officer's Determination of Issue(s):


Whether Public Schools provided the parent with sufficient notice of an Individualized Education Program meeting concerning the student scheduled for January 13, 2004?

Hearing Officer's Orders and Outcome of Hearing:

The case was dismissed, Public Schools provided the parent with sufficient notice of the IEP meeting and any defects in the hearing notice were technical in nature, and did not deprive the parent of any substantive rights.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of 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.

DAVID R. SMITH
Printed Name of Hearing Officer


Signature

cc: Parent
School Division
State Education Agency

This action was initiated by Mr. _____, the student's father (the "parent"), who filed a hearing request with the _____ Public Schools ("PS") dated January 21, 2004.⁴ The parent contends that PS failed to comply with the provisions of 34 C.F.R. §300.345 (b); 8 VAC 20-80-62 (D), in that PS did not provide sufficient notice for an Individualized Education Program ("IEP") meeting concerning the student, scheduled for January 13, 2004 at 2:00 p.m.

B. Issue:

Whether PS provided the parents with sufficient notice of an IEP meeting for the student scheduled for January 13, 2004 at 2:00 p.m.?

C. Procedural Background.

The undersigned was appointed to serve as the hearing officer to preside over the Due Process Hearing concerning the student. The letter of appointment is dated March 16, 2004 signed by Mr. _____, Coordinator, Monitoring and Compliance for PS⁵.

Although not stated in the letter of appointment, the undersigned Hearing Officer replaced another Hearing Officer originally appointed to preside over this matter⁶, who had recused himself from serving as the Hearing Officer by his Order issued on March 9, 2004.⁷ The parties had engaged in pre-hearing discussions with the prior Hearing Officer, including the issue(s) in the case and the scope of the Hearing.

⁴ Hearing Officer's Exhibit 1

⁵ Hearing Officer's Exhibit 1

⁶ Hearing Officer's Exhibit 5

⁷ Hearing Officer Exhibits 2 and 10 (b)

During a Pre-Hearing Conference with the prior Hearing Officer on February 23, 2004⁸ the parties had discussed the expansion of the scope of the Hearing beyond the single issue presented by the parent in the hearing request.⁹ The parties also exchanged 5-Day Disclosure documents.¹⁰

After the appointment of the undersigned as the Hearing Officer, the parties discussed the status of the case and the applicable issue(s) and also the scope of the Hearing. Based on the discussions, it was agreed that this matter would proceed in accordance with the hearing request as filed by the parent on January 21, 2004 with the single issue as stated above.¹¹ Accordingly, with respect to this Decision, the undersigned Hearing Officer does not consider any orders issued prior to March 16, 2004 concerning of any purported expansion of the Hearing, as binding and therefore, not relevant to any of the findings and conclusions as stated herein.

D. The Record:

The Record in this matter consists of the following:

1. Hearing Officer Exhibits, 1 through 17¹²
2. Transcripts of the Pre-Hearing, dated March 23, 2004¹³;
3. Transcripts of the Pre-Hearing, dated March 29, 2004¹⁴;

⁸ Hearing Officer's Exhibit 4

⁹ Hearing Officer's Exhibit 7

¹⁰ See Attachments B and C

¹¹ Hearing Officer Exhibit 19, Transcript of Pre-Hearing March 29, 2004; Hearing Officer's Exhibit 20, Transcript of Hearing, March 31, 2004

¹² Attachment A

¹³ Hearing Officer's Exhibit 18

¹⁴ Hearing Officer's Exhibit 19

4. Transcripts of the Due Process Hearing, dated March 31, 2004¹⁵;
5. Parent's Exhibits, 1 through 30¹⁶
6. PS Exhibits, PS-1 through PS-149¹⁷
7. PS Letter dated April 5, 2004, Cafferky/Smith¹⁸

E. Participants at the Hearing:

1. Mr. _____, Parent
2. John F. Cafferky, Esq. Attorney for PS
3. Mr. _____, representative for PS
4. Observers: Mr. _____, Ms. _____ and Ms. _____

II. FINDINGS OF FACT

No witnesses testified at the Hearing, the parties agreeing to rely on the record including the documents admitted into evidence and oral arguments. Based on the evidence I find the following:

1. The student is a fourteen year-old female and requires special education and related services as a result of specific learning disabilities¹⁹. She is currently attending the Academy in _____, Virginia,²⁰ where her parents unilaterally placed her²¹.

¹⁵ Hearing Officer's Exhibit 20

¹⁶ Attachment B

¹⁷ Attachment C

¹⁸ Letter submitted in accordance with the Interim Order dated April 2, 2004

¹⁹ Tr. 10, 16-18; Hearing Officer Exhibit 11, Draft IEP dated March 9, 2004

²⁰ Hearing Request dated January 21, 2004 - Hearing Officer's Exhibit HO-7

²¹ Tr.15, 16-19

2. Pursuant to a Hearing Officer's Decision dated October 31, 2003, PS was ordered to convene an IEP meeting concerning the student "as soon as possible on a date convenient to the parents."²²

3. By e-mail dated November 21, 2003, subject "Responding to your telephone message", the parent stated that he was attempting to send PS representative, Dr. _____, an e-mail regarding times and places for holding an IEP meeting. The parent also stated that he needed to check with others whom he would be inviting.²³

4. By e-mail dated December 8, 2003, Dr. _____ requested that the parent provide dates for the IEP meeting.²⁴

5. By e-mail dated December 9, 2003, the parent stated to Dr. _____ that an IEP meeting could take place at 2 p.m. or later on December 11, December 12, or December 18 at the _____ Academy and that the parents would be inviting the student's teachers and other appropriate personnel. The e-mail also stated:

Would you also be kind enough to clarify the purpose of the meeting, As you see it? Our understanding of PS position is that it maintains that your Department (Contract Services) has the unilateral power, wholly apart from the IEP process, to select the venue of (the student's) education within the "private Day school" point on the continuum of services. Is this correct?²⁵

²² Hearing Officer's Exhibit - HO-10 _

²³ Tr. 32, 13-18; HO-10-h, e-mails dated 11-21-03

²⁴ Tr 33, 6-11; Hearing Officer Exhibit 10-h, e-mail dated December 8, 2003

²⁵ Tr. 34, 6-18; Hearing Officer Exhibit 10-h, e-mail dated December 19, 2003

6. The parent also asserted in the December 9, 2003 e-mail, that PS had only offered the Day School as an alternative placement for the student.

7. In an e-mail dated December 12, 2003, Dr. confirmed to the parent that the Principal of the Academy had agreed to host the "upcoming" IEP meeting for the student. The e-mail also offered dates for the meeting and requested confirmation from the parent.²⁶

8. In an e-mail dated December 19, 2003, the parent referenced a telephone conversation between himself and Ms. on December 12, 2003 and listed seven (7) alternative dates for holding the IEP meeting, including January 13, 2004 at 2:00 p.m. The e-mail also stated that the dates that were listed had been "cleared with others we will be inviting to the meeting, including a number of teachers and administrators at the Academy." The e-mail also requested that Dr. provide information about a private-day school placement and referenced an IEP that the parent contends was completed in his absence.²⁷

9. By return e-mail dated December 22, 2003, Dr. confirmed the IEP meeting for January 13, 2004 at the Academy. Dr. also stated "I will provide written notice of the meeting and response to your inquiry the week of December 29."²⁸

10. On January 12, 2004, PS, through Dr. , issued a notice of an IEP meeting for Tuesday, January 13, 2004 at the Academy. The notice also had checked as the purpose of the meeting "an annual IEP." Furthermore, the notice had checked the school

²⁶ Tr. 35, 6-9; Hearing Officer's Exhibit 10-h, e-mail dated December

²⁷ Tr. 35, Hearing Officer's Exhibit 10-h

²⁸ Tr. 35, 12-23; Hearing Officer's Exhibit 10-g

staff that would be in attendance: the principal or designee, special education teacher, "Contract Services", "Coord".²⁹

11. By e-mail dated January 12, 2004, the parent stated "Having received no notice from you with respect to the IEP meeting that we had proposed for tomorrow at 2 p.m., I feel that I have no choice but to ask that the meeting be rescheduled for a date that will permit you to give us more than twenty-four hours' notice."³⁰

12. By return e-mail dated January 12, 2004, Ms. responded to the parent stating "I am sorry we cannot meet as scheduled on Tuesday, January 13."³¹ Ms. also requested that the parent furnish other dates. The parent responded by return e-mail dated January 12, 2004 stating that he could furnish other dates, but requested information that he had previously requested.³²

13. The parent filed a request for a due process hearing with the PS dated January 21, 2004.³³ The parent alleges in paragraph 7 of the hearing request under "Description of the nature of the problem (what are the issues; what's wrong?)", that PS violated the notice provisions of 34 C.F.R. §300.345 (b); 8 VAC 20-80-62 (D) with regard to the scheduling of an Individualized Education Program ("IEP") meeting for January 13, 2004 at 2:00 p.m.

14. The hearing request further states in paragraph 8, regarding "Facts relating to the problem (what happened that caused the problem?)":

²⁹ Hearing Officer's Exhibit 10-g

³⁰ Tr 37, 3-7; Hearing Officer's Exhibit 10-g

³¹ TR 37, 8-10; Hearing Officer's Exhibit 10-g

³² Tr 37, 1-7; Hearing Officer's Exhibit 10-g

³³ Hearing Officer's Exhibit 1

After all parties agreed via e-mail on December 22, 2003, on the time and place for the January 13, 2004, IEP meeting, PS failed to provide the requisite notice, which it had promised in the December 22, e-mail to do "the week of December 29." The eventual notice to parents was postmarked on January 13, 2004 – after I complained by e-mail on the afternoon of January 12, 2004, that we had received no notice of the meeting and asked that the meeting be rescheduled for that reason.

15. The parent did not state in the hearing request how any failure by PS to provide the notice denied him his right to participate in the development of his daughter's IEP, nor is any such denial evident based on the record. Also, the parent did not propose a resolution of the problem; stating instead in the hearing request in reference to a proposed resolution in paragraph 9 "Not known at this time."

16. By e-mail dated January 22, 2004 / , the parent stated that he was following up on a conversation regarding setting a date and time for an IEP meeting; six dates were proposed, including February 19, 2004.³⁴

17. Three IEP meetings were conducted by PS in which the parent participated, February 19, 2004³⁵, February 25, 2004³⁶ and March 9, 2004. At the March 9, 2004, meeting, PS presented a draft IEP³⁷. The parties engaged in approximately 15 hours of discussions regarding the development of an IEP for the student.³⁸

³⁴ Hearing Officer's Exhibit 10-g

³⁵ PS Exhibit 89

³⁶ PS Exhibit 90

³⁷ Hearing Officer's Exhibit 11, the parent did not sign the IEP.

³⁸ Tr. 20, 9-11

III. CONCLUSION:

1. Whether PS provided the parents with sufficient notice of an IEP meeting for the student scheduled for January 13, 2004 at 2:00 p.m.?

2. Based on the findings of the undersigned Hearing Officer as stated above, it is concluded that PS provided the parent sufficient notice of the IEP meeting, although technically defective. This technical defect concerned PS failing to provide the parent with the appropriate "notice" form more than 24 hours in advance of the meeting. Even so, in view of the numerous pieces of communications between the parties, the parent had reasonable notice of the meeting that enabled him to effectively participate in the meeting. There was no evidence that any technical defect regarding PS providing the parent with the appropriate form prohibited the parent from being an active participant in the IEP meeting with knowledge of what was to be addressed at the meeting.

3. The parent had actual knowledge of the meeting and his complaint is not that he was unaware of the meeting and therefore not able to fully participate, but that he just did not receive the official notice through the appropriate form more than 24-hours in advance of the meeting, even though the date, time and location was clear and as stated herein, the purpose of the meeting had been established by the issuance of the Hearing Officer's Decision dated October 31, 2003.³⁹

4. Pursuant to 34 C.F.R. §300.345 (b); 8 VAC 20-80-62 (D), PS is required to provide parents of notice of IEP meetings:

D. Parent Participation.

1. Each local educational agency shall take steps to ensure that one

³⁹

PS Exhibit 68

or both of the 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 to 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.

5. Based on the evidence, PS did not provide the parent with a single document fully complying with the above regulations concerning the scheduling of an IEP meeting for the student until on or about January 12, 2004.⁴⁰ Even so, the evidence also establishes that PS substantially complied with providing the parent with the required "notice." This conclusion is based on the series of communication between PS and the parent by e-mail over a nearly three-month period of time, beginning from at least November 21, 2003 until January 12, 2004, concerning the efforts of the parties to schedule the meeting⁴¹. The evidence establishes that the parent not only knew of the date, time and location of the scheduled IEP meeting, but in fact the parent suggested the date, time and location of the meeting.⁴² Therefore, proceeding with the January 13, 2004 IEP meeting should not have presented the parent with any surprises.

⁴⁰ Notice dated January 12, 2004, / ; Hearing Officer's Exhibit 10-g

⁴¹ See Findings of Fact 2 through 9

⁴² Hearing Officer's Exhibits 10-h, Parent e-mail dated December 19, 2003

6. The parent asserts that PS did not identify the purpose of the meeting; however, based on the Due Process Hearing on October 7, 2003 resulting in a Hearing Officer's Decision dated October 31, 2003, also involving this parent and PS, it appears clear that the purpose of the meeting was to develop an annual IEP meeting for the student⁴³.

7. PS through Dr. promised to provide the parent with a "notice" the end of December 2003. Whereas PS should have provided the parent with the "notice" as promised and as finally sent on or about January 12, 2004, the failure to do so here is at most a technical procedural violation of IDEA. However, not all procedural errors, including the failure to provide notice, will automatically give rise to a denial of FAPE where the parents have not been denied the opportunity for meaningful participation as is the case here. *Tennessee Dept. of Mental Health & Mental Retardation v. Paul B.*, 24 IDELR 452 (6th Cir. 1996); *Myles S. v. Montgomery County Board of Education*, 20 IDELR 237 (M.D. AL 1993).

8. Here, there is insufficient evidence that the parent was denied any rights in view of the nearly three (3) months of communication concerning the scheduling of an IEP meeting for the student. Accordingly, whereas PS did not provide the parent with a document containing all the necessary provisions (time, date, location, purpose, participants) in full compliance with the applicable regulations, when viewing the numerous pieces of communication between the parent and PS as a whole, it is clear that both parties were aware of the date, time, location and purpose of the January 13, 2004 IEP meeting. Additionally, considering the e-mails between the PS and the parent as a whole, it is difficult to see how the parent was not aware of who would be participating in the meeting.

⁴³

PS Exhibit 68

9. It is also significant to note that subsequent to January 13, 2004, the parties engaged in three (3) IEP meetings for approximately fifteen (15) hours discussing the development on an IEP for the student. Therefore, any failure of PS to provide the “notice” for the January 13, 2004 IEP meeting did not deprive the parent of any substantive rights. *Doyle v. Arlington County School Board*, 806 F. Supp. 1253 (E.D. Va. 1992); *DiBuo V. Board of Education of Worcester County*, 309 F. 3d 184, 190-91 (4th Cir. 2002); *Alexis v. Board of Educ. for Baltimore Pub. Schs.*, 40 IDELR 7 (D. Md. 2003).

10. It is noted that the parent does not request any specific relief in the hearing request, but merely states “Not known at this time.” Based on the record, it appears that the parent simply wants an acknowledgment from PS that it made a mistake.⁴⁴ PS argues that what the parent seeks is in the nature of a declaratory judgment and argues that a Hearing Officer under the IDEA does not have the authority to make such a determination. This Hearing Officer concludes that the parent does seek a declaration that PS made a mistake. It is noted that the position of PS was confirmed in a prior Due Process Hearing by Mr. Charles Aschman in his Decision of October 31, 2003, *Hogan v. Fairfax County Public Schools*⁴⁵, that a hearing officer does not have the power to issue a declaratory judgment under IDEA citing *Newark Unified School District*, 32 IDELR 217 (Ca. SEA 2000). However, in view of the findings and discussion as stated herein concerning the sufficiency of the “notice” there is no need to address the question as to whether or not a Hearing Officer can issue a declaratory judgment..

11. A Due Process Hearing should not be for the purpose of simply making a point, but to ensure that the best interests of a disabled child are protected. It is difficult to see how the

⁴⁴ Tr. 21, 17-21

⁴⁵ PS Exhibit 68

question about "notice" as presented here serves that purpose. This is not a situation where the parent first learned about an IEP meeting 24 hours prior to the meeting or had no input in scheduling the meeting.

12. The IDEA entitles disabled students to a Free and Appropriate Public Education ("FAPE). See 20 U.S.C. § 1412(a) (1997). Specifically, Section 1412(a) provides that, "[a] free appropriate public education is available to all children with disabilities residing in the State between ages 3 and 21, inclusive" Similarly, the accompanying regulation at 34 C.F.R. § 300.121(a) also requires each state to have "[i]n effect a policy that ensures that all children with disabilities aged 3 through 21 residing in the State have the right to FAPE" There is no dispute in this matter that the student requires special education and related services having specific learning disabilities⁴⁶. This matter concerns the parent's contention that he did not receive appropriate notice from PS of the January 13, 2004 IEP meeting. As concluded herein, any purported failure of PS to fully comply with the "notice" provisions as discussed herein did not deprive the parent of an opportunity to fully participate in the meeting.

13. Since the Hearing concerned the sufficiency of the notice to the parent of an IEP meeting, no evidence was presented regarding whether the student is receiving educational benefit at her current placement; accordingly, this decision does not address the question of whether the student is receiving FAPE at her current placement..

IV. ORDER

This matter is **DISMISSED**.

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Tr. 10, 16-18; Hearing Officer Exhibit 11, Draft IEP dated March 9, 2004

V. APPEAL INFORMATION

This decision is final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court.

VI. IMPLEMENTTION PLAN

The LEA is responsible to submit an implementation plan to the parties, the hearing officer and the Virginia Department of Education within 45 calendar days.

4-26-04

Date



David R. Smith, Esq.
Hearing Officer