## COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

## SPECIAL EDUCATION DUE PROCESS HEARING

, et als. Complainants

v.

COUNTY SCHOOL BOARD Respondent.

**Student & Parent:** **Administrative Hearing Officer:**

John V. Robinson, Esquire

7102 Three Chopt Road

Richmond, Virginia 23226

**Child's Advocate:** (804) 282-2987 (Telephone)

Kandise Lucas (804) 282-2989 (Facsimile)

jvr@jvrlawpc.com (E-mail)

**LEA's Attorney:**

Jason H. Ballum, Esq.

Alan D. Bart, Esq.

## DECISION OF THE HEARING OFFICER

## I. Introduction

The Parent, on behalf of her minor son, (the "Student"), through her advocate, initiated this proceeding against the County School Board (the "School Board") under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. ("IDEA") with the filing of three due process complaints dated December 4, December 6, and December 8, 2017.

After consolidating the cases, the Hearing Officer determined the sole issue was whether the school division was required to conduct a manifestation determination review ("MDR") as a result of the Student's removal arising out of an incident that occurred on November 30, 2017. No other issues are pending before the Hearing Officer. For the reasons discussed below, the Parent has failed to carry her burden of proof, and the Hearing Officer decides in favor of the School Board.

## II. Findings of Fact[[1]](#footnote-1)

1. The requirements of notice to the Parent were satisfied[[2]](#footnote-2). The Student's date of birth is , . PE 1-1[[3]](#footnote-3).

2. The issue for decision by the hearing officer in this proceeding is whether the School Board was required to conduct a MDR.

3.The Student is a ninth-grade student at High School in County, Virginia. See, e.g., SB 3, 4.

4. On September 18, 2017, the Student was initially found eligible to receive special education and related services under the disability category of Other Health Impairment (“OHI”) as a result of his Attention Deficit Hyperactivity Disorder, (“ADHD”). See SB 1.

5. The Parent did not sign consent to the initial eligibility. Id.

6. The Student’s IEP team met on October 11 and October 18, 2017 and developed an initial Individualized Education Program (“IEP”). See SB 2 & 3.

7. During the October 11, 2017 IEP meeting, the Parent was represented by Ms. Kandise Lucas, Dr. Marla Crawford, and Ms. Lorraine Wright. See id.

8. During the October 18, 2017 IEP meeting, the Parent was represented by Ms. Lucas and Ms. Wright. See id.

9. By the conclusion of the October 18, 2017 IEP meeting, the school staff had proposed what the LEA contends is a complete initial IEP. Tr. 686, 692 (expert testimony of Ms. Donice Davenport).

10. At the conclusion of the IEP meeting on October 18, 2017, Ms. , Exceptional Educational Specialist, provided the Parent with her business card and invited the Parent to call Ms. if the Parent had any questions about the proposed IEP. Tr. 367-368.

11. The Parent did not call Ms. with questions about the proposed IEP.

12. A copy of the proposed IEP was sent to the Parent on October 26, 2017, along

with a prior written notice, and a note from the Student’s case manager, Ms. seeking the Parent’s consent. Tr. 317-319; 321.

13. The School Board contends that the proposed IEP was designed to allow the Student to make educational progress appropriate in light of his particular circumstances. See

SB 3.

14. The Parent failed to respond to the request for consent to the initial IEP, but the Parent testified that she chose not to sign consent. Tr. 701-702; 724.

15. The Parent did not provide consent to the initial provision of special education and related services until December 18, 2017, at which time she returned the proposed IEP and indicated that she consented to its implementation. See SB 6; Tr. 319-320.[[4]](#footnote-4)

16. On November 30, 2017, prior to the Parent providing consent to the initial provision of special education and related services, the Student engaged in a physical altercation with another student in the school gymnasium during PE class, his last class of the day. See SB 4; Tr. 146-147.

17. School staff quickly intervened in an attempt to stop the altercation, but the Student continued aggressive posturing and made physical contact with a physical education teacher and the school principal. SB 4.

18. The Student resisted School Board staff’s attempts to deescalate the situation and raised his fists towards staff in a threatening manner. Id.

19. The Student also refused to respond to the directives of school resource officers. Id.

20. The school contacted the Student's mother and asked her to come to the school. Tr. 206.

21. The Student left school at approximately 3:30 p.m. on November 30, 2017. Id.

22. The school day concludes at 3:55 p.m., although on that day the Student's PE class concluded earlier than 3:55. Tr. 206-207.

23. On Monday, December 4, 2017, Principal notified the Parent of his decision to suspend the Student for ten days with a recommendation for expulsion. SB 4.

24. On December 14, 2017, the principal amended the disciplinary removal to what the School Board contends was a short-term, ten school-day suspension, and the Student was permitted to return to school on December 15, 2017. See SB 5, 8, 9; Tr. 209-210.

25. The Student returned to High School and resumed his prior placement on December 15, 2017 after serving what the School Board contends was a ten-day suspension beginning December 1, 2017 and ending on December 14, 2017. See SB 8.

26. The School Board did not conduct, and was not required to conduct, a MDR because the Student’s Parent had not yet provided written consent to the initial provision of special education and related services. See SB 6; Tr. 319-321.

27. The School Board made reasonable efforts to obtain informed consent from the Parent for the initial provision of special education and related services to the Student.

II. Additional Findings, Conclusions of Law and Decision[[5]](#footnote-5)

In this administrative due process proceeding initiated by the Parent, the burden of proof is on the Parent. *Schaffer, ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

In Virginia, a parent must provide written consent to the initial provision of special education and related services before a student is entitled to the benefits of a free appropriate public education ("FAPE"), which would include the IDEA's disciplinary procedures. See 8 VAC 20-81-170-(E)(1)(c) and (E)(4).

Because at the time of the Student's disciplinary infraction on November 30, 2017, the Parent had not yet provided consent to the initial provision of special education and related services, the Student was not at that time entitled to the benefits of FAPE and its protections under the IDEA, including the discipline procedure of a MDR.

8 VAC 20-81-170 provides, in part:

E. Parental consent.

1. Required parental consent. Informed parental consent is required before:

**...**

c. Initial provision of special education and related services to a child with a disability; CFR 300.300(b)(1))

**...**

4. Refusing consent.

**...**

b. If the parent(s) refuses to consent to the initial provision of special education and related services (34 CFR 300.300(b)(3) and (4))

(1) The local educational agency may not use mediation or due process hearing procedures to

obtain parental consent, or a ruling that the services may be provided to the child.

(2) The local educational agency's failure to provide the special education and related services to the child for which consent is requested is not considered a violation of the requirement to provide FAPE; and

(3) The local educational agency is not required to convene an IEP meeting or to develop an IEP for the child for the special education and related services for which the local educational agency requests consent. However, the local educational agency may convene an IEP meeting and develop an IEP to inform the parent about the services that may be provided with parental consent.

(c) If the parent(s) of a parentally placed private school child refuses consent for an initial evaluation or a reevaluation, the local educational agency: (34 CFR 300.300(d)(4))

(1) May not use mediation or due process hearing procedures to obtain parental consent,

or a ruling that the evaluation of the child may be completed; and

(2) Is not required to consider the child as eligible for equitable provision of services in accordance with 8VAC20-81-150.

(d) A local educational agency may not use a parent's refusal to consent to one service or activity to deny the parent(s) or child any other service, benefit, or activity of the local educational agency, except as provided by this chapter. (34 CFR 300.300(d)(3)).

(Emphasis supplied)

34 CFR 300.300(b) provides, in part:

(b) Parental consent for services.

(1) A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

(2) The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

(3) If the parent of a child fails to respond or refuses to consent to services under paragraph (b)(1) of this section, the public agency may not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child.

(4) If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency--

(i) Will not be considered to be in violation of the requirement to make available to FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and

(ii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for the special education and related services for which the public agency requests such consent.

(Emphasis supplied).

The School Board's position is supported by cases like Colbert County Bd. of Educ. v. B.R.T., 51 IDLER 16 (N.D. Ala. 2008). In B.R.T., the parent attended the initial IEP meeting, but refused to provide consent to the initial IEP because the parent objected to the proposed placement. The U.S. District Court determined that because the parent did not provide consent to the initial IEP, the parent had not consented to the initial provision of services. As a result, the Court reasoned the school board could not obtain the parent's consent through mediation or due process and it also could not be held liable for not providing FAPE to the student.

Once a parent refuses to provide consent for the initial provision of services, the parent is considered to be refusing the benefits of FAPE and its protections under the IDEA, including the discipline procedures. Letter to Yudien, 38 IDELR 267 (OSEP 2003) ("[W]here a parent of a child with a disability refuses consent for the initial provision of services, we would consider the parent to have refused the benefits of FAPE and its protections under the IDEA, including the discipline procedures...."); see also Letter to Gantwerk, 39 IDELR 215 (OSEP 2003) (School divisions are not required to apply the IDEA's disciplinary protections to children who are not receiving special education because the parents have refused to provide consent). Furthermore, under such circumstances, the Student "may be disciplined in the same manner as nondisabled students." Letter to Fulfrost, 42 IDELR 271 (OSEP 2004).[[6]](#footnote-6)

The IDEA mandates that when a parent refuses the initial provision of services, the student is subject to "the same disciplinary measures applied to a child without a disability who engages in comparable behaviors." *See* 8 VAC 20-81-160(H)(3)-(4); *see also* Letter to Gantwerk, 39 IDELR 215 (OSEP 2003); and Letter to Fulfrost, 42 IDELR 271 (OSEP 2004).

The Parent testified that she declined the initial provision of special education and related services because she was not satisfied with the IEP dated October 18, 2017. Id. The Parent did not grant consent to the Student’s IEP until December 18, 2017, which was not only after the

behavioral incident that led to the suspension, but also after the Student had returned from his ten-day suspension. SB 6; see also id. "Consent" in this context must be in writing 8 VAC 20-81-10. The Parent made no attempt to consent to the initial provision of services irrespective of any IEP. Tr. 321.

As specified in Finding paragraph 27 above, the evidence further demonstrates that the school division made reasonable efforts to obtain parental consent by: holding IEP meetings on October 11, 2017 and October 18, 2017 (at which the Parent was represented by her advocates Ms. Lucas, Dr. Crawford, and Ms. Wright) (SB 2-3); providing the Parent numerous copies of the procedural safeguards (Tr. 752); providing prior written notice (Tr. 692); the Student’s case manager sending a note home to the Parent requesting consent (Tr. 726); and a school administrator providing her business card after the October 18, 2017 IEP meeting so that the Parent could contact Ms. with any questions that the Parent may have (Tr. 367-368). In addition, the Parent was represented by at least two special education advocates at all pertinent times. SB 2, 3. Despite the efforts of school staff to secure consent, as the Parent testified, she was not interested in granting consent to the initial IEP and she declined the initial provision of services. Tr. 701-702; 724. The IDEA expressly states that the School Board has no FAPE obligation to the Student in the absence of consent to the initial provision of special education and related services. See 8 VAC 20-81-170(E)(1)(c).

In this case, the Parent did not provide consent for the initial provision of special education and related services until December 18, 2017 and, therefore, as of November 30, 2017, the protections that could have been afforded to the Student under the IDEA, including a MDR, were not applicable. See J.V. v. Stafford Cty. Sch. Bd. 115 LRP 6187 (Va. July 7, 2014) (affirmed 792 S.E. 2d 286 (Va. Ct. App. Nov. 15, 2016)); see also J.V. v. Stafford Cty. Sch. Bd, 71 IDELR 99 (Va. May 31, 2017); 8 VAC 20-81-170(E)(1)(c) and (E)(4). The IDEA mandates that when a parent refuses the initial provision of services, the student is subject to “the same disciplinary measures applied to a child without a disability who engages in comparable behaviors.” See 8 VAC 20-81-160(H)(4); see also Letter to Gantwerk, 39 IDELR 215 (OSEP 2003); Letter to Fulfrost, 42 IDELR 271 (OSEP 2004). Accordingly, the Student is not entitled to a MDR in this matter and the Hearing Officer must find in favor of the School Board.

The parent bears the burden to establish by a preponderance of the evidence that she consented to the initial provision of special education and related services and was entitled to a MDR for the Student in this proceeding and she not has sustained this burden.

Because the hearing officer's decision on the Parent's failure to provide initial consent is dispositive of the case, the hearing officer does not address the other arguments raised by the parties. The LEA is reminded of its obligations concerning 8 VAC 20-81-210(N)(16) to develop and submit an implementation plan to the parents and the SEA within 45 days of the rendering of this decision.

Right of Appeal. This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.

ENTER: 2 / 20 / 2018

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John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by e-mail)

1. To the extent the other section entitled, “Additional Findings, Conclusions of Law and Decision” includes findings of fact, these findings are incorporated into this section. [↑](#footnote-ref-1)
2. The Parent and the Student are referred to generically herein to preserve privacy. [↑](#footnote-ref-2)
3. Exhibits submitted by the LEA and admitted into evidence in this proceeding are cited as "SB <Exhibit Number> <page reference, if any>". Exhibits submitted by or on behalf of the Student and admitted into evidence in this proceeding are cited as "PE<Exhibit Number> <page reference, if any>". References to the verbatim transcript of the hearing held on January 25-26, 2018 are cited in the following format "Tr.<page number>." References to the Parent's post-hearing Opening Brief are cited in the following format: "POB<page number>". References to the LEA's post-hearing Opening Brief are cited in the following format "SOB<page number>". [↑](#footnote-ref-3)
4. The Parent unilaterally altered the proposed IEP by adding accommodations and services, which the School Board interpreted as a request from the Parent to consider additional proposed services. [↑](#footnote-ref-4)
5. To the extent the above section entitled, “Findings of Fact” includes conclusions of law, these conclusions are incorporated into this section. [↑](#footnote-ref-5)
6. If the parents refuse to consent to the initial provision of special education services, the school division cannot be considered in violation of the requirement to make available a free appropriate public education to the student. 8 VAC 20-81-170(E)(4)(b). In addition, under such circumstances, a school division may not even initiate a due process hearing or seek mediation or override the lack of parental consent. Id. [↑](#footnote-ref-6)