14-052

VIRGINIA:

Department of Education
Special Education Due Process Hearing

AND

v. In Re:

COUNTY PUBLIC SCHOOLS

ORDER TO DISMISS

THE PARTIES

is a child in County. County Public Schools (" CPS"), the local education agency (LEA) was represented by Patrick T. Andriano, Esq. of Reed Smith, LLP. and , the parents and the petitioners in this due process hearing, appeared *pro se*.

PROCEDURE

A request for a due process hearing was filed by the parents with CPS on July 28, 2014. This hearing officer was appointed on July 29, 2014. On August 5, 2014, the first pre-hearing conference was held by telephone. CPS, by counsel, objected to the sufficiency of notice of a due process hearing. At that time, this hearing officer determined that the notice was insufficient, and parent was granted permission to amend the due process hearing notice (request) within seven days. The parent then filed the Amended Due Process Request which was received by the hearing officer on August 8, 2014. A second pre-hearing conference was held on August 13, 2014. At that time the issues to be determined by the hearing officer at the hearing were found to be issues regarding whether the IEP proposed by the CPS on October 25, 2013 provided the child with a FAPE in the least restrictive environment. The hearing dates were set for October 8 and 9, 2014. On August 18, 2014, CPS send the parents an unsigned letter as a written response to the complaint.

When there was no resolution by the parties by September 7, 2014, the applicable time lines for the due process hearing commenced. The date the hearing officer decision was due was October 22, 2014.

The third pre-hearing conference was held by telephone on September 22, 2014. The parent requested documents from CPS and inquired as to the availability of nineteen witnesses

she wanted to call for the hearing. The parent agreed to prepare subpoenas for the documents and the witnesses.

The fourth pre-hearing conference was held on October 1, 2014 at the request of the hearing officer regarding the parent's request for documents and subpoenas of witnesses. As to the request for documents, after review of the request and the objections, the request for documents was denied. As to the witness subpoenas, the parent requested more and more witness subpoenas (up to twenty-seven) and the subpoena form was unacceptable to the hearing officer. After review of the witness subpoena requests, the hearing officer agreed to the subpoena for eighteen witnesses and denied the subpoenas for nine witnesses. The hearing officer agreed to prepare the subpoenas and have them ready for the parent to pick up by 9:00 a.m. the following day.

This case was scheduled to be heard on October 8 and 9, 2014. On October 7, 2014, at 6:16 p.m., this hearing officer received an email from CPS, by Counsel, which included the attachment, " COUNTY SCHOOL BOARD'S MOTION TO DISMISS." Later that night, at 9:07 p.m., this hearing officer received an email from arguing against the motion to dismiss. At the onset of the hearing on October 8, 2014, the hearing officer reviewed the motion to dismiss and the opposition to the motion with the parties.

DISCUSSION

CPS, by counsel, argues that the parent is not entitled to a due process hearing on the issue of whether there has been a denial of a FAPE because the parent has refused to grant consent to the initial eligibility determination and to the initial provision of special education and related services. The parent argues that she had agreed with the initial eligibility determination.

Based on the Amended Due Process Request, the issue before this hearing officer was whether the IEP proposed by the CPS on October 25, 2013 provided the child with a FAPE in the least restrictive environment. It is the opinion of this hearing officer that a parent would be entitled to challenge the proposed IEP, even if they did not give permission for that IEP to be implemented.

However, before the parent can challenge the proposed IEP, the parent has to pass the eligibility threshold. According to the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, (8VAC20-81-80.D.8.), the local educational agency **shall** obtain written parental consent for the initial eligibility determination. (emphasis added). In this

case the parent did not agree to the eligibility determination. At the eligibility meeting, the parent crossed out *agree* and added *acknowledge*. I find that does not constitute consent for the eligibility determination.

The parent has the right to file for a due process hearing to challenge the eligibility determination. (8VAC20-81-210.A.1.) But she has not done so. Without the threshold issue of eligibility being resolved, the issue of the appropriateness of the initial IEP that followed is not ripe for determination of a hearing officer. The issue of the eligibility determination was not before this hearing officer. The issues regarding the initial IEP and services offered therein will have to be resolved after the parent has agreed to the eligibility determination.

After review of the motion to dismiss from the school division and the argument by both parties, this hearing finds that the motion to dismiss should be granted on the basis that the parent has not consented to the eligibility determination and that the eligibility issue needs to be resolved before a hearing officer can review a subsequent proposed IEP.

THEREFORE: It is ORDERED that the matter of the due process hearing requested by the parent on August 8, 2014 is dismissed without prejudice.

So Ordered this 14th day of October, 2014.

Jane E. Schroeder
Hearing Officer

DECISION OF THE HEARING OFFICER

I. Findings of Fact[1]

1. The requirements of notice to the Parents were satisfied[2]. The Student is a kindergartener whose date of birth is December 5, 2006. SB 17[3]. The Student suffers from multiple disabilities, and is eligible to receive special education and related services. SB 13.

2. The issue for decision by the hearing officer in this proceeding is whether the Student is entitled to a manifestation determination review ("MDR").

3. The Student began attending County Public Schools (" CPS", the "school division" or the "LEA") in September 2013 as a kindergarten student.

4. On October 9, 2013, an eligibility committee determined that the Student was eligible for special education and related services in order to access the general curriculum and to benefit from her educational setting. SB 13.

5. The eligibility committee determined that the Student met the criteria for special education as a student with an intellectual disability because, among other reasons, her intellectual functioning, adaptive skills and academic skills showed significant deficits when compared to her same-age peers. SB 13.

6. When asked to consent in writing to the eligibility committee's determination, the Parent struck out the word "agree" in the check-the-box response, "I AGREE with the eligibility team's determination"; and instead wrote the word "Acknowledge". SB 13; PE 5.

7. The School Board, by counsel, contends that acknowledgement typically does not constitute consent and while the hearing officer agrees with this contention, the matter does not end here. School Board Motion to Dismiss at 4-6; SOB 7-9.

8. In its supplemental prior Written Notice ("PWN") dated October 18, 2013, the School Board stated:

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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.

2 The Parent and the Student are referred to generically herein to preserve privacy.

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 theStudent 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 June 17, 2014 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>".

> Although the [Parent] replaced the wording on the consent to eligibility from "agree with" to "acknowledge", the eligibility team interpreted [Parent's] signature as consent to eligibility. The team is moving forward with the understanding that [Student] is eligible for special education services. Additionally, [Parent] was informed that her signature did not indicate agreement with placement options. The IEP team will convene to consider special education services and placement continuum options.

SB 16.

9. The Parent testified that after reviewing this PWN, she also proceeded on the basis that she had consented to the eligibility committee's determination.

10. Accordingly, the School Board proceeded to the next task at hand, developing an initial IEP for the Student because the Student had not previously been found eligible for special education and related services.

11. On October 25, 2013, several IEP team members convened to develop the Student's initial IEP, including the Parent, the Student's general education teacher in kindergarten (Ms.), a special education teacher, a speech pathologist and others. SB 17.

12. The IEP provides daily, 5 days per week, amongst other things, for: 210 minutes of special education from a special education teacher in a special education classroom; 180 minutes of special education in the general education classroom; and it provides both small group and one-on-one instruction. SB 17.

13. Additionally, the IEP offers the Student numerous accommodations and modifications, including visual and verbal prompts, a visual schedule, clarification of directions and preferential seating. SB 17.

14. Annual goals address the Student's specific weaknesses in reading, writing and mathematics. SB 17.

15. The IEP also proposes 240 minutes monthly of the related service of speech-language pathology services by a speech therapist. SB 17.

16. The Parent refused to consent to the initial IEP offered by the School Board, checking the box "I do not give permission to implement this IEP and the placement decision." SB 17.

17. On November 6, 2013, the School Board provided the Parent a PWN which, amongst other things, stated:

> [Parents] did not give permission to implement the proposed IEP and placement decision. As a result, [Student] is a general education student for all purposes and will receive no special education services.

SB 18.

18. The Parent did not respond to this PWN.

19. After a series of school disciplinary infractions, on April 9, 2014, Mr. , the Acting Principal of the Student's elementary school, wrote to the Parents, stating in part:

> This letter is to inform you that your daughter, [Student], is suspended from school for ten days effective April 10, 2014 and running through April 30, 2014. Additionally, I am recommending to the Superintendent of Schools that your daughter be suspended from County Public Schools for the remainder of the 2013-2014 school year.

SB 36.

20. Shortly after this PWN was issued, the Student was removed for the remainder of the school year because of, amongst other things asserted by the School Board, the Student's disruption to the learning environment at her school. SB 36.

21. By letter dated May 5, 2014, to Mr. , at the LEA, the Parent asserted that the Student was entitled to a MDR because of her disability. By letter of the same date, Ms. , on behalf of the School Board, responded in part:

> To date the parents have refused to provide parental consent allowing County Public Schools (CPS) to provide necessary special education and related services to [Student]. Since they have refused this initial provision of special education services, [Student] is a general education student and not entitled to the protection of the Individuals with Disabilities Education Act ("IDEA"), to include the right to a manifestation determination review.

Exhibit H to Parent's Request for Expedited Due Process Hearing.

22. The testimony of the LEA's educational professionals was both credible and consistent on the major issues before the hearing officer. The demeanor of such professionals at the hearing was candid and forthright.

II. Additional Findings, Conclusions of Law and Decision[4]

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 FAPE, which would include the IDEA's disciplinary procedures. See 8 VAC 20-81-170-(E)(1)(c) and (E)(4). As a result of the parent's refusal to consent to the initial provision of special education and related services, the Student is not entitled to the benefits of FAPE and its protections under the IDEA, including the discipline procedure of a MDR.

The LEA has at all times been willing to offer the Student the services under the October 25, 2013 initial IEP while the Parent has consistently demonstrated that she is unwilling to consent to the provision of services pursuant to this initial IEP. Tr. 74; 176-177; 181; 239. 251; and 276. Accordingly, this proceeding is akin to 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 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. Just like the parent in B.R.T., the Parent in this matter attended the initial IEP meeting, and refused to provide written consent to implement the IEP because she disagreed with the placement. Thus, the Parent has not consented to the initial provision of services.

In B.R.T., the United States District Court for the Northern District of Alabama rejected the basis for the hearing officer's decision in favor of the parent at the administrative level in such case that the parent was not required to consent to services which she believed to be inappropriate in order to be entitled to a due process hearing.

The reasoning of Judge Ellis in *Fitzgerald v. Fairfax County Sch. Bd.*, 556 F.Supp.2d 543 (E.D.Va. 2008) is instructive. In the instant case, the legal obligation to provide FAPE to the Student is squarely imposed on the LEA.

The IDEA, its accompanying regulations and the provisions cited by the Parent supporting her position, do not require the School Board to accede to a parent's demands concerning the initial provision of services. While the IDEA and the IEP process are designed to ensure parental participation in decisions concerning the educational programming for their child, the IDEA does not permit parents to usurp or otherwise hinder a LEA's authority and duty to provide FAPE to the Student in this case in the context of an initial provision of services.

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4 To the extent the above section entitled, "Findings of Fact" includes conclusions of law, these conclusions are incorporated into this section.

If the hearing officer were to adopt the Parent's asserted position, such a reading could result, in the language of *Fitzgerald,* in delays, stalemates and impasses that would leave educators hamstrung. The Parent cites no case in support of her position, nor has any been found.

It is undisputed that the Parents have refused to provide consent to the initial IEP dated October 25, 2013. *See*, e.g., SB 17. 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). The Parents in this case refused to provide consent for the initial provision of special education services and, therefore, as of October 25, 2013, the protections that could have been afforded the Student under the IDEA, including a MDR, were no longer applicable.

As confirmed by the U.S. Department of Education, "initial" means the first time a parent is offered special education and related services *after* the student has been evaluated and determined to be a student with a disability. Letter to Champagne, 53 IDELR 198 (OSEP 2008). Once a student is found eligible for special education and related services and the parents "receive a proposed individualized education program, they have the right to make the decision as to whether the initial receipt of special education and related services is appropriate for their child." Letter to Fulfrost, 42 IDELR 271 (OSEP 2004). If the parents refuse consent to that initial provision of services, such refusal relieves the school division of any FAPE obligations,[5] including the discipline procedures, until the parent provides the requisite consent. Id.

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).

IDEA defines FAPE as special education and related services that (i) have been provided at public expense and under public supervision and direction; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary school education in the state involved; and (iv) are provided in conformity with an IEP. 20 U.S.C. § 1401(8).

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5 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.

The IEP is the backbone of a student's special education program. To that end, the Supreme Court of Virginia has recognized that an appropriate set of IEP goals is in and of itself is a significant factor in determining whether a school district has offered an appropriate program. *See School Bd. v. Beasley*, 238 Va. 44, 52, 380 S.E.2d 884, 889 (1989).

The School Board must provide the parent with an IEP constituting a formal written offer showing a clear record of the educational placement and services proposed and so that the School Board knows what to implement to meet its legal obligation to provide FAPE. In evaluating whether the School Board offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself. See, *County Sch. Bd. v. Z. P. ex. rel. R. P.*, 399 F. 3d 298, at 306 n.5 (4th Cir. 2005).

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 in this proceeding and she has not sustained this burden.

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: 7 /7 / 2014

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)