09-053

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: CHILD Due Process Hearing	} } }	**Findings of Fact and Decision**

Parent, *Pro se*:

Counsel for School Division:

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This matter came to be heard upon the Request for a Due Process Hearing filed by the Parent under the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. §1400 et seq., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia ("Virginia Regulations"). This due process complaint arises out of the School Division's March 15, 2007 eligibility committee determination that the Child was not eligible for special education services under the disability category Other Health Impaired ("OHI"). In February 2007, the Child had been found eligible for special education services as a student with a Specific Learning Disability ("SLD") in the area of writing. The requirements of notice to the Parent have been satisfied.

The due process hearing was held before the undersigned hearing officer on April 29, 2009 at the Hearing Location, Virginia. The hearing, which was closed to the public, was

transcribed by a court reporter. The Parent appeared at the hearing. The School Division was represented by its Director of Special Education Services and by counsel. The Parent and School Division counsel made opening and closing statements.

ISSUES FOR DECISION

1. Whether the Child should have been found eligible for special education services under the additional disability category Other Health Impaired ("OHI") in March 2007; and

2. Whether School Division committed a procedural violation by not providing to the Parent a draft Individualized Education Program ("IEP") prepared in advance of a March 15, 2007 IEP meeting.

BURDEN OF PROOF

The Parent's principal claim in this case is that School Division erred in March 2007 by finding that the Child was not eligible for special education services under the OHI disability category. In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Id.,* 546 U.S. at 62, 126 S.Ct. at 537. Here the Parent is not challenging an IEP, but seeks relief for the School Division's ineligibility determination. In the Fourth Circuit Court of Appeals' decision affirmed by the U.S. Supreme Court in *Schaffer*, the Fourth Circuit endorsed "the normal rule of allocating the burden to the party seeking relief" in IDEA due process hearings. *See Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 453-456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S.Ct. 528 (2005). Here the Parent is the party seeking relief. Accordingly, I find that in this case, the burden of proof is upon the Parent.

FINDINGS OF FACT

The Parent testified herself in support of her due process complaint and called no other witnesses. The School Division called as witnesses the School Psychologist, the Visiting Teacher, and Special Ed Director. Numerous documents were offered by the parties and received into evidence. I make the following findings of fact based upon the preponderance of the evidence adduced at the hearing:

1. The Child was born on Date of Birth. At the present time he is a student at Current Placement under a School Division IEP. It is not disputed that he is a child with a disability in need of special education services.

2. In the 2006-07 school year, the Child was a fifth grade student at School. The Parent requested that he be evaluated for eligibility for special education services. School Division utilized a range of evaluation tests, interviews and record reviews.

3. The Child scored 101 on the WISC-IV measure of his cognitive abilities. This score is in the average range of full-scale IQ scores.

4. Comparing the Child's cognitive ability scores with his academic achievement scores, except for the Child's broad written language score, all of the Child's achievement scores were at or above age-level expectations and also not inconsistent with his cognitive ability.

5. The Child's grades in school before the eligibility evaluation were within the average range except for in the area of written expression.

6. The Child passed all Virginia Standards of Learning ("SOL") test content areas in third and fourth grades as "proficient" or "advanced".

7. In the 2005-06 school year, the Child had one reported disciplinary referral for

which he was suspended from school for one day.

8. In the 2006-07 school year, prior to the March 2007 eligibility evaluation, the Child had four disciplinary referrals, three of which related to a November 2006 fighting incident with another student. The Child was first suspended from school for one day. Upon his return his misconduct worsened to the point that he allegedly hit a school administrator on her face. He was subsequently expelled from school for this incident.

9. In January 2007, an Outside Psychologist determined that the Child met the criteria for the diagnosis of Attention Deficit/Hyperactivity Disorder ("ADHD") – Mixed Type. School Division does not dispute this diagnosis.

10. In February 2007, the School Division eligibility committee found that the Child was eligible for special education services based upon a Specific Learning Disability ("SLD") in written expression.

11. The Parent requested that the Child also be found eligible under the disability Other Health Impaired ("OHI") – ADHD. At a Special Education Assessment-Review/ Reevaluation Meeting on March 15, 2007, the School Division eligibility committee determined that the Child was not eligible under OHI, even though the Child met the diagnosis for ADHD, because the committee found (1) that the Child's educational performance was not adversely affected by ADHD and (2) that the determinant factors in the Child's educational performance were Oppositional Defiant Disorder ("ODD") and his SLD condition – not ADHD.

12. The School Division convened an IEP meeting on March 15, 2007. Prior to the IEP meeting, the Special Ed Director had prepared a draft IEP which would have placed the Child in a specialized day program designed for special education students who cannot attend

public schools.[1] At the IEP meeting the Parent requested that the day program placement be changed to homebound services and also requested that there be an additional writing goal.

13. After the March 15, 2007 IEP meeting, the School Division sent the Parent a "second draft IEP for 2006-2007" for the Parent to review. The second draft IEP provided for homebound services and a writing goal as requested by the Parent at the IEP meeting and additional changes which the Parent had requested by email. On March 28, 2007, the Parent consented to implementation of the second draft IEP, reserving her objection that the Child should have been found eligible under the OHI-ADHD disability category.

DECISION

I. Should the Child have been found eligible in March 2007 for special education services under OHI–ADHD?

The first issue raised by the Parent is whether School Division improperly found that the Child was not eligible for special education services under the additional disability category OHI–ADHD when the eligibility committee met in March 2007. (The Child had earlier been found eligible for special education services as a student with an SLD in written expression.)

Under the Virginia Regulations, a child may be found eligible based upon OHI if the child has "limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that, (i) is due to certain chronic or acute health problems including ADHD; and (ii) adversely affects a child's educational performance. 8 VAC § 20-80-10 (2002). In the present case, the School Division stipulates that the Child had ADHD when evaluated in 2007. To

[1] The Child had been expelled from school in December 2006 as a consequence of the November 2006 disciplinary incidents.

establish that the Child should have been found eligible under OHI, the Parent's burden was to show a causal connection between the Child's ADHD condition and resulting educational difficulties. *Cf. Springer v. Fairfax County School Bd.*, 134 F.3d 659, 666 (4th Cir. 1998). I find that the Parent failed to meet that burden.

The School Division offered the expert opinion of two School Division professionals that the Child's ADHD did not adversely affect his educational performance. The School Psychologist testified that the Child's grades, with the exception of written expression, were all within the range appropriate to his average cognitive abilities. According to the School Psychologist, the Child's written expression deficits were attributable to an SLD for which the Child received special education services. On academic achievement testing conducted for the 2007 eligibility evaluation, the Child scored within the average ranges as would be expected for his cognitive abilities (except for the area of written expression.) The Child passed the Virginia SOL tests in both the third and the fourth grades. The Special Ed Director similarly opined that when the eligibility committee met in 2007, there was no evidence that indicated that there were problems with the Child's academic achievement, except for the problems with written expression.

The Parent contends that the Child's expulsion from school, following a fight with another student in November 2006 and continuing defiant conduct after his return to school, establishes that the Child's ADHD adversely affected his educational performance. However, the School Division experts, the School Psychologist and the Special Ed Director, testified that the misconduct that resulted in the Child's long term expulsion were not behaviors that are diagnostic of ADHD. The School Psychologist opined that the Child's aggressive behavior and

profanity, the length of the defiant interaction and the Child's refusals of the administrator's instructions would not typically be ADHD behaviors. The Special Ed Director opined that the Child's conduct was intentional and purposeful – not impulsive or inattentive acts which are the behaviors that are attributable to ADHD.

The Parent offered the January 2007 written opinion of the Outside Psychologist that the Child meets the diagnosis criteria for ADHD-Mixed Type. However, the Outside Psychologist, who did not testify at the hearing, offered no opinion in his report on whether the Child's ADHD condition affected his educational performance or whether there was a connection between the ADHD condition and the Child's misconduct which resulted in his long term suspension from school.

I find that the testimony of the School Psychologist and the Special Ed Director is persuasive that the Child's ADHD disability did not adversely effect his educational performance prior to the March 2007 special education eligibility determination and that the behaviors which led to the Child's long term suspension were not attributable to his ADHD condition. *See JH ex rel. JD v. Henrico County School Bd.*, 395 F.3d 185, 197-198 (4th Cir. 2005) (Professional opinions of local educators entitled to deference.) Consequently, I find that the Parent has not met her evidentiary burden of showing that the School Division erred in its March 2007 determination that the Child was not eligible for special education services based upon his ADHD disability.

2. Was School Division's failure to show the Parent its draft IEP in advance of the March 15, 2007 IEP meeting a procedural violation of IDEA?

The Parent contends that School Division violated IDEA's procedural requirements by

not disclosing to her a draft IEP prepared in advance of the March 15, 2007 IEP meeting. School Division acknowledges that it prepared the draft IEP before the meeting, but states that it invited the Parent's input at the IEP meeting and the IEP team revised the draft based on that input. The final IEP, signed by the Parent on March 28, 2007, contained changes requested by the Parent at the IEP meeting as well as additional changes requested by her in a later email.

The IDEA regulations in effect in 2007 certainly required that the school system afford to parents the opportunity to participate in developing their child's IEP. *See* 34 C.F.R. § 300.345 (2006). The IDEA's procedural requirements are "designed to insure that parents participate meaningfully in the decision-making process for their handicapped child." *Doyle v. Arlington County School Bd.* 806 F.Supp. 1253, 1262 (E.D.Va.1992), *aff'd* 39 F.3d 1176 (4th Cir.1994) (unpublished). "Thus, if the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input." *Id.* However, while a school system must not finalize its IEP before an IEP team meeting, it can, and should, have given some thought to the program. *See id.*

I find from the evidence in this case that the Parent did have the opportunity for meaningful input at the March 15, 2007 IEP meeting and that School Division had not predetermined the outcome by preparing its draft IEP. The Parent testified that she understood that the document was a draft IEP to be considered by the IEP team. At the IEP meeting, the Parent provided meaningful input, including, *inter alia*, requesting that the Child's placement be changed to a homebound setting and that there be an additional writing goal. The Child's final IEP contained these changes. *See Fitzgerald v. Fairfax County School Bd.* 556 F.Supp.2d 543, 561 (E.D.Va. 2008) (Preparation of draft IEP acceptable so long as committee remains

open-minded.) Moreover under Fourth Circuit precedent, a procedural violation of the IDEA cannot support a finding that a school district failed to provide a disabled child with a free appropriate public education ("FAPE") when the procedural violation did not actually interfere with the provision of a FAPE to that child. *See, e.g., DiBuo ex rel. DiBuo v. Board of Educ. of Worcester County,* 309 F.3d 184, 190 (4th Cir. 2002); *Gadsby v. Grasmick,* 109 F.3d 940, 956 (4th Cir. 1997). The Parent adduced no evidence that the School Division's not furnishing her a copy of the draft IEP before the March 15, 2007 IEP meeting interfered with the provision of FAPE to the Child. In sum, therefore, I find that the Parent has not shown a procedural violation by School Division.

ORDER

For the reasons set forth above, it is hereby ordered as follows:

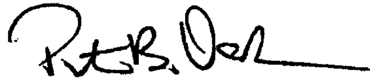
1. The relief requested by the Parent herein is denied in its entirety.

2. The School Division shall develop an implementation plan within 45 calendar days of the date of this decision which must state how and when this decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing, the hearing officer and the Virginia Department of Education.

3. The School Division is the prevailing party in this due process hearing.

Right of Appeal Notice

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



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Date of Decision: May 28th, 2009