17-032

COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

, et als. Complainants

v.

PUBLIC SCHOOLS Respondent.

Student & Parent:

Child's Advocate:

LEA's Attorney:
Nicole M. Thompson, Esquire

Administrative Hearing Officer:
John V. Robinson, Esquire
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DECISION OF THE HEARING OFFICER

I. Findings of Fact[1]

1. The requirements of notice to the Parent were satisfied[2]. The Student is a 10th grader whose date of birth is SB 1[3]. The Student is eligible to receive special education and related services under the disability categories of Specific Learning Disability and Speech or Language Impairment. SB 9 at 9.

2. The issue for decision by the hearing officer in this proceeding is the Parent's challenge to the manifestation determination review ("MDR") decision that the child's behavior was not a manifestation of the child's disability. Tr. 5.

3. The Department of Social Services (the " DSS") placed the Student into the - Home residential facility in late 2015 or early 2016.

4. The LEA did not know the reason that the Student was sent to the residential facility.

5. On October 10, 2016, the Student's IEP Team met to develop an IEP for the Student. Both the Parent and the Student participated by telephone conference call. SB 1 at 1.

6. Other than as reflected in the IEP, the Parent did not ask for the IEP to address emotional issues of the Student.

7. The IEP does state that "[the student] does seem depressed or detached at times. She lacks tolerance for certain peer behaviors." AE 1 at 4.

8. The IEP provides under the heading "Effect of disability on Student":

> She shuts down and will not respond to teacher prompting to complete work. She will not participate in class activities or discussion at that point or ask questions. AE 1 at 6.

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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>". References to the verbatim transcript of the hearing held on January 3, 2017 are cited in the following format "Tr.<page number>. References to the LEA's post hearing Opening Brief are cited in the following format "SOB<page number>".

9. Similarly, under the heading "Functional Performance", the IEP provides:

> She has difficulty verbalizing her academic needs, so she will shut down rather than attempt to communicate about her struggles. AE 1 at 6.

10. Dr. , the Private Placement Instructional Specialist from the Office of Exceptional Education, attended the October 16, 2016 IEP meeting for the Student.

11. Consistent with the IEP and the Minutes of the IEP meeting (SB 2), Dr. credibly testified that the Parent did not request that other emotional issues of the Student be addressed in the IEP.

12. A representative of - Home did not inform Dr. of any emotional issues of the Student that would affect her in the school setting.

13. The IEP Team at the High School said that when they received any documentation from the - Home, they could discuss if any additional supports were needed for the Student.

14. The Parent did not ask that any additional behaviors or emotional issues be addressed in the Student's IEP, did not offer any documents or any evidence that she procured documentation from the - Home and/or that she submitted any releases for the documentation.

15. However, the Parent did give the IEP Team information concerning how the Student behaves when she is frustrated in class.

16. This information, described above, was reflected in the IEP and was also observed by Ms. , the Student's science teacher, before and after the Parent signed to give her consent to implement the October 10, 2016 IEP.

17. On October 19, 2016, at approximately 1:30 p.m., the Student was screaming in the main hallway between the cafeteria and the main office of the high school.

18. Attempts by staff, including Ms. , an assistant principal, to calm her down failed. The Student refused to tell anyone what was wrong.

19. The Student, amongst other things, hit the Security Officer with her bag and pushed Ms. 's arm with sufficient force to cause her radio to fly out of her hand.

20. After the Student was restrained by the School Resource Officer, (the "SRO") who came to assist the Security Officer, the Student spat in the face of the SRO, also threatening to shoot the SRO in the head and to blow and shoot up the school. SB 7 at 2-3.

21. After approximately 25 minutes, the Student calmed down.

22. The MDR occurred on October 31, 2016. SB 8.

23. The Parent and the Student participated in the MDR. Ms. testified credibly that the LEA, based on a number of identified factors, determined that the infractions were not a manifestation of the Student's disability or the direct result of the LEA's failure to implement the IEP. Tr. 126-138.

24. By contrast, the Parent offered no probative evidence concerning why the manifestation determination was in error.

25. The Parent requested an administrative due process hearing on November 17, 2016 under the *Individuals with Disabilities Education Improvement Act of 2004* ("IDEA 2004").

26. The parties held a first pre-hearing conference call on December 1, 2016 at 3:00 p.m. The Parent confirmed that she is challenging the LEA's manifestation determination.

27. Pursuant to the recent *Letter to Snyder*, 116 LRP 6063 (OSEP 12/13/15), hearing officers are no longer permitted, at they once did in the Commonwealth and elsewhere, to allow the parties in a disciplinary case like this one to mutually agree to extend the expedited timelines.

28. The parties held a second pre-hearing conference call at 3:30 p.m. on December 12, 2016.

29. The Parent again confirmed to the hearing officer that the sole issue for the hearing is the Parent's challenge to the manifestation determination that the child's behavior was not a manifestation of the child's disability.

30. 8 VAC 20-81-210(E)(3)(a) specifically and clearly allows an expedited due process hearing in such a case and the Parent requested it in her Request for Due Process Hearing when she stated "I would like to appeal the decision made at the meeting." Accordingly, the School Board's Motion to Dismiss of November 23, 2016 was dismissed and the hearing on this sole issue proceeded.

31. While the hearing officer was sympathetic to the LEA's sufficiency challenge in its November 23, 2016 motions, sufficiency challenges are not permitted in the expedited hearing context. 34 C.F.R. §300.532(c). The fact that the sufficiency challenge does not apply in expedited cases is emphasized in the commentary to the federal regulations:

> *Comment*: **Many commenters requested clarifying whether the requirements in § 300.508(d), regarding sufficiency of the complaint, apply to the expedited hearing requested under § 300.532(c), pertaining to disagreements with a decision regarding disciplinary**

placements.

Discussion: **In light of the shortened timelines for conducting an expedited due process hearing under § 300.532(c), it is not practical to apply to the expedited due process hearing the sufficiency provision in § 300.508(d), which requires that the due process complaint must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not include all the necessary content of a complaint as required in § 300.508(b). To identify the provisions that do apply when a parent requests a hearing under § 300.532(a), we have changed § 300.532(a) to clarify that parents and the LEA may request a hearing under § 300.532(a) by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).**

Analysis at Federal Register, Vol. 71 at p. 46725

32. Pursuant to his inherent authority to manage the hearing, the hearing officer with the cooperation of the parties, clarified the sole issue for the hearing. Accordingly, the School Board's challenge to the sufficiency of the Parent's complaint was denied.

33. The hearing officer entered a Status Report and Scheduling Order (the "Scheduling Order") on December 14, 2016. Amongst other things, the Scheduling Order provided:

EXCHANGE OF EXHIBITS AND WITNESS LIST:

The parties will exchange and deliver to the hearing officer a list of witnesses and documentary evidence for the hearing (including all evaluations and related recommendations that each party intends to use at the hearing) no later than five business days prior to the hearing. 20 U.S.C. § 1415(f)(2). 34 C.F.R. § 300.512(a)(3). The parties agreed that this exchange and delivery to the hearing officer deadline is by 5:00 p.m. on December 27, 2016.

The exhibits should be marked and tabbed and in a notebook. The parties are encouraged to prepare a joint exhibit notebook for the convenience of all concerned. At the same time that the parties exchange their proposed exhibits and the names of their proposed witnesses, they shall also deliver copies of the same to the hearing officer. Of course, a separate notebook is needed for the witnesses. The hearing officer encourages the parties to bates-number or number each page of each tab for ease of reference...

Except as otherwise specified herein, service should be made on counsel, representative or party as appropriate by facsimile or by hand delivery by the deadlines indicated above.

EXCHANGE/DELIVERY:

Except as otherwise specified herein, service should be made on counsel, representative, party or hearing officer as appropriate by e-mail in PDF format, by facsimile or by hand delivery by the deadlines indicated above.

34. The Parent did not present any probative evidence of the Student's alleged emotional issue.

35. The Parent's testimony during the hearing included little or no testimony about the actual MDR meeting and/or the discussion that took place during that meeting. This fact is noteworthy since the Parent is disputing the outcome of the MDR and bears the burden of proof.

36. Ms. stated on the record that she only intended to present an alleged audio recording of the MDR meeting.

37. objected to the inclusion of this alleged recording as evidence not only because it was not timely submitted as evidence as set out in the federal and Virginia special education regulations, and the order of the Hearing Officer, but also because the Parent made the recording without giving proper notice to PS under the Virginia special education regulations. The Hearing Officer sustained the objection and did not admit the audio recording as evidence.

38. 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

Concerning the hearing officer's decision to exclude the Parent's audio tape which was not timely exchanged as an exhibit, of course, the relevant federal and state regulations have the force of law. Additionally, in *City of Hopewell v. County of Prince George, et als.*, 240 Va. 306, 314, 397 S.E.2d 793, 797 (1990), the Virginia Supreme Court specifically left open the question whether the trial judge in that case even had the discretion to allow a rebuttal witness to testify where Petersburg had not previously named such witness in accordance with the court's pretrial order entered January 30, 1989. In any event, the Court decided that the trial judge clearly had not abused his discretion in refusing to allow such witness to testify even under circumstances where Petersburg was arguing that there were good reasons why the witness was not named on the witness list filed by the deadline in the pretrial order. By contrast, in this proceeding the Parent advances no good reasons for her failures.

The Virginia Supreme Court looks with favor upon the use of stipulations and other pre-trial

(or in this proceeding, pre-hearing) techniques which are designed to narrow the issues or settlement of litigation. *McLaughlin v. Gholson*, 210 Va. 498, 500, 171 S.E.2d 816, 817 (1970). The Scheduling Order in this proceeding and, specifically, the parties' stipulated deadline concerning exchange of witness lists and exhibits, was a set of rules which the parties agreed to live by and constituted precisely such a pre-hearing technique. To have allowed the Parent in the hearing to ignore the deadline for exchange of exhibits would have thwarted the rules the parties themselves agreed to abide by and violated fundamental principles of fairness, notice and due process. Accordingly, the hearing officer is comfortable with his decision not to disregard the regulations and the Scheduling Order.

The correctness of the MDR decision is limited to the information known to the team when the MDR was conducted. Accordingly, it was incumbent on the Parent to fully inform the team at the MDR meeting from any available sources concerning why the Student's disciplinary infractions should have been considered manifestations of the Student's disabilities. *See Adams v. State of Oregon*, 195 F.3d 1141, 1150 (9th Cir. 1999) (IEP "was reasonably developed based on information available to the [multidisciplinary team] including information from the parents").

At the MDR meeting and at the hearing, the school board's experts, all professional educators, opined that the Student's behavior on October 19, 2016 was not a manifestation of her disabilities. While the Parent disagreed with the school experts' opinions, she offered no contrary expert opinion to support her own contention that the Student's behavior was a manifestation of her disability. Under well established precedent in this federal judicial circuit, the opinion of school board witnesses, as professional educators, is due appropriate deference. *See, e.g. County School Bd. of Henrico County, Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 313 (4th Cir.2005). There was no evidenced adduced at the hearing that the Student's October 19, 2016 conduct was the direct result of the local educational agency's failure to implement the IEP.

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).

The Parent bears the burden to establish by a preponderance of the evidence that the MDR decision was incorrect and she has not sustained this burden.

Concerning MDRs, the Virginia Regulations provide in part:

> D. Manifestation determination. (34 CFR 300.530(c), (e), (f), and (g))
>
> 1. Manifestation determination is required if the local educational agency is contemplating a removal that constitutes a change in placement for a child with a disability who has violated a code of student conduct of the local educational agency that applies to all students.
>
> 2. The local educational agency, the parent(s), and relevant members of the child's IEP team, as determined by the parent and the local educational

agency, constitute the IEP team that shall convene immediately, if possible, but not later than 10 school days after the date on which the decision to take the action is made.

3. The IEP team shall review all relevant information in the child's file, including the child's IEP, any teacher observations, and any relevant information provided by the parent(s).

4. The IEP team then shall determine the conduct to be a manifestation of the child's disability:
(1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
(2) if the conduct in question was the direct result of the local educational agency's failure to implement the child's IEP.

5. If the IEP team determines that the local educational agency failed to implement the child's IEP, the local educational agency shall take immediate steps to remedy those deficiencies.

6. If the IEP team determines that the child's behavior was a manifestation of the child's disability:
a. The IEP team shall return the child to the placement from which the child was removed unless the parent and the local educational agency agree to a change in placement as part of the modification of the behavioral intervention plan. The exception to this provision is when the child has been removed for not more than 45 school days to an interim alternative educational setting for matters described in subdivision C 5 a of this section. In that case, school personnel may keep the student in the interim alternative educational setting until the expiration of the 45-day period.
(1) Conduct a functional behavioral assessment, unless the local educational agency had conducted this assessment before the behavior that resulted in the change in placement occurred, and implement a behavioral intervention plan for the child.
(a) A functional behavioral assessment may include a review of existing data or new testing data or evaluation as determined by the IEP team.
(b) If the IEP team determines that the functional behavioral assessment will include obtaining new testing data or evaluation, then the parent is entitled to an independent educational evaluation in accordance with 8VAC20-81-170 B if the parent disagrees with the evaluation or a component of the evaluation obtained by the local educational agency; or
(2) If a behavioral intervention plan already has been developed, review this plan, and modify it, as necessary, to address the behavior.

7. If the IEP team determines that the child's behavior was not a

manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except that services shall be provided in accordance with subdivision C 6 a of this section.

E. Appeal (34 CFR 300.532(a) and (c))

1. If the child's parent(s) disagrees with the determination that the student's behavior was not a manifestation of the student's disability or with any decision regarding placement under these disciplinary procedures, the parent(s) may request an expedited due process hearing.

2. A local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may request an expedited due process hearing.

3. The local educational agency is responsible for arranging the expedited due process in accordance with the Virginia Department of Education's hearing procedures at 8VAC20-81-210.

a. The hearing shall occur within 20 school days of the date the request for the hearing is filed.

b. The special education hearing officer shall make a determination within 10 school days after the hearing.

c. Unless the parent(s) and the local educational agency agree in writing to waive the resolution meeting, or agree to use the mediation process,

(1) A resolution meeting shall occur within 7 calendar days of receiving the request for a hearing.

(2) The due process hearing may proceed unless the matter has bee resolved to the satisfaction of both parties within 15 calendar days of the receipt of the request for a hearing.

d. The decisions on expedited due process hearing are appealable consistent with 8VAC20-81-210.

8 VAC 20-81-160

The Parent failed to prove during the hearing that the outcome of the MDR that took place on October 31, 2016, should not be upheld. The Parent's claim is based on her belief that PS ignored the Student's emotional issues when the MDR team made its decision that the Student's behavior on October 19, 2016, was not a manifestation of her disabilities of Specific Learning Disability and Speech or Language Impairment.

However, the Parent did not present any documentation of the Student's alleged emotional

issue. Given that the Parent has the burden of persuasion as well as the burden of production, it is up to the Parent to demonstrate her claim that ignored evidence of the Student's alleged emotional condition thus making the decision of the MDR team incorrect. The Parent did not come close to meeting that 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: 1 / 18 / 2017

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)