

COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED

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VIRGINIA:

JUN 02 2017

SPECIAL EDUCATION DUE PROCESS HEARING

**Dispute Resolution &
Administrative Services**

et als.

Complainants

v.

COUNTY SCHOOL BOARD

Respondent.

Student & Parent:

Administrative Hearing Officer:

John V. Robinson, Esquire
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Child 's Attorney:

None

LEA 's Attorney:

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JUN 02 2017

Dispute Resolution &
Administrative Services

DECISION OF THE HEARING OFFICER

I. Findings of Fact¹

1. The requirements of notice to the Parents were satisfied². Tr. 2. The Student's date of birth is _____, PE 2³. The Student suffers from multiple disabilities, and is eligible to receive special education and related services.
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.
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.
6. 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.
7. 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."
8. On November 6, 2013, the School Board provided the Parent a PWN which, amongst other things, stated:

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 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 May 17, 2017 are cited in the following format "Tr.<page number>." References to the Parent's post-hearing Opening Brief and Reply Brief are cited in the following format: "POB<page number>" and "PRB, <page number>", respectively. References to the LEA's post-hearing Opening Brief and Reply Brief are cited in the following format "SOB<page number>" and "SRB<page number>", respectively.

[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.

9. The Parent did not respond to this PWN.

10. 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.

11. 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.

12. 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.

13. Parental "consent" is required by applicable law to be in writing. *See, e.g.*, 8 VAC 20-81-10 and 34 CFR 300.9

14. In a previous administrative proceeding, on July 7, 2014, the hearing officer decided in favor of the School Board that the Parent had failed to meet her burden of proving upon a preponderance of the evidence that she had consented to the initial provision of special education and related services.

15. The Parent appealed the hearing officer's decision and the decision was not overturned by either the _____ County Circuit Court or the Court of Appeals of Virginia. *See J.V. v. _____ Cnty. Sch. Bd.*, No. 0679-15-4, 2016 BL 379072 (Va. Ct. App. Nov. 15, 2016).

16. Since that time, the Parent has refused consent to four additional IEPs developed and proposed for the Student by the LEA.

17. However, on November 13, 2014, on a LEA eligibility form for the Student, the Parent drew a third box in addition to the form's two boxes from which a parent may select to indicate whether she either does or does not agree with the eligibility team's determination.

18. The Parent proceeded to check the third box and she wrote beside the box: "I consent to spec [sic] education services." SB 7 at 9 and PE 39.

19. The Parent signed and dated the form below. SB7 at 9 and PE 39.

20. Accordingly, the Parent has consented to the initial provision of special education and related services as of November 13, 2014.

21. In October of 2016, the Student was long-term removed for the remainder of the 2016-2017 school year as a result of the Student's continual and repeated disruptions to the learning environment at her school, which included such things as pulling other students' hair, slapping and kicking teachers and students, throwing books and scissors at teachers, and putting her hands on other students' food. SB 16.

22. On October 7, 2016, the Parent sent an email to Mr. [redacted], Executive Director of Legal and Administrative Services for CPS, requesting an MDR in connection with the Student's long-term suspension. In her e-mail, the Parent stated: "Please advise me as soon as possible whether [the Student] will be granted a new MDR in view of the fact that I have already signed an eligibility consent form without reservation and two IEPs in the last three months." PE 4.

23. On October 17, 2016, Ms. [redacted], Supervisor of Student Services, responded to the Parent's email stating that the Student was not entitled to an MDR because, contrary to the Parent's assertions, the Parent had "not granted consent to any initial IEP" for the Student. SB 17.

24. Ms. [redacted] clarified the School Board's position in her October 17, 2016 letter that the Student "would be entitled to an MDR if [the Parent] were to sign consent to" the Student's currently proposed IEP, which, at that time, was dated June 14, 2016. Ms. [redacted] enclosed a copy of this IEP for the Parent's signature with her October 17, 2016 letter.

25. Since October of 2016, the Parent has declined to provide consent to the Student's June 14, 2016 IEP or any other IEP, and the Student has remained out of school due to her long-term suspension. SB 18, 19.

II. Additional Findings, Conclusions of Law and Decision⁴

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). Because the Parent provided consent, effective November 13, 2014, to the initial provision of special education and related services, the Student is 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

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

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 applicable regulations do not say that a parent must consent to the "initial IEP" which, in any event, typically will follow the general consent to the "[i]nitial provision of special education and related services to a child with a disability", as the regulatory framework envisages.

The regulatory framework relieves the LEA of liabilities only for claims that it failed to provide the services "for which the [LEA] requests consent." In other words, the parent could not sue the School Board in this case for failing to provide services under the June 14, 2016 IEP at Hartwood Elementary School when the parent refused to consent to those very services. However, the regulatory language does not purport to preclude a challenge to other aspects of FAPE, such as a MDR, or even a challenge to the adequacy of the offer itself. *See, e.g.,* 8 VAC 20-81-170(E)(4)(d).

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.

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.

There are no controlling court decisions on this issue within the Fourth Circuit.

It is clear that the Parents have refused to provide consent to any IEP offered by the LEA for the Student. However, parental consent to the initial provision of special education services need not and should not be conflated with the consent to the initial IEP, as the School Board argues. See District of Columbia Public Schools, 110 LRP 39083 (2009) and the cases cited in the Parent's Opening Brief and Reply Brief.

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).⁵

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 hearing officer finds persuasive the reasoning in a 2011 guidance document published by the U.S. Department of Education's Office of Special Education and Rehabilitative Services ("OSERS") regarding IEPs, Evaluations, and Reevaluations. Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 111 LRP 63322 (Sept. 1, 2011). In the document OSERS posed the question: "Does the requirement that a public agency obtain parental consent for the initial provision of special education and related services mean that

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.

parents must consent to each service included in the initial IEP developed for their child?" Id.
Question D-5.

In response, OSERS answered:

No. Under 34 CFR § 300.300(b)(1), a public agency that is responsible for making FAPE available to a child with a disability must obtain consent from the parent of the child before the initial provision of special education and related services. However, this consent requirement only applies to the initial provision of special education and related services generally, and not to the particular special education and related services to be included in the child's initial IEP. In order to give informed consent to the initial provision of special education and related services under 34 CFR § 300.300(b)(1), parents must be fully informed of what special education and related services are and the types of services their child might need, but not the exact program of services that would be included in an IEP to be developed for their child. Once the public agency has obtained parental consent and before the initial provision of special education and related services, the IEP Team would convene a meeting to develop an IEP for the child in accordance with 34 CFR §§ 300.320 through 300.324. Decisions about the program of special education and related services to be provided to the child are left to the child's IEP Team, which must include the child's parents, a public agency representative, and other individuals, consistent with 34 CFR § 300.321. While the IDEA does not require public agencies to obtain parental consent for particular services in a child's IEP, under the regulations in 34 CFR § 300.300(d)(2), States are free to create additional parental consent rights, such as requiring parental consent for particular services. In cases where a State creates additional parental consent rights, the State must ensure that each public agency in the State has effective procedures to ensure that the parent's exercise of these rights does not result in a failure to provide FAPE to the child.

For Question D-6, OSERS asked and answered:

What recourse is available to parents who consent to the initial provision of special education and related services but who disagree with a particular service or services in their child's IEP?

Answer: In situations where a parent agrees with the majority of services in his/her child's IEP, but disagrees with the provision of a particular service or services, such as physical therapy or occupational therapy, the public agency should work with the parent informally to achieve agreement. While the parent and the public agency are attempting to resolve their differences, the agency should provide the service or services that are not in dispute.

In situations where a parent disagrees with the provision of a particular special

education or related service, and the parent and public agency later agree that the child would be provided with FAPE if the child did not receive that service, the public agency could decide not to provide the service with which the parent disagrees. If, however, the parent and the public agency disagree about whether the child would be provided with FAPE if the child did not receive a particular special education or related service with which the parent disagrees, and the parent and public agency cannot resolve their differences informally, the parent may use the procedures in subpart E of the IDEA regulations to pursue the issue of whether the service with which the parent disagrees is not appropriate for their child. This includes the mediation procedures in 34 CFR § 300.506 or the due process procedures in 34 CFR §§ 300.507 through 300.516.

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 has sustained this burden.

By not conducting the MDR requested by the Parent in her October 7, 2016 e-mail to Mr. , the School Board violated subsection C and D of 8 VAC 20-81-160.

Accordingly, the hearing officer decides pursuant to 8 VAC 20-81-160(F)(2) that the Student should be returned to the placement from which she was removed in the most recent long term suspension.

The hearing officer will now address the Parent's motion for stay put services. In the disciplinary context, Congress' clear intent is that when there is an appeal under Section 615 (K)(3) of the Act by the parent or the public agency, the child shall remain in the interim alternative educational setting chosen by the MDR Team pending the hearing officer's decision or until the time period for the disciplinary action expires, whichever occurs first, unless the parent and the public agency agree otherwise. This is a departure from the prior law under which the child remained in the child's placement prior to the interim alternative educational setting. See 34 CFR 300.533 and Comment at Federal Register, Vol. 71, No. 156 (Monday, August 14, 2006); and 8 VAC 20-81-160(G).

To the extent that the Parent's motion for a stay put placement was already before the County Circuit Court in an earlier special education administrative proceeding, the hearing officer has dealt with it previously in a separate Decision in this case.

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: 5 / 31 / 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)

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regarding**

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