

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: C.S.

Date of Birth: [redacted]

ODR No. 3152-11-12-KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent

Carol Herring, Esquire  
P.O. Box 407  
Glen Mills, PA 19342

Chichester School District  
401 Cherry Tree Road  
Aston, PA 19014

Thomas C. Warner, Esquire  
Sweet, Stevens, Katz & Williams, LLP  
331 Butler Avenue  
New Britain, PA 18901

Dates of Hearing:

November 2, 2012; November 12, 2012

Record Closed:

November 18, 2012

Date of Decision:

November 18, 2012

Hearing Officer:

William F. Culleton, Esquire, CHO

## INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Student) is an eligible student enrolled in the District named in the title page of this decision (District). Student attends a District school. Parent requested due process, regarding an alleged incident in which a school administrator allegedly touched, pushed or struck Student and suspended Student inappropriately. Parent alleged assault and battery, violations of constitutional due process guarantees, spoliation of evidence, procedural violations regarding a three day suspension, and retaliation and discrimination under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. The District moved to dismiss for lack of jurisdiction. In a ruling and order dated November 12, 2012 (HO-14), this hearing officer dismissed for lack of jurisdiction all claims except the section 504 claim, which was scheduled for hearing on November 20.

Despite three hearing dates scheduled and noticed formally, Parent failed three times to convey to the District the five day notice required in due process hearings in Pennsylvania, including the five day notice expressly directed by the Hearing Officer in a ruling forwarded to counsel on November 12, 2012 (HO-11). The District now moves to dismiss all remaining claims, and I hereby dismiss them, although I dismiss certain claims without prejudice.

## ISSUES

1. Should the Parent's Complaint Notice alleging various violations of law, including a violation of section 504, be dismissed for lack of jurisdiction and due to Parent's repeated failure to provide the usual five day notice to the District prior to hearing?

Based upon a review of the correspondence file in this matter, I find that:

1. Parent filed this request for due process on or about May 14, 2012, and the matter was scheduled for hearing on June 4, 2012. (Complaint, May 10, 2012.)
2. Parent's attorney entered an appearance on June 1, 2012. (Letter, Carol Herring, Esquire to ODR, May 10, 2012, attached.)
3. The June 4, 2012 hearing date in the matter was cancelled and time lines suspended at Parent's request to allow for amending the complaint. The June 15 deadline for amending the complaint was extended twice at the request of parent's counsel, to June 27. Parent filed an amended complaint on June 26. A hearing was scheduled for August 26, 2012. (HO-2.) (Amended Complaint, 6-26-12.)
4. The August 26 hearing date was rescheduled three times, twice at Parent's request and once at District request, to November 2 by telephone conference call for oral argument only on District motions to dismiss for lack of hearing officer jurisdiction. (HO-6-10.)
5. Parent's counsel objected to going forward on November 2 due to lack of notice that oral argument was expected, and the matter was scheduled for an additional session on November 12, 2012 at 9:30 AM. At 7:14 AM on November 12, Parent's counsel left an email message with District counsel and the hearing officer, stating that counsel and Parent would not appear because counsel decided to go to an emergency room at that time due to a fall that had occurred during the preceding weekend. The hearing commenced, but was terminated after about one hour due to absence of counsel, and an additional session was scheduled for November 20 at 6 PM. (NT 56-75, 97-119; HO-1, 11.)
6. The District challenged the hearing officer's jurisdiction to entertain the complaint on May 22, 2012, and renewed its objection to jurisdiction orally after Parent's counsel entered appearance. In a conference call, the hearing officer granted permission to Parent's counsel to file written arguments on the issue of jurisdiction, and extended the time for filing twice at counsel's request to August 27, 2012. On that date, counsel advised that counsel would not file any papers, and the hearing officer indicated that the jurisdictional issues would be addressed on the first hearing date. On November 2, 2012, the hearing officer invited Parent's counsel to file briefs at counsel's discretion prior to the hearing on November 12; Parent's counsel did not do so. (HO-4, 5.)
7. On October 24, the District provided five day notice of witnesses and documents to be offered into evidence. Parent failed to provide the District with five day notice of witnesses and documents to be offered into evidence prior to the October 31, 2012 hearing date, and the hearing dates subsequently scheduled for November 2, November 12 and November 20. (NT 88-93, 97-119; HO-10.)

8. On November 9, 2012, District counsel moved to exclude any evidence to be offered by Parent due to failure to provide five day notice of evidence. Counsel again moved to exclude all Parent's evidence on November 14, 2012. (HO-12, 13.)
9. On November 14, the hearing officer provided Parent with an opportunity to respond regarding the failure to provide five day notice, setting a deadline of noon on November 15. Parent failed to either confirm or deny failing to file the five day notice, which was due by November 13. (HO-13.)
10. On November 15, School District counsel reported having received from Parent's counsel a message purporting to be a five day notice, which was received three business days before the scheduled hearing on November 20, 2012. Counsel renewed the District's motion to dismiss all remaining claims. (HO-13.)

### DISCUSSION AND CONCLUSIONS OF LAW

#### DISMISSAL FOR LACK OF JURISDICTION

In the attached ruling dismissing claims for lack of jurisdiction, I explain my reasoning, and I incorporate the ruling in its entirety into this decision, which is final.

#### DISMISSAL FOR FAILURE TO PROVIDE "FIVE DAY NOTICE"

Parties are required to comply with the "five day rule" when seeking a hearing regarding section 504 complaints. Chapter 15 of the Pennsylvania Code governs District obligations under section 504, and it provides for administrative adjudication of complaints under that Chapter by special education hearing officers. 22 Pa. Code §15.8. This section adopts many of the procedures for IDEA due process hearings set forth in Chapter 14, specifically incorporating by reference 22 Pa. Code § 14.162(k). 22 Pa. Code §15.8(d). Section 14.162(k) provides that either party to a due process proceeding may prohibit the introduction of evidence if the proponent of the evidence has not "disclosed" that evidence at least five business days before the hearing at

which the evidence is offered. 22 Pa. Code §14.162(k).<sup>1</sup> I conclude that I must preclude evidence at the request of the party who does not receive the required five day notice.

In the present matter, I have allocated the burden of going forward to the Parent, and Parent is on notice of this. Moreover, I have given Parent three opportunities to provide the five day notice, and Parent has repeatedly failed to do so. Since the above discussed regulation will prohibit Parent from introducing any evidence at the November 20, 2012 hearing<sup>2</sup>, and since Parent will be unable to go forward with evidence as a result, Parent cannot bear Parent's burden of persuasion – the burden to introduce a preponderance of evidence that the facts are as the Parent alleges them to be. Thus, the matter must be dismissed.

I consider the present state of affairs as due wholly to the conduct of counsel, and I am loathe to attribute to Parent any intention to delay, despite a statement that the Parent made that suggested complicity, (NT 91). On the state of the record at this point, I will not permanently preclude Parent from bring Parent's section 504 claim in the future. Therefore, I will dismiss the section 504 claim without prejudice; by this I mean that if the Parent should file another due process claim in the future asserting the same facts that were asserted in the present matter, and claiming the same relief by reason of an alleged violation of section 504, it will not be precluded by doctrines of issue or claim preclusion (res judicata or collateral estoppels).

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<sup>1</sup> When there are multiple hearing sessions, as in the present matter, this section can be read as requiring disclosure five days prior to the first hearing in the matter. However, I interpret it as allowing some leeway in the hearing officer's discretion to require the notice five business days before the session in which it is offered into evidence. Thus, in this matter, I do not conclude that the regulation precluded giving the Parent another opportunity to provide five day notice prior to the November 12 or the November 20 hearings. It is the repeated failure to do so that leads me to dismiss this matter.

<sup>2</sup> Parent's counsel asserts that counsel cannot attend the scheduled hearing, even though it is scheduled at 6 P.M. Counsel offers no reason for being unable to attend. Given the string of excuses, all personal to Parent's counsel, that have caused multiple delays in the hearing of this matter, I cannot accept such a unilateral declaration of counsel as a reason to further delay this matter. Common legal practice and the custom in these proceedings require parties to abide by scheduling decisions made by a hearing officer unless the hearing officer reschedules the hearing session upon request. I have made it clear that there would be no further rescheduling of the matter for any reason.

On the other hand, I conclude that the Parent has had months in which to address the jurisdictional concerns that led to my dismissal of all other causes of action arising from the facts alleged in the complaint in the present matter. Moreover, Parent's counsel has had multiple scheduled opportunities to respond to the District's motions to dismiss, and has specifically declined to respond in writing. Therefore, I dismiss these legal causes of action with prejudice.

### CONCLUSION

I conclude that the section 504 claim must be dismissed because the District properly asserts the five day rule and parent has failed repeatedly to comply with it. All other claims must be dismissed with prejudice, consistent with my attached ruling that the hearing officer lacks jurisdiction over any remaining claims.

Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

### ORDER

1. The section 504 claims alleged in the Complaint Notice are dismissed hereby, without prejudice.
2. All other claims are hereby dismissed with prejudice.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

November 18, 2012