

XXXX XXXX,

V.

BALTIMORE CITY PUBLIC

SCHOOLS

*** BEFORE HARRIET C. HELFAND,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-CITY-OT-13-20742**

*** * * * ***

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STATEMENT OF THE CASE

On May 29, 2013, XXXX XXXX (Parent), on behalf of her daughter, XXXX XXXX, (Student), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH), requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore City Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).¹

I held a telephone prehearing conference (Conference) on August 7, 2013. The Parent represented herself. Darnell Henderson, Esquire, and Nancy L. Ruley, Esquire, represented

¹ At the time of filing the Complaint, a request was made for mediation to resolve the dispute. Randi Bocanegra, Esquire, was named as attorney in the Complaint. BCPS declined mediation, but scheduled a resolution meeting between the parties. OAH was not informed about the result of the resolution meeting. On July 22, 2013, OAH received a Motion to Withdraw Representation from Ms. Bocanegra, stating that she had been unable to contact either the Student or the Parent since late June 2013, despite numerous attempts via telephone, letter, and certified

BCPS. By agreement of the parties, the hearing was scheduled for October 4 through October 10, 2013. I issued a Prehearing Conference Report and Scheduling Order (PCR) on August 9, 2013.

The hearing dates requested by the parties fell more than 45 days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2012). During the Conference, the parties requested an extension of time until thirty days following the conclusion of the hearing for me to issue a decision. 34 C.F.R. 300.515; Md. Code Ann., Educ. § 8-413(h) (2008).

On August 19, 2013, BCPS filed a Motion for Summary Decision (Motion 1). The Parent did not respond to Motion 1. I issued a Ruling on Motion 1 on September 9, 2013, denying BCPS' Motion 1, and ordered the hearing to proceed on the merits as scheduled.

I began the hearing on October 4, 2013, at the OAH in Hunt Valley, Maryland. The Parent represented herself. Darnell Henderson, Esquire, represented BCPS. At the conclusion of the Parent's case, BCPS made a Motion for Judgment (Motion 2), pursuant to COMAR 28.02.01.12E, asserting that the Parent failed to present sufficient evidence to meet her burden to prove that BCPS had violated the IDEA. The Parent argued against Motion 2. To address Motion 2, I suspended the hearing and agreed to issue a ruling on Motion 2 by October 8, 2013.²

mail. I was assigned the matter on August 1, 2013, at which time I contacted the parties to convene a prehearing conference as soon as practicable.

² I requested BCPS to provide the Parent and me with a written copy of Motion 2 by close of business October 4, 2013, and permitted the Parent, if she wished, to respond in writing by close of business October 7, 2013. I agreed to issue a ruling on Motion 2 by October 8, 2013, and inform the parties whether or not the hearing would resume on October 9 and 10, 2013. On October 4, 2013, I received BCPS' written copy of Motion 2. On October 7, 2013, I received a document from the Parent that was not responsive to Motion 2, and that I am treating as a Motion for Continuance.

On October 7, 2013, I received a document from the Parent that I am considering a Motion for Continuance of the case in order to submit additional documentation.³ I will address both BCPS' Motion 2 and the Parent's request in this Ruling.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2012); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A .05.01.15C; COMAR 28.02.01.

ISSUES

1. Should the Parent's Motion for Continuance be granted?
2. Should BCPS' Motion for Judgment be granted?

DISCUSSION

In a special education due process hearing, the burden of proof lies with the party seeking relief. See *Shaffer v. Weast*, 546 U.S. 49 (2005). In this matter, that party is the Parent, and the standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009). The issues identified by the parties during the August 7, 2013 Conference consisted of the following: (1) Did the Student receive a Free Appropriate Public Education (FAPE) for the 2011-2012 and 2012-2013 school years from BCPS? (2) Did BCPS fail to conduct appropriate assessments of the Student for the 2011-2012 and 2012-2013 school years? (3) Did BCPS fail to provide the Student with assistance to make educational progress towards functional life skills

³ This document does not appear to have been sent to BCPS.

during the 2011-2012 and 2012-2013 school years? 4) Did BCPS fail to implement appropriate Individualized Education Plan (IEP) goals for the Student during the 2011-2012 and 2012-2013 school years? (5) And, if so, what is the appropriate remedy?

Parent's Motion for Continuance

On August 7, 2013, the parties participated in the Conference to discuss scheduling of the case, as well as discovery issues. Topics included in the Conference were exchanges of documents and witness lists, and a timeline for the issuance of subpoenas. On August 9, 2013, I issued a PCR outlining what had been discussed at the Conference, along with timelines and schedules for discovery, the filing of motions, and hearing dates.

The PCR specifically provided, pursuant to the five-business-day disclosure rule set forth in 34 C.F.R. § 300.512, that the parties shall make any prehearing disclosures by September 27, 2013. The PCR also stated that the parties shall exchange witness lists no later than five business days prior to the hearing and that any subpoenas for witnesses shall be requested from OAH at least ten days prior to the hearing. BCPS provided the Parent with exhibits and witness lists by September 27, 2013. The Parent did not provide BCPS with documents or witness lists.

On October 2, 2013, two days prior to the hearing, the Parent submitted a request for three witness subpoenas to OAH. On that date, the OAH docket clerk mailed the subpoenas to the Parent's requested witnesses. On October 4, 2013, prior to the hearing, one of the witnesses called OAH relating that she would be unavailable to appear at the hearing because of prior plans. Another witness, Randi Bocanegra, Esquire, who had previously represented the Parent, filed a Motion to Quash, which I received on October 4, 2013, immediately prior to the hearing.⁴

⁴ The Parent's third subpoenaed witness did not respond to the subpoena.

On October 4, 2013, Ms. Bocanegra appeared at the hearing in support of her Motion to Quash. Ms. Bocanegra's motion was based on both her pre-existing schedule and short notice of the hearing, and issues regarding attorney-client privilege between her and the Parent. During a discussion of Ms. Bocanegra's motion, it became clear that the Parent's intent in calling Ms. Bocanegra as a witness was to offer evidence regarding prior unsuccessful settlement negotiations with BCPS in this matter. When the Parent learned that discussion of these negotiations would not be admissible in the hearing, she expressed that she no longer needed Ms. Bocanegra as a witness. Accordingly, I granted Ms. Bocanegra's Motion to Quash and excused her from the hearing.

Prior to the Parent's testimony at the hearing, BCPS moved to enforce the five-business-day rule provided for in 34 C.F.R. § 300.512, and exclude any documentary evidence offered by the Parent at the hearing that had not been disclosed to BCPS pursuant to the rule. 34 C.F.R. § 300.512(3) provides, in pertinent part:

§ 300.512 Hearing Rights.

(a) *General.* Any party to a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534, or an appeal conducted pursuant to § 300.514, has the right to—

...

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.

This regulation compelled me to grant BCPS' request. The August 9, 2013 PCR clearly noted the timeframes for the submission of documents, and presented a deadline to which the

Parent did not adhere. At the hearing, I explained to the Parent why I was unable to accept any previously undisclosed documents, and she did not appear to contest my ruling.

On October 7, 2013, OAH received a phone call from the Parent, expressing concern about the expense of faxing numerous documents to OAH, presumably in response to BCPS' Motion 2. During the call, it was ascertained that what the Parent wanted to do was fax all of the documentary evidence she originally wanted to introduce at the hearing. The Parent was informed that, in response to BCPS' Motion 2, she had only to describe why the motion should not be granted and the case dismissed. Shortly thereafter, OAH received a one-page document from the Parent stating the following: "Petitioner Motion for Continuous for the Chance to Submittings of Material of Fact finding documents to Establish supported evidence for [Student] v. [BCPS]." As such, I am considering the Parent's submission as a Motion for Continuance.

The dates for the hearing were scheduled for October 4, 2013 through October 10, 2013. Even if I were to permit the Parent's documents to be admitted at the conclusion of the hearing, they would have had to have been disclosed to BCPS by October 3, 2013, five business days prior to the final day of the hearing. Moreover, the granting of a continuance would be inappropriate in this matter. It had been made clear to all of the parties in the PCR and prior Conference, that any documents to be admitted into evidence were subject to the five-business-day rule. The PCR also set forth the procedures and timelines for identifying witnesses and requesting subpoenas. The Parent did not comply with any of these requirements, despite almost two month's notice of the time limitations. While it is regrettable that the Parent was unable to meet these deadlines, she is nevertheless precluded from extending them, particularly at this late date. Consequently, I am denying the Parent's Motion for Continuance.

BCPS' Motion for Judgment

Following the Parent's presentation of her case, BCPS raised Motion 2, based on its contention that the Parent had not met her burden of proof to demonstrate that BCPS did not fulfill its obligations as described in issues (1) through (4). The OAH regulation governing motions for judgment are found at COMAR 28.02.01.12E, as follows:

.12 Motions.

...

E. Motion for Judgment.

- (1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.
- (2) When a party moves for judgment at the close of the evidence offered by an opposing party, the judge may:
 - (a) Proceed to determine the facts and to render judgment against an opposing party; or
 - (b) Decline to render judgment until the close of all evidence.
- (3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

The OAH's procedural rule on a motion for judgment is almost identical to Md. Rule 3-519 (Motion for Judgment in the District Court) and Md. Rule 2-519 (Motion for Judgment in the circuit courts, as that rule applies to bench trials). Discussion about these court rules is applicable by analogy. The rules permit a judge in a bench trial to decide such a matter on the

sufficiency of the evidence or to find facts at the end of a plaintiff's (in this administrative matter, the Parent's) case. Niemeyer and Schuett, Md. Rules Commentary: 390 (2nd ed. 1992) (citing *Pahanish v. Western Trials, Inc.*, 69 Md. App. 342 (1986)). In such a case, an Administrative Law Judge (ALJ) can properly grant the motion for insufficient evidence (lack of evidence produced to satisfy elements of proof in an administrative action) or, assuming that a party seeking relief has offered some evidence to satisfy the elements, an ALJ can take the next step in the analysis and grant the motion by deciding that evidence was produced to satisfy the elements, but that the evidence was not probative or persuasive. For the Parent to survive BCPS' Motion 2, she must offer some probative evidence to establish, at a minimum, that BCPS failed to provide FAPE, conduct appropriate assessments, implement appropriate IEP goals, and/or failed to provide the Student with assistance to make educational progress towards functional life skills during the 2011-2012 and 2012-2013 school years, the issues that constituted the Parent's Complaint.

At the hearing, the Parent relied exclusively on her testimony to support her case. The Parent's testimony consisted primarily of her desire to have the Student's BCPS records expunged and her displeasure with BCPS' personnel. The Parent offered no evidence regarding any of the Student's IEPs, assessments, or functional goals. Without the production of such evidence, it is virtually impossible to substantiate the Parent's case. It was the Parent's burden to produce the evidence necessary for me to make findings relevant to the Student's experience with BCPS. While I can acknowledge the Parent's obvious dissatisfaction with BCPS, absent relevant and substantive proof, I can make no findings that could support her case.

Due to the lack of evidence offered by the Parent, I am compelled to grant BCPS' Motion

2. The Parent has failed to meet her burden of proof to demonstrate that any of the issues upon which her complaint was based should be resolved in her favor. As such, the case is dismissed.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law:

1) that the Parent's failure to adhere to the five-business-day disclosure rule precludes admission of untimely disclosed documents into evidence and that continuance of the matter is inappropriate due to adequate notice to the Parent of the rule; and 2) that the Parent has failed to satisfy her burden to prove, by a preponderance of the evidence, that the Student did not receive a FAPE from BCPS for the 2011-2012 and 2012-2013 school years; that BCPS failed to conduct appropriate assessments of the Student, failed to implement appropriate IEP goals, and failed to provide the Student with assistance to make educational progress towards functional life skills during the 2011-2012 and 2012-2013 school years. I further conclude that BCPS is entitled to judgment as a matter of law. 34 C.F.R. § 300.512(a)(3); 20 U.S.C.A. § 1415(f)(1)(A) (2010); COMAR 28.02.01.12E; *Shaffer v. Weast*, 546 U.S. 49 (2005).

ORDER

I **ORDER** that the Parent's Motion for Continuance be **DENIED**; and further **ORDER** that BCPS' Motion for Judgment be **GRANTED**.

October 8, 2013
Date Decision Mailed

HCH/tc

Harriet C. Helfand
Administrative Law Judge

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8-413(j) (2008).

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.