

**In re: Special Education Due Process Case # DP-25-04**

**ORDER RE: SCHOOL'S MOTION TO DISMISS**

In this case, the School District has filed a motion to dismiss Parent's Due Process Complaint. The School District's motion asserts that (1) Parent's Complaint is insufficient because the facts fail to allege a procedural violation of Parent's rights under the Individual with Disabilities Education Act (IDEA) and, (2) in the alternative, even if the factual allegations rise to a level of a procedural violation, they fall short of a substantive violation that would entitle Parent to relief.

For the reasons set forth below, the School District's motion to dismiss is hereby granted.

**I. FACTS**

The following material facts, as alleged in Parent's Complaint, are not in dispute:

1. Student is in the fifth grade and is eligible for special education and related services under the disability categories of Autism Spectrum Disorder and Specific Learning Disability.
2. In an email dated September 3, 2024, Parent raised concerns about Student's inability to complete an educational assessment given to the class at the beginning of the school year.
3. Student's Individualized Education Program (IEP) team met on September 11, 2024 at Parent's request to discuss the concerns outlined in the September 3<sup>rd</sup> email.

4. During the IEP team meeting, Parent requested a functional behavior assessment (FBA) of Student to determine the root cause of Student's inability to complete standardized educational assessments.
5. Much of the one-hour plus meeting was spent brainstorming about the nature of Student's apparent frustration with taking standardized tests and how best to address the issue.
6. An IEP team member explained to Parent that the School had recently hired a new Board Certified Behavior Analyst (BCBA) and suggested that the newly-hired BCBA first observe Student and then advise the IEP team whether any further assessment (including an FBA) related to Student's behavior was necessary.
7. At the end of the IEP team meeting, Parent was advised that Parent's request for an immediate FBA was being denied and that the School would prepare and send Parent a Prior Written Notice of Decision (PWND) that would formally deny the requested assessment and assign the District's BCBA to observe Student.
8. The School's principal completed the PWND and a copy of that document was sent to Parent on September 17, 2024.
9. On September 18, 2024, Parent filed a Due Process Complaint alleging that the PWND was inadequate because it did not meet the requirements of federal law and Vermont's Special Education Rules. Parent further alleged that these deficiencies in the Notice significantly impeded Parent's participation in the IEP process and deprived Student of an educational benefit under the IDEA.
10. The Complaint specifically claimed that the PWND failed to describe (1) the specific reasons why the request for an FBA was rejected; (2) the evaluation method used in

deciding to refuse the request for an FBA; (3) the specific input on the FBA by members of the IEP team; and, (4) the strategies discussed by the IEP team to support Student.

11. On September 27, 2024, the School's principal amended a statement in the PWND and sent the Notice to Parent. The Amended PWND otherwise provided the same information as the first PWND dated September 17, 2024.

12. On October 25, 2024, the School District filed its Motion to Dismiss the Complaint.

13. Parent filed Parent's response to the Motion on November 1, 2024.

## **II. DUE PROCESS COMPLAINTS ARE SUBJECT TO SUMMARY DISPOSITION**

The Second Circuit has held that due process complaints are subject to summary disposition. *See J.D. ex rel. J.D. v. Pawlet School District*, 224 F.3d 60, 68-69 (2d Cir. 2000). As the Court observed: "the purpose of an adversarial hearing is to resolve disputed issues of fact. Issues of law reside where they always have - with the adjudicator, whether an administrative or judicial officer."

Although the Court in *J.D. ex rel. J.D.* addressed only the application of Rule 56 summary judgment motions to complaints filed under IDEA, there is nothing in the opinion suggesting that summary disposition of due process complaints for failure to state a claim under Rule 12(b)(6) would be inappropriate. After all, resolution of both Rule 12(b)(6) motions to dismiss and Rule 56 motions for summary judgment require an adjudicator to resolve issues of law, not disputed issues of fact.

## **III. STANDARD OF REVIEW**

When ruling on a Rule 12(b)(6) motion to dismiss, the adjudicator must take the allegations of the complaint to be true and "draw all reasonable inferences in favor of the

plaintiff." *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

#### IV. CONCLUSIONS OF LAW

##### **Parent's Due Process Complaint must be dismissed because it fails to state a claim upon which relief may be granted**

The due process complaint in this case alleges that the School District failed to provide Student with a Free Appropriate Public Education (FAPE) because of deficiencies in the PWND sent to Parent by the School District in September 2024. Specifically, Parent asserted that the PWND did not describe (1) the specific reasons why the request for an FBA was rejected; (2) a description of the evaluation method used in deciding to refuse the request for an FBA; (3) the specific input on the FBA by members of the IEP team; and, (4) the strategies discussed by the IEP team to support Student. As a result of deficiencies, Parent alleges that the School District violated Student's rights under the IDEA: "A failure to implement the procedural requirements or provide needed behavioral supports could result in the child not receiving a meaningful educational benefit, causing a denial of FAPE."

In its response, the School District maintains that because its PWND complied with the requirements set forth in Vermont Special Education Rule (VSER) 2365.1.1, the School District did not violate Student's procedural rights under the IDEA and, therefore, Student was not denied a FAPE.

The IDEA requires school districts to provide a FAPE to eligible students. Federal law defines FAPE as "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of

the State educational agency; (C) include an appropriate preschool, elementary, or secondary education in the State involved; and (D) are provided in conformity with the individual education program required by [federal law]." 20 U.S.C. §1401(9).

In *Board of Education of Hendrick Hudson Central School District v. Rowley*,, 458 U.S. 176, 188-189 (1982), the United States Supreme Court held that under the IDEA, "educational instruction [must be] specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction."

Thus, IDEA does not require schools to furnish eligible students with "every special service necessary to maximize each handicapped child's potential." Instead, the Court noted, "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201.

To ensure that eligible students receive a FAPE, a school must "create an individualized education program ('IEP') for each such child ... The IEP is 'a written statement that sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.'" *R.E. v. New York City Department of Education*, 694 F.3d 167, 174-715 (2d Cir, 2012).

If a due process complaint has been filed claiming that an eligible student has been denied a FAPE, the complaining party has the burden to prove that the student has been denied either a procedural FAPE or a substantive FAPE, or both. *Schaffer v. Weast*, 546 U.S. 49, 62

(2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed on the party seeking relief").

To prove procedural violations, the complaining party must show that the school has failed to comply with the procedures set forth in the IDEA. *Cerra v. Pawling Central School District*, 427 F.3d 186, 192 (2d Cir. 2005). Procedural violations of the IDEA deny FAPE only if they impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits. *R.E. v. New York City Department of Education*, 694 F.3d at 189-190. In addition, "multiple violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not." *Id.*

To prove substantive violations, the complaining party must prove that the student's IEP was not reasonably calculated to enable the child to receive educational benefits. *M.H. v. New York City Department of Education*, 685 F.3d 217 (2d Cir. 2012); *Scott ex rel. C.S. v. New York City Department of Education*, 6 F.Supp.3d 424 (S.D.N.Y. 2014) ("A school district fulfills its substantive obligations under IDEA if it provides an IEP that is likely to produce progress, not regression, and if the IEP affords the student with an opportunity greater than mere trivial advancement").

In this case, based on the undisputed facts, Parent has not met Parent's burden to prove that the School District failed to provide student with a FAPE.

VSER 2365.1.1 requires Local Education Agencies (LEA) to provide written notice to the parent or guardian of a student eligible for special education and related services when the LEA refuses to initiate or change a student's identification, evaluation, educational placement, or

the provision of a FAPE. This rule requires each prior written notice of decision to include the following information, if that information is applicable to the LEA's refusal to initiate or change an element of the student's IEP:

1. A description of the action proposed or refused by the LEA;
2. An explanation of why the LEA proposes or refuses to take action;
3. A description of evaluation procedures, tests, records, or reports upon which the action is based;
4. A description of other factors that are relevant to the proposed or refused action;
5. A statement that the parents of special education students have procedural protections as set forth in the Parental Rights in Special Education Notice developed by the Agency of Education;
6. Sources for parents to contact to obtain assistance in understanding the provision of their parental rights in special education.

On September 11, 2024, Student's IEP team met for over an hour to discuss and consider Parent's request for a functional behavior assessment (FBA) of Student to determine the root cause of Student's inability to complete standardized educational assessments. Parent submitted a complete audio recording of that meeting with Parent's Due Process Complaint.

The recording confirms that there was an in-depth discussion of the problem identified by Parent, i.e., Student's inability to complete standardized educational assessments.

Throughout the meeting, Parent insisted that the only way to determine the root cause of the problem was for the school to conduct an FBA. Other members of the IEP team disagreed with Parent's opinion and suggested that a newly hired BCBA be given an opportunity to observe Student and submit their findings and recommendations to the IEP team.

In the meantime, members of the IEP team suggested that certain "simple strategies," including those suggested by Student, could be utilized to address Student's problem. Once the BCBA completed their observation and reported their findings to the IEP team, the team

could consider whether any further assessments, including an FBA, were necessary. Thus, the IEP team did not categorically deny Parent’s request for an FBA, but instead put the final decision on hold until additional data could be developed to inform that decision.

Following the meeting, the School’s principal sent Parent the initial PWND on September 17, 2024 and an amended PWND on September 27, 2024.<sup>1</sup> Both Notices addressed each of the six topics required by VSER 2365.1.1. First, the Notice informed Parent that the School District was refusing to conduct an FBA and was proposing to have the District’s BCBA observe Student. Second, the Notice provided a detailed explanation for its decision to refuse Parent’s request for an FBA and its decision to have the District’s BCBA observe Student. Third, the Notice provided a description of the information relied upon by the IEP team and the School District in reaching its decision. Fourth, the Notice explained that other options were considered and rejected, and provided reasons for not approving these other options, with the caveat that the IEP team “may wish to revisit that accommodation in the future.” Fifth, the Notice indicated that there were no other reasons for refusing Parent’s request for an FBA and its decision to have the District’s BCBA observe Student by marking that section with an N/A, or not applicable. Sixth, the Notice informed Parent that the Vermont Agency of Education’s booklet entitled “Notice of Procedural Safeguards: Rights of Parent of Students with Disabilities” included resources available to

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<sup>1</sup> After receiving the initial version of the School District’s PWND, Parent sent the School’s Principal an email in which Parent alleged that the Notice was legally insufficient for several reasons.

The following day, the School Principal sent Parent a copy of the amended PWND and indicated that the amended PWND included “one small revision” to the original PWND.



help in understanding special education law and noted where Parent could obtain a copy of the booklet.

The Due Process Complaint filed in this case alleged that the School District's PWND fails to comply with VSER 2365.1.1 because (a) the "proposes to begin or change box" on the form was not checked; (b) "the only reasons listed for the FBA refusal were the generic wording of 'teacher input, parent emails/input, review of current testing accommodations'"; and, (c) options that were discussed at the September 11, 2024 IEP team meeting were not included in the PWND.

Contrary to the first allegation, the "proposes to begin or change box" is checked on both the original and amended PWRD to reflect the fact that the IEP team agreed to have the District's BCBA observe Student. The allegation that the reasons provided for the decisions made by the IEP team are "generic" is belied by the detailed explanation in both the initial PWND and the amended PWND. Finally, both of the Notices addressed the "other options" question by describing accommodations that could be employed to address Parent's concerns and concluded that the IEP team may "wish to reconsider that accommodation in the future."

Because the School District's initial and amended PWND provided Parent with the information required by VSER 2365.1.1(a)-(g) regarding the assignment of the District's BCBA and its refusal to initiate an FBA at that time, Parent has not met Parent's burden to prove the procedural violation alleged in Parent's Due Process Complaint. For that reason, the School District's Motion to Dismiss is granted.

## **CONCLUSION**

For the reasons stated in this order, the School District's motion to dismiss is granted and judgment is entered in its favor in this matter.

## **NOTICE OF APPEAL RIGHT**

Pursuant to Vermont Department of Education Rule 2365.1.8:

"(a) The decision of the hearing officer is final unless appealed to a state or federal court of competent jurisdiction.

(b) Parties have the right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction in accordance with Rule 2365.1.9."

Dated: November 4, 2024

David J. Williams  
Vermont Agency of Education  
Due Process Hearing Officer