STATE OF VERMONT
AGENCY OF EDUCATION

Special Education Due Process Hearing
Case #DP 14-16 (.)

SUMMARY JUDGMENT ORDER

A Due Process Complaint was filed by the Parents on June 18, 2014. An Initial Conference Call was held on June 23, 2014 and a Scheduling Order was issued on the same date. Pursuant to the Scheduling Order, the Parents were to clarify the issues and requests for relief set forth in their Due Process Complaint by June 26, 2014. On July 11, 2014 the District filed a Motion for Summary Judgment.

UNDISPUTED FACTS

The parties disagree about many facts in this case, however, there is no genuine dispute about the following facts:

1. The Student was found eligible for Special Education and provided with an Individualized Education Plan (hereafter "IEP") while attending grade at the Wells Village School. (Parents' Due Process Complaint (hereafter "Complaint"), page 5).
2. The Student entered the grade of high school in 2012 with an IEP. On March 26, 2013 he was found to be no longer eligible for special education based on the progress had made as indicated by evaluation results. The Parents did not disagree. (Complaint, page 5; District's Summary Judgment (hereafter "SJ") Motion, Exhibit A; SJ Motion, Exhibit B).
3. The Student entered the grade in the fall of 2013 without an IEP. (Complaint, page 5).
4. During October of 2013, the Student had an with another student and was suspended for day. (Complaint, page 5; SJ Motion, Exhibit C).
5. On October 31, 2013, The Student another student and was suspended for days. was allowed to return to school on November 7, 2013. (SJ Motion, Exhibit D).
6. On November 6, 2013, the Parents requested an independent evaluation (SJ Motion, Exhibit B, page1).

7. The Parents and the District discussed a Plan for the Student on November 7, 2013 and again on November 8, 2013 but failed to reach agreement on the terms. The Parents did not agree with the provision that required the Student to keep hair out of eyes. The plan stated that when the Student's hair was "in face or over eyes," would be sent to an alternative space until hair was removed from face or eyes. (Complaint, page 5; Exhibits E, F & G, SJ Motion).

8. For approximately the next two weeks, the Student went to school, however, pursuant to the Plan was sent to an alternative learning space or was picked up by parents when hair or hoodie covered eyes. (SJ Motion, Exhibit F, page 3; SJ Motion, Exhibit H).

9. On November 21, 2013, the Parents accepted the District's offer of hours per day of in-school tutoring instead of regular classroom instruction to begin on November 25th. (SJ Motion, Exhibit E, Exhibit F, page 3 and Exhibit J).

10. On January 2, 2014, the Student's Father took the Student to Dartmouth-Hitchcock to be evaluated. On January 5, 2014, the Father took the preliminary report from Dartmouth-Hitchcock to the Principal and the Principal agreed that the Student could return to the regular classes. (Complaint, page, 5; SJ Motion, Exhibit F, page 3).

11. The Student was diagnosed by a at Dartmouth-Hitchock with . (Complaint, page 5; SJ Motion, Exhibit B, page 1).

12. The District reviewed the Dartmouth-Hitchcock evaluation and issued a Prior Written Notice of Decision dated February 4, 2014, finding the Student eligible for special education. The Student's IEP Team met on February 4, 2014 and developed an initial IEP. The Student began receiving special education services pursuant to February 14, 2014 IEP. (SJ Motion, Exhibit B, page 1; SJ Motion, Exhibit L, page 1; SJ Motion, Exhibit K).

13. On March 21, 2014, the Student was assessed by and diagnosed with complex . (Complaint, page 5; SJ Motion, Exhibit F, page 3).

14. The Student was determined eligible for special education by the District on February 4, 2014 (effective date 01/29/14) with primary

disability and

as a second disability. (SJ Motion, Exhibit B, page1).

15. The Parents filed a Due Process Complaint with the Agency of Education on June 18, 2014. At the initial conference call on June 23, 2014, the District requested and the Parents agreed to clarify/supplement their claims and the relief sought by June 26, 2014. This was done by emails from the Parent(s) on June 25, June 26, July 2, July 9 and July 14, 2014. (SJ Motion, Exhibits A, N and M).

16. The Parents state that the District did not use timely and accurate identification information when determining whether the Student had a disability. This included an initial score of and academic grades the Student received during the first term of grade (average). The Parents allege that the District should have used the Student's current grades, an accurate test result and in addition, the assessments by Dartmouth-Hitchcock and . (Complaint, page 4).

17. It was determined at the Student's February 4, 2014 IEP Team meeting that the initial score was probably low due to the Student being uncooperative and that the Student's symptoms were interfering with academic performance. (SJ Motion, Exhibit K, page 2; Complaint, page 4).

18. The Student was given a subsequent test on March 14, 2014 and the score was . (Complaint, page 4).

19. The Student was assessed by Dartmouth-Hitchcock on January 2, 2014 and by March 21, 2014. These assessments were considered by the Student's IEP Team in developing his February 4, 2014 IEP. (SJ Motion, Exhibit K).

20. The Parents have stated that the issue of the Student's placement could be resolved by providing the Student with services throughout the summer, summer camp or other technology related experiences, on-line courses and a assessment. (Complaint, page 6).

21. On or before June 26, 2014, the Student's Father and the District reached agreement on issues raised in the complaint as follows: the Student will not be penalized for having hair in front of eyes or a hoodie in front of face; will be allowed to take on-line courses from and another source chosen by the Parents in a variety of subjects; and, a summer camp for the Student would be chosen by the Parents. The Parent

stated that would like to have the agreement put in writing and signed by both parties. (SJ Motion, Exhibit M).

22. When the Student's IEP was revised on June 19 2014, additional information was available to the Team including March 21, 2014 assessment of the Student and a second test of the Student done on March 14, 2014. (SJ Motion, Exhibit K, page 2).

23. Pursuant to the Student's IEP Program , the Student will not be penalized academically or or disciplined for having a hoodie over face or otherwise avoiding eye contact; will take on-line courses in the core content areas; will have further evaluations/testing at Dartmouth-Hitchcock in July of 2014. Pursuant to the Student's IEP Extended School Year Services, the Student will receive services times a week between June 30 and August 8, 2014 from an at a separate school. (SJ Motion, Exhibit K, pages 8 and 10).

24. The Student's Father and the Superintendent met on June 30, 2014 for a resolution session. The Father stated in his July 2, 2014 email that they were able to reach agreement on all issues raised by the Parents except for the issue of the Student being denied education because of hair over eyes during November and December of 2014. The Superintendent offered to provide an additional summer camp for the Student and on-line courses which the Student could access at home during the summer. Neither of these offers was accepted by the Father. (SJ Motion, Exhibits N and O).

25. The Parents have indicated that the issue of the Student's in-school suspension during November of 2013 and missing school in November and December of 2013 could be resolved by having the District's High School "disciplined" by the Agency of Education and by the suspension of the high school principal's educational licenses in order to prevent such action from being taken against any child with disabilities. The Parents proposed that resolution should also include a state review of the use of a "filing cabinet room" for in-school suspensions and insure that all students at the District's high school are treated with respect. (Complaint, page 5; SJ Motion, Exhibit A).

26. The Parents have sought legal advice but could find an attorney they could afford. (Complaint, page 5).

DISCUSSION

Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 56 V.R.C.P 56(c)(3). To determine whether or not there is a genuine issue of material fact, a court accepts as true claims in opposition if they are supported by evidentiary documentation. *Robertson v. Mylan Labs. Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356.

The issues raised by the Parents in this case are set forth in the Complaint filed on June 18, 2014 and subsequent emails on June 25, and 26 and July 2, 9 and 14 and address the areas of special education identification, evaluation and placement of the Student.

The issues raised by the Parents' Complaint relating to the identification of a disability include the use of timely and accurate information such as an accurate score, as well as, current grades and appropriate assessments. The Dartmouth-Hitchcock assessment of the Student and the negative impact of the disability on the Student's academic performance were considered by the District when it determined that that Student was eligible for special education. This information was, also, considered by the IEP Team in the development of the Student's February 4, 2014 IEP and its revision on June 19, 2014. Thus, the action and information requested by the Parents in their Complaint for resolving the identification issues were taken and considered respectively by the District in it's finding of eligibility and later by the IEP Team in it's development of the Student's IEP. Accordingly, the identification issues raised by the Parents have been resolved and these claims are moot.

The Parents under the Evaluation section of their Complaint describe the Student in October of 2013 as failing academically, having with other students and being placed in in-school suspension for avoiding eye contact and being allowed only hours per day of regular classes. The Parents contend that the student missed school for the months of November and December of 2013. They state that the District should be disciplined by the Agency of Education to prevent other children with disabilities from having an action such as the Student's in-school suspension taken against them. A June 25, 2014 email from the Student's Father (hereafter "Father") states that any resolution should include the suspension of the High School Principal's educational licenses and that the use of "a filing cabinet room" as an instructional should be reviewed by the state.

The Agency of Education (hereafter the "Agency") governs the licensing and suspension of educator's or administrator's licenses and if a person has "reasonable cause to believe a licensee has engaged in unprofessional conduct or is incompetent" a written report may be submitted to the Agency. 16 V.S.A. §1699. If a report is filed, the Agency's has a process for investigating such claims and rendering a decision pursuant to 16 V.S.A. §1698 *et seq.* Any licensing action including suspension of an educator's or administrator's license is not within the scope of a Hearing Officer's authority. Likewise, the Parents request that the Agency of Education discipline the District's high school is clearly outside a Hearing Officer authority as is the request for a state review of the use of a "filing cabinet room". A due process hearing is not an appropriate forum for establishing protections for all students. See *J.S. v. Attica Cent. Sch.*, 00-CV-513S, 2011 WL 4498369, *8(W.D.N.Y. Sept. 27, 2011). Therefore, the Parents request for this relief is beyond the scope of this proceeding.

The issues raised by the Parents under the Educational Placement section of their Complaint include an allegation that the Student's teachers appear to be prejudiced and discriminatory toward is occasionally sent to the office for hair in eyes and grades are not consistent with ability. The Parents state that these issues can be resolved by services throughout the summer, Summer Camp or other technology related experiences and a assessment. The Father's June 26, 2014 email stated that resolution had been reached regarding the Student as follows: will not be disciplined or academically penalized for having hair in eyes or not making eye contact; will be allowed to take a variety of on-line courses; and, will attend a summer camp selected by the Parents. The Father requested that the terms of the agreement be put in writing and signed by the parties. However, these requests, in addition to others, were written into the Student's IEP and consequently, no written agreement was required.

An additional educational placement issue was raised by the Father in his July 2, 2014 email. The Father alleges that the Student's in-school suspension and absence from regular classes during November and December of 2014 constitute a denial of Student's education. The Student was found to be no longer eligible for special education in the spring of grade year. Thus, was not on an IEP when entered the grade in

the fall of 2013. The Student was subsequently found eligible for special education on February 4, 2014 and I EP became effective on February 14, 2014.

The Individuals with Disabilities Education Act (hereafter "IDEA") defines a Free Appropriate Public Education (hereafter "FAPE") as "special education and related services that...are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(9). Consequently, a child who is not eligible for special education cannot be denied FAPE. See *L..J. v. Pittsburg Unified Sch. Dist., 13-CV-03854-JSC*, 2014 WL 1947115, *6 (N.D. Cal. May 14, 2014). During November and December of 2013, the time in question, the Student was not eligible for special education, was not on an IEP and, therefore, was not entitled to special education and other services. However, in an effort to resolve the alleged denial of education the Superintendent met with the Father on June 30, 2014 and offered additional services for the Student including another summer camp and an online course that the Student could access from home. The Father declined these offers. The relief requested by the Parents relating to the issue of educational placement has been included in the Student's IEP, refused by the Father or was not available to the Student due to ineligibility. The issues raised by the Parents regarding educational placement including denial of FAPE are moot.

The Parents also contend that although the District or Supervisory Union is required by the Parents' Rights in Special Education Handbook to provide parents with any free or low cost legal services available in the area, it did not do so. However, the Parents state in their Due Process Complaint dated June 16, 2014 that they attempted to find an attorney but were not able to afford one. In addition, during the Initial Conference Call on June 23, 2014, the Hearing Officer advised the Parents to call at the Agency of Education to obtain a list of special education attorneys, legal organizations and advocates. Thus the Parents not only had knowledge of attorneys prior to filing their Complaint but they were also given contact information for names of additional special education attorneys and advocates. The issue of the District's failure to provide the Parents with information about low cost attorneys did not prejudice them or deny them of rights under special education law and is, therefore, moot.

CONCLUSION

Based on the above, the District has established that the issues raised by the Parents regarding the identification, evaluation and placement of the Student under IDEA have been resolved, are outside the Hearing Officers scope of authority or are inapplicable. Therefore, all the issues raised by the Parents are moot

ORDER

The District's Motion for Summary Judgment is hereby GRANTED.

NOTICE OF APPEAL RIGHTS

Pursuant to Vermont Agency 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 within 90 days of the decision.

(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. An appeal from a due process decision to a court of competent jurisdiction in accordance with Rule 2365.1.9 shall be commenced within 90 days from the notice of the final decision, and not after."

Dated at Hartland, Vermont, this 24th day of July 2014

Catherine C. Stern, Hearing Officer

The Parents provided the Principle with the Dartmouth-Hitchcock assessment on January 2, 2014 and the Student returned to regular classes at the District's high school on January 5, 2014.