STATE OF OHIO
DEPARTMENT OF EDUCATION

IN THE MATTER OF:	*	Before the Impartial Hearing Officer, Veronica M. Murphy
THE IMPARTIAL DUE PROCESS HEARING	*	567 Spitzer Building Toledo, Ohio 43604
FOR Student	*	(419) 242-3135
	*	**SE-1653-2005**
on behalf of her daughter, ,	*	**DECISION**
Petitioners,	*	
and	*	
Toledo Public School District.	*	

This due process request alleged, first, that the respondent school district failed or refused to identify the petitioner student with a disability and develop an individualized educational plan for her. That issue was resolved at the hearing by the parent's acceptance of the district's offer to do the evaluation. The second issue was whether the school district had a legal obligation during the last two school years to treat the student as having a disability when taking any disciplinary action against her.

The petitioners did not prove that the school district had the requisite knowledge of a potential disability which would entitle the student to the protections given a student with a disability. Parent's due process request is, therefore, denied.

School District in future mediations will inform parents who agree to initial multifactored

evaluations that their signature is required on the ODE parent consent form as well as the agreement.

I. PROCEDURAL BACKGROUND

On April 14, 2005 the petitioner parent (hereafter "Parent") filed a request for a due process hearing for her daughter, a student enrolled in Start High School (hereafter "Student"), alleging that the respondent Toledo Public Schools (hereafter "School District") had failed to provide her daughter with a free and appropriate public education (hereafter "FAPE") and had suspended her from school for actions related to her disability. IHO Ex. 2. On April 29, 2005, Veronica M. Murphy was appointed the impartial hearing officer. IHO Ex. 1. Parent represented Student pro se, and Attorney Lisa Pizza represented School District. Tr. 3-4.

Between the initial telephone conference with the parties on May 5, 2005 and the in-person Discovery Conference on May 25, 2005, School District filed a motion in limine to limit evidence at the hearing to matters occurring after the parties had previously entered into a mediation agreement on May 19, 2003 regarding Student, IHO Ex. 8 and 10, which limitation Parent opposed, IHO Ex. 7 and 9. The district's motion was granted. IHO Ex. 13. The hearing was set for May 31, 2005, and a Discovery Conference was held on May 25, 2005 at which the parties exchanged exhibits and witness lists. IHO Ex. 17, 18, 19 and 27.

During the Discovery Conference, Parent stated that she would not authorize the release of any information by Dr. Larry Hamme, a psychologist who had evaluated Student pursuant to the May 2003 mediation agreement, and the district's attorney withdrew its request for a subpoena duces tecum. IHO Ex. 11 and 14; *see* Tr. 38-44.

Each party made one request for an extension of time. IHO Ex. 3 and 15. Both requests

were found reasonable and granted, IHO Ex. 12 and 16, thereby extending the timeline for this Decision a total of 47 days until July 15, 2005, IHO Ex. 16, Tr. 374-376.

The hearing was conducted on May 31 and June 1, 2005. Seven witnesses testified including Parent, Student and five School District employees, school administrators and a school psychologist. At Parent's option the hearing was open. IHO Ex. 6 at 2; Tr. 35.

A procedural question raised at the start of the hearing was whether Parent had received access to and copies of Student's complete school record. Tr. 17-22. Parent specifically alleged a gap in Student's educational record in that she had not received grade cards issued since October, 2003. Tr. 22-27, 30-32. School district stated that Parent had been given a transcript of Student's grades, but that her grade cards issued during that time had been withheld because she owed unpaid fines and fees totalling under $200. Tr. 22-23, 27-32 . Decision on the issue was reserved until the hearing officer could determine whether the missing items were necessary for purposes of the due process hearing, Tr. 24-25, 32-34, and the parties were asked if any compromise was possible regarding the issue, Tr. 32. During the lunch break, School District provided a copy of the missing grade report for the previous school year, Parent Ex. 54, which, added to the grade card report for the current school year, Parent Ex. 31, resolved the issue, Tr. 106-107.

Both parties verified that all other procedural requirements had been met, Tr. 16-18, 34-37, and that neither was aware of any procedural errors in due process that would prevent going forward with the hearing, Tr. 37-38. The hearing concluded on June 1, 2005, and the parties submitted post-hearing briefs in a timely manner, which have been added to the record. IHO Ex. 33 and 34, Tr. 375.

Another procedural question arose during the first day of hearing when Parent requested

that Dr. Earl Murry, who had come to observe the hearing and whom Parent recognized as a person with special knowledge, be permitted to assist her. Tr. 108, 110-111. School District objected to this change after the hearing was in progress based on lack of notice. Tr. 110, 112. Parent offered no reason for not disclosing the information sooner stating only that at the Discovery Conference the hearing officer had not specifically asked whether she wanted assistance. Tr. 109. Parent had, however, been advised of her rights including her right to assistance on May 5, 2005, Tr. 16-17, 109-110; *see* IHO Ex. 6 at 1, and given ample opportunity to raise the matter at the Discovery Conference on May 25, 2005, Tr. 110, 112, and School District's objection was sustained, Tr. 112-113.

II. ISSUES FOR HEARING

Parent's April 14, 2005 request for a due process hearing contained thirteen paragraphs of reasons why she believed Student has a disability due to fetal distress and has been denied FAPE by School District. IHO Ex. 2. During the May 5, 2005 prehearing telephone conference Parent clarified that these reasons raised two related issues. She alleged, first, that Student has not received FAPE because she was neither given a Multi-Factor Evaluation (hereafter "MFE") nor an Individual Education Plan (hereafter "IEP"), nor placed in an appropriate program for her behavioral disorder. Second, Parent also alleged that Student was suspended from school for actions related to her disabilities. IHO Ex. 6.

At the May 24, 2005 Discovery Conference, Parent further clarified the relief she was seeking for Student: that School District conduct an MFE and provide an IEP with whatever additional services Student might need in order to complete high school and graduate as early as possible unless Student transferred to a charter school. IHO Ex. 20 at par. 2. Based on her belief

that the MFE would identify Student as a child with a disability, Parent also wanted School District to follow disciplinary procedures appropriate to children with disabilities in any future disciplinary actions taken with Student. *Id.*

At the hearing School District offered to stipulate that if Student were still enrolled in the district at the start of the coming school year, within 30 days of the beginning of the 2005-2006 school year, they would conduct an MFE of Student and convene a meeting to determine whether she is a student with a disability eligible for special education under the Individuals with Disabilities Education Act (hereafter "IDEA") and if so convene an IEP meeting to develop an IEP. Tr. 45. This offer required Parent to meet twice with the school psychologist, first prior to the evaluation to plan the MFE and sign the necessary forms for permission to conduct the MFE and for release of medical information required for a determination of emotional/behavioral disability and then again after the evaluation to discuss the results before the team convenes to do an IEP if one is warranted. Tr. 44-54. The first meeting could be before this school year ends. Tr. 54. Parent accepted this offer and conditions, Tr. 51, thus disposing of the first due process issue.

School District did not concede the issue of disciplinary actions taken prior to the request for due process, Tr. 47, nor stipulate whether the IEP would include services such as summer school or night school to help Student be able to graduate sooner since its content would be determined by the IEP team based on what was in the MFE, Tr. 51-52. Parent understood that if at that point, she did not agree, that would then be the basis for a new request for a due process hearing. Tr. 52, 57, 59-60.

The sole issue remaining to be resolved by the hearing here was whether School District denied Student FAPE under IDEA by failing to treat her as a student with a disability when

disciplining her between the May 2003 mediation agreement and the present. Tr. 54-57.

III. PARENT'S POSITION

Parent believes that School District's administrators have intentionally failed to evaluate Student's disability and have disciplined her inappropriately as a result by suspending her from school and lowering her grades as a means of behavior control. Tr. at 62-63. She also alleges that she and Student have been harassed and retaliated against for exercising her due process rights. IHO Ex. 2, Tr. 295. She is concerned that Student's history of suspensions, expulsions and lowered grades has lowered her self-esteem and will damage her future hopes and ambitions, and she wants a finding that those disciplinary actions were wrong. Tr. 298; *see* Parent's Closing Brief at 4-6.

IV. SCHOOL DISTRICT'S POSITION

School District maintains that it had no obligation under the applicable law and regulations to treat Student as having a disability for purposes of discipline. Tr. 46, 63-65. School District further alleges that although it repeatedly tried to obtain from Parent permission for an evaluation, release of assessment records and medical and behavioral information, her lack of cooperation impeded their efforts. Tr. 63-64. Ultimately School District determined that it would not evaluate Student and that evaluation was unnecessary. *Id.* School District wants the due process request dismissed. School District's Post-Hearing Brief at 15.

V. FINDINGS OF FACT

1. Student is 16 ½ years old and has been enrolled at Start High School for the last

three school years. Bd. Ex. I, IHO Ex. 2 at paragraph 8. Her grades during the last two school years have ranged from A to F and F-, which is for failure due to excessive absence. Parent Ex. 30-32, 34, 38 and 54. She has passed all her Ninth Grade Proficiency Tests except science, which she failed by only 6 points short of the required score of 200 last year. Parent Ex. 36 and 37, Bd. Ex. V, Tr. 198-99. Her grade placement is 9R because she has not earned the units of credit required for a junior. Parent Ex. 38, Tr. 86-87, 140-143. She is repeating ninth grade, Tr. 142, because she has accumulated only 5 3/4 credits over 2 ½ years at Start. Tr. 196-197.

2. On May 19, 2003, Parent and School District engaged in mediation regarding a previous request for a Due Process Hearing under IDEA and reached an agreement. IHO Ex. 8 at Ex. 1, Bd. Ex. A. Under its terms School District would complete an MFE of Student by September 30, 2003 that would take into consideration the results of an evaluation that was then currently being conducted by psychologist Larry Hamme. School District would pay Dr. Hamme up to $600 for his evaluation and would convene an MFE planning meeting by the end of June, 2003 if his evaluation report were available. *Id.* at par. 1.

3. Also under the mediation agreement School District would continue to hold in abeyance disciplinary proceedings pending against Student until the MFE was completed. IHO Ex. 8 at Ex. 1 and Bd. Ex. A at par. 3. They would then go forward, but if Student were determined to be eligible for special education, the procedural safeguards under IDEA would be followed. *Id.*

4. The day after the mediation Student's attorney wrote to Thom Billau, Director of Student Services, requesting investigation of an incident that had occurred that day as well as the possibility that some of Student's "tardiness" had, in fact, been the result of "constructive removal" from classes by teachers. Parent Ex. 1.

5. Also following the mediation, Parent reconsidered the agreement she had signed and asked Student's attorney to void it if possible. Parent Ex. 2. In her letter to the attorney she referred to matters from the mediation that had been left out of the written agreement and voiced concern about proving errors since the mediation had not been recorded by taping or a stenographer. *Id.*

6. The Start School Improvement Leader notified Parent on June 2, 2003 that the Start school psychologist[1] had collected two Behavior Evaluation Scales to date that would supplement Dr. Hamme's evaluation, was awaiting Dr. Hamme's report and would meet with her that month if he received it. Parent Ex. 3, Bd. Ex. J., Tr. 77-78.

7. On July 30, 2003, School District paid Dr. Hamme's invoice for Student's psychological examination within 24 hours of receiving it. Bd. Ex. B, Tr. 92.

8. After the start of the following school year in mid-September, 2003, there was a flurry of correspondence between the parties. The newly assigned school psychologist, Robin Scott, wrote to Parent requesting a meeting, written permission to test Student and information about Dr. Hamme's evaluation. Bd. Ex. C. Dr. Hamme notified the school psychologist that Parent had rescinded the authorization to release the results of the testing conducted by his office in July, but was allowing him to provide the names of the instruments that had been used. Bd. Ex. E. Mr. Billau requested the assistance of Student's attorney in encouraging parent to have the assessment information released so it could be considered in the MFE. Bd. Ex. G, Tr. 93-94.

[1]The Start school psychologist at the time was Bruce Kelly, since retired. He passed along files and records to school psychologist, Robin Scott, who was assigned Start High School at the start of the 2003-204 school year. Tr. 319-20.

On the same day Parent informed the school psychologist that Student's evaluation had not been completed and that Student was seeing a therapist. Bd. Ex. D.

9. A week later the school psychologist wrote to Parent, Bd. Ex. F., confirming a discussion they'd had and enclosing permission form PR-05, Parent Consent for Evaluation, Bd. Ex. F-1, and School District optional MFE planning form, part of Bd. Ex. F. Her letter was sent by both certified and regular mail. Tr. 321-322. The certified mail was returned unclaimed, part of Bd. Ex. F; the regular mail copy was never returned to her, Tr. 322.

10. Form PR-05, Parent Consent for Evaluation, Bd. Ex. F-1, is a model form provided by the Ohio Department of Education (hereafter "ODE"), which is available on the ODE website at www.ode.state.oh.us, and is the only form Ms. Scott ever issues for parental permission, and she testified that it is a state required form. Tr. 334-335.

11. Ms. Scott had referred to needing Parent to sign a permission form for testing in both her letters, Bd. Ex. C and F, referring to PR-05 by name in the second, Ex. F. Tr. 336-338. She had also told her about it on the phone and tried to explain what she does for all evaluations; Parent had told her to just send the information. Tr. 337.

12. On October 17, 2003, Mr. Billau wrote to Parent reviewing the problems School District had encountered in trying to comply with the mediation agreement. Joint Ex. J-1, Tr. 95-98. He informed her that based on her lack of permission to complete an evaluation and refusal to let Dr. Hamme share testing results with the district, School District had no option but to assume Parent no longer desired their MFE and did not want them to determine whether Student has a disability. *Id.*

13. On November 11, 2003 Mr. Billau notified Parent that School District was refusing to initiate an evaluation because Parent had refused to grant written permission, or to

allow Dr. Hamme to share assessment information with the district although they had contracted with him to conduct achievement and intelligence testing and paid for it as part of the mediation agreement. IHO Ex. 4 at Ex. P. 1 and Bd. Ex. I at 1-4.

14. Mr. Billau also notified Parent that based upon observation and information supplied by Student's classroom teachers, School District had no reason to suspect she had a disability so she would be subject to the same discipline as all other general education students. Bd. Ex. I at 5, Tr. 98-100; *see* Bd. Ex. J and K, Tr. 324-33, 338-39.

15. The information from classroom teachers consisted of two behavior rating scales completed by teachers who had had Student in class for the 2002-2003 school year and rated her average to above average, Bd. Ex. J, Tr. 324-25, 338-39, and anecdotal information from four teachers at the start of the 2003-2004 school year that Student was doing well in three of those classes, but not in the keyboarding class she didn't like, Bd. Ex. K. The guidance counselor had also observed Student in classes for two hours on May 22, 2003 and found her behavior better than that of her classmates. Bd. Ex. J. School District appropriately relied on this information in deciding not to evaluate Student.

16. As Mr. Billau had notified Parent in October that School District would do, Joint Ex. J-1 at last paragraph, he also directed on November 12, 2003 that Student be subject to the same code of conduct and discipline as any other general education student, Bd. Ex. L. Tr. 81, 100.

17. Parent admitted having stopped trying to communicate with the school for a time in part from frustration and in part from hope that school personnel would treat Student better if the combativeness between the parties lessened. Tr. 308.

18. As of February, 2005 Parent communicated by letter requesting responses be in

writing. Parent Ex. 5, 8, 10; *see* Tr. 116, 147-48, 174, 180-83, 213-14, 216, 221. After she complained to the School District Harassment Committee that month, Parent Ex. 6, the Start principal wrote to her only once, Parent Ex. 7, because Mr. Smith, Chair of that committee, became the School District's contact person at that point. Tr. 213-16. There is no evidence that anyone ever explained that to Parent before this hearing. Joint Ex. 4, Parent Ex. 9 and 11-13; *see* Tr. at 215-16; *see also* IHO Ex. 4 at par. 3.

19. On March 3, 2003 in a letter to the Start principal, Parent requested that the appropriate person contact her in writing to explain how the MFE process would affect Student's education at this stage of her education. Parent Ex. 8. The Start principal was not sure how it would and did not believe that her request had anything to do with him at that point so he never responded. Tr. 214-15.

20. Parent never provided School District with information from Student's therapist because the school psychologist, Ms. Scott, did not respond to Parent's informing her Student was seeing a therapist. Bd. Ex. D, Tr. 312-13.

21. Parent gave a medical record she believed evidenced her daughter's disability to Mr. Smith, the Chair of the School District's Harassment Committee, a record showing fetal distress at birth. She expected him to pass it on to the Director of Student Services, Tr. 297 who supervises special education and school psychologists for the School District, Tr. 92. Parent provided this record sometime in April, 2005. Tr. 307-308.

22. School District has a city-wide student discipline code with basic rules about attendance and behavior. Bd. Ex. P., Tr. 139. Violation or infraction of these rules can result in suspension or expulsion. Bd. Ex. P. The code is distributed to all students at the beginning of the school year. Tr. 139.

23. In addition Start High School has a dress code, Bd. Ex. Q, and an agenda book and an addendum that contain disciplinary procedures and the attendance and grading policy, Bd. Ex. R and Q, under which a combination of days missed or tardies to class can reduce a student's grade by one letter grade for three days' absence from school, or to an F- for five or more days absence, *id.*, Tr. 191-192. An F- is an attendance F and with Start's block scheduling equivalent to missing 10 of 45 days in a quarter. Tr. 190-92.

24. Student received several attendance F's during the last two school years, Parent Ex. 31, 54, for a combination of unexcused class absences and latenesses as well as suspensions, Bd. Ex. V- Z and AA. Since classroom teachers have discretion to decide whether to impose a penalty for being late to class, Tr. 196, Student's attendance records may not fully reflect all the class time she has missed, Tr. 264-65.

25. Student received the Start High School agenda book and addendum, Bd. Ex. R and Q, at the beginning of each school year in question, Bd. Ex. J, Tr. 189, 196, 266-67, but never read them although parts explaining the behavior rules and dress code were read to her the first day of school, Tr. 267.

26. Student has been either suspended from school or had in-school suspensions for disorderly conduct, failure to follow directions and skipping classes four times during the 2003-2004 school year and seven times during the 2004-2005 school year and was expelled for repeated violations on April 13, 2005. Bd. Ex. Z. She believes she is treated differently from other students and harassed and that this has increased since Parent's previous due process request in the spring of 2003. Tr. 256-57, 260-61.

27. During the 2003-2004 school year, Student had no disciplinary actions taken against her during the first or third quarter, one 2-day in-school suspension that would not affect

her grades during the second quarter, and then two suspensions totaling 9 days in the fourth quarter. Bd. Ex. Z, Tr. 201-202, which would have given her a letter grade reduction in the classes missed during the suspensions, or half her classes because Start has a block schedule, Tr. 202-203.

28. During the current school year, Student had three in-school suspensions that had no impact on her grades. Bd. Ex. 2. From the tail end of the first quarter through the third quarter Student had four suspensions that would have given her a letter grade reduction in half of her classes for the third quarter. Bd. Ex. Z, Tr. 203-204. Student's 15-day expulsion in April would have given her an F- or attendance F for the fourth quarter, but she still could have received passing grades or credits for half of her classes if there were no other attendance issues with her grades. Tr. 204-205.

VI. APPLICABLE LAW

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA") and its implementing regulations, 34 C.F.R. Part 300, require school districts to identify and provide FAPE to students with disabilities including any related services necessary for the student to benefit from her education, 34 C.F.R. § 300.13. In order to qualify as a student with a disability, she must meet certain criteria. A student with a disability as defined under IDEA includes one who has an emotional disturbance. 34 C.F.R. § 300.7(a)(1). "Emotional disturbance" is defined as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance:

(1) an inability to learn that cannot be explained by intellectual, sensory or health factors;

(2) an inability to build or maintain satisfactory interpersonal relationship with peers and teachers;

(3) inappropriate types of behavior or feelings under normal circumstances;

(4) a general pervasive mood of unhappiness or depression, and

(5) a tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.7(c)(4)(i). The term does not apply to students who are socially maladjusted unless it determined that they have an emotional disturbance. 34 C.F.R. § 300.7(c)(4)(ii). Behavioral problems can also be manifested by students with specific learning disabilities, 34 C.F.R. § 300.7(c)(10), or other health impairments that are recognized as disabilities because of their effect on a student's educational performance, 34 C.F.R. § 300.7(c)(9).

The Ohio Department of Education ("ODE") has also established implementing regulations under Ohio law specifying the procedures for compliance with IDEA, RC Chapter 3323, known as *Operating Standard for Ohio's Schools Serving Children with Disabilities* that are intended in part to ensure Ohio is in compliance with federal regulations under IDEA as well as enhance parental involvement. OAC 3301-51-01 to 3301-51-09 and 3301-51-11. The federal law requires school boards to adopt policies, procedures and programs that are consistent with state policies and procedures for the education of children with disabilities in their district. 300 C.F.R. § 300.220.

ODE revised its Operating Standards in 2002. During the 2003-2004 school year ODE required school boards to adopt new procedures that aligned with these regulations and through its Office for Exceptional Children published three versions of Model Procedures. School districts could adopt one of ODE's three versions, 34 C.F.R. § 300.220, or submit their own set of locally developed model procedures to ODE for approval, 34 C.F.R. § 300.182. ODE also

offered a uniform set of forms for district use. Both the forms and model procedures are available on ODE's website.[2] School districts were asked to inform ODE by May 30, 2003 whether they had adopted one of ODE's versions or chosen to submit their own because certain federal special education funding is contingent upon compliance. These versions were to replace previous statewide model policies and procedures.[3]

Both federal and state regulations mandate the evaluation procedures to be used to determine a student's eligibility 20 U.S.C. § 1414; 34 C.F.R. §§ 300.530 - 300.535; OAC 3351-01-06(A)-(F). They also provide special protections for a student with a disability against excessive removals from school in the context of disciplinary procedures, *i.e.*, suspensions and expulsions. 34 C.F.R. § 300.520, OAC 3301-51-05(K)(1)-(11). These protections are available to a student who has not yet been determined to be eligible for special education and related services "if the school district had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." OAC 3301-51-05(K)(12)(a); 20 U.S.C. § 1414(k)(8)(A); 34 C.F.R. § 300.-527(a).

A school district must be deemed to have had knowledge of a potential disability if

(1) The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(2) The behavior or performance of the child demonstrates the need for these services as a child with a disability;

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[2] http://www.ode.state.oh.us/exceptional children/children with disabilities/

[3] *Id.* "Introduction" to *Model Procedures for the Education of Children with Disabilities.*

(3) The parent of the child has requested an evaluation for a suspected disability; and

(4) The teacher of the child or other personnel of the school district have expressed concern about the behavior or performance of the child to the director of special education of the school district or to other personnel in accordance with the school district's established child find or special education referral system.

OAC 3301-51-05(K)(12)(b)(i)-(iv); 34 C.F.R. § 300.527(b)(1)-(4) (emphasis added). If, however, after receiving such information, the school district conducted the MFE as mandated and determined the student was not eligible, or notified the student's parents of its determination that an evaluation was not necessary, then the school district would not be deemed to have knowledge, 34 C.F.R. § 300.527(c); OAC 3301-51-05(K)(12)(c). Neither would the school district have to follow the discipline procedures it has to follow with special education students, OAC 3301-51-05(K)(1)-(11); 34 C.F.R. §§ 300.519 - 300.529. If it does not have knowledge of a potential disability before taking disciplinary measures against a student, the student may be subjected to whatever disciplinary actions are applied to any student who engages in comparable behaviors. OAC 3301-51-05(K)(12)(d); 34 C.F.R. § 300.527(d).

The party who alleges a violation of IDEA has the burden of proof on each issue raised. If the party fails to meet that burden, no relief may be granted. *See Knable v. Bexley City School Dist.*, 238 F.3d 755, 768 (6th Cir. 2001)*, Doe v. Board of Educ. Of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir. 1990). *See also Upper Arlington*, SEA - 1380-2300. pdf (at http://web app2.ode.state.oh.us/exceptionalchildren) at p. 6.

VII. ANALYSIS

Parent believes Student to be a child with a disability eligible for the benefits and protections of IDEA based on her behavioral and emotional problems and on medical records related to circumstances of her birth.[4] She describes her daughter as intellectually capable of performing in school, but unable to be productive because of behavioral issues and school suspensions. Tr. 297-98, *see* Bd. Ex. D and V, Parent Ex. 36 and 37, Tr. 198-99. Both Parent and Student perceive some of the administrators and teachers at Start High School as harassing Student, Tr. 256-57, 260-61, 264-65, 297-98; Joint Ex. J-4 to J-6; Bd. Ex. MM, IHO Ex. 2, and Student's disciplinary removals have been for disorderly conduct, failure to follow directions, skipping classes, and repeated violations, Joint Ex. 7, Bd. Ex. Z, II to KK. Although Student has a number of friends at school, Tr. 264, she was also expelled for 15 days after a vicious fight with another student that followed prior problems with that young lady and another. Bd. Ex. M. These are among factors considered in determining whether a student has an emotional disturbance. 34 C.F.R. § 300.7(a)(1), (c)(4)(i)(A)-(C); *see* Tr. 83-84. Whether Student is a student with that disability and eligible for the help Parent has been seeking from School District will be determined by the MFE to which Parent has agreed. Tr. 44-54.

Since Student has not yet been evaluated, the question here is whether the School District had knowledge that she was potentially a child with a disability entitled to the protections of IDEA before removing her from school. OAC 3301-51-05(K)(12)(b)(i-iv); 34 C.F.R. § 300.527(b)(1)-(4). If they did, they could not have removed her for more than 10 consecutive school days, OAC 3301-51-05(K)(1)(a); 34 C.F.R. § 519(a) without providing appropriate

[4]Sometime in April, 2005 Parent provided a school administrator, Mr. Smith, with a copy of a record showing fetal distress at birth, but that medical record was not part of the record of this hearing. Tr. 297, 307-308. Parent also had neurological testing done and received the results after this hearing. Parent's Closing Brief submitted June 27, 2005.

services, OAC 3301-51-05(K)(5) and (6); 34 C.F.R. § 520.

A. School District's knowledge

Even though the issue of an MFE was resolved by agreement, it is necessary to look at the sequence of events regarding evaluation since the May 19, 2003 mediation agreement, Bd. Ex. A, to determine what knowledge the School District had and when. The very day after Parent signed the agreement, she wanted to cancel it because of the waiver and release of liability clause it included. Her relationship with Student's attorney ended a few days later, and she relied pro se on her own understanding of procedural requirements from then on, or at times her misunderstanding. In midsummer, School District paid Dr. Hamme as it had agreed, but did not learn until mid-September after the start of the school year that Parent would not authorize him to share the results of his testing because she believed it incomplete.

Despite all the correspondence included in the record here, there was an abysmal lack of genuine communication between Parent and school administrators that is very worrisome. The matter of parental consent or permission for testing is a prime illustration. School District did indeed make repeated efforts to secure Parent's consent in compliance with federal and state regulations on the standard form, PR-05, "Parent Consent for Evaluation."[5] School psychologist

[5]PR-05 is one of the required ODE forms that school districts use. It had been in use (prior to any July 1, 2005 revisions in ODE materials) and publicly available on the ODE website. Also available there are overviews of the Model Procedures and Model Forms cross-referencing them to the ODE Operating Standards in the Ohio Administrative Code. *See* www.ode.state.oh.us./exceptionalchildren/childrenwithdisabilities/PDF/ModelProcQA_REV.pdf and www.ode.state.oh.us/exceptionalchildren/childrenwithdisabilities/PDF/Forms_QA_112.pdf. School districts may re-format the 8 Model Forms, *e.g.* by adding their logo or changing the spacing, and supplement with additional forms, but if they change the substance or content of any of the 8 forms that constitutes "locally developed" procedures under 34 C.F.R. § 300.182.

Robin Scott verified that PR-05 was the only form of written consent she ever used and the one required by the state. Tr. 334.[6] She told Parent orally and in writing in September that she needed written permission to conduct an MFE and sent her the PR-05 consent form, Tr. 335-38, and Mr. Billau also wrote to Parent about this in October and November, Joint Ex. 1, Bd. Ex. I. Since Parent thought she had already given permission for the MFE when she'd signed the mediation agreement, *see* Tr. 73-75: *see also* Tr. 336-37, she received the consent form, but never signed and returned it. This was only one of the technicalities Parent didn't understand.

There is obviously a long history of parental frustration and mistrust of School District here to which the district's administrators have at times contributed as illustrated by the testimony of the Start principal. In February, 2005 Parent began requesting that school administrators communicate with her in writing. In addition to any concerns she had about documentation, she also believed that writing instead of talking could be a way to reduce the antagonism between the parties. *See, e.g.,* IHO-7 and Tr. 221. The principal did write to her in February, 2005 that Start High School was willing to meet with her to discuss her concerns and asked her to call about scheduling. Because of Parent's February 14, 2005 harassment complaint, Mr. Smith became the School District's contact person for Parent while she not knowing that, wrote to the principal copying Mr. Smith.

Like any large organization School District has different departments to handle different

[6]Because of the confusion about this requirement apparent during the hearing, this hearing officer verified through ODE's Office for Exceptional Children that School District had adopted the Outline Version of the Model Procedures as of September 30, 2003. This is available at http://www.ode.state.oh.us/exceptionalchildren/childrenwithdisabilities/modelppd/Outline_Version.pdf (April 2003) and indicates that the "Parent Consent for Evaluation" form is required by OAC 3301-51-06(A)(2) and (3).

matters as well as volumes of board policies.[7] Different high schools also have different policies, and building administrators are assigned different areas of responsibility and authority.[8] Delegation of duties is an unavoidable necessity for the operation of the district so that it can comply with all its legal obligations and duties to students. Unfortunately, what is needed for efficiency and compliance can create practical obstacles for parents in dealing with school bureaucracy when they don't understand how it is organized.

[7] *See, e.g.,* Tr. 77 (board policies), 89, 113-14, 118, 125-26 (special education v. expulsion appeals).

[8] *See, e.g.,* Tr. 86-87 (credit requirements), 189 (dress code), 189-91 (attendance and grades), 166-67, 269-70, 276-77, 284-86.

Parent has asserted in her letters to various administrators that Student has experienced harassment and retaliation due to her race and her disability. That raised a variety of issues that different individuals in the School District handle and which are not within the scope of this due process request.[9] There is no "one stop shop" to which Parent can take her concerns. This hearing officer does not doubt Parent's sincere commitment to Student's interests, nor her desire for a "cease fire" in dealing with School District. It is saddening to see how her efforts to get help for her daughter have taken her to one dead end after another, but the School District cannot be deemed to have had knowledge of Student's potential disability before Parent supplied the information they needed. She revoked Dr. Hamme's authorization to provide a report on September 18, 2003. She first provided medical records that may be relevant to determining whether Student has a disability to Mr. Smith sometime in April, 2005 possibly before, possibly after Student was expelled, and there is no evidence that what she gave him ever reached Mr. Billau's office. Mr. Smith chairs a committee that deals with parental complaints against school personnel, not with special education needs of students. Whatever neurological testing results Parent now has she obtained two weeks after the due process hearing.

School District cannot determine Student's eligibility for special services without all the information required for the MFE. 34 C.F.R. §§ 300.531-30.534; OAC 3301-51-06(A)-(E). School District made its decision not to evaluate Student and determined she did not need to be

[9]Even if there were evidence that Student had experienced retaliation because Parent had filed a due process request in the past, an impartial hearing officer has no jurisdiction over such a claim. *See Upper Arlington* SEA - 1380-2003.pdf (at http://webapp2.od.state.oh.us/exceptional children) at p. 9 (State Level Review decision).

evaluated based on the behavior rating scales, classroom observations and other information supplied by Student's teachers, Tr. 324-33, 338-39, Bd. Ex. J and K, because that was all they had or could obtain without Parent's consent and involvement in the evaluation process. It did not support Parent's statements that Student had a disability. Her teachers rated her behavior as average or above average. When the guidance counselor observed her in two classes, her behavior was not only better than that of her classmates, but exemplary. Teachers' notes indicated she read and wrote at or above grade level and was doing well in her classes except for keyboarding. Student didn't like the class, came to it late from lunch every day and wasn't doing any work; this was in marked contrast to the pattern of her other classes. None of the teachers who had regular contact with Student saw her as needing evaluation or special services. School District appropriately relied on their feedback and school psychologist's review of it.

B. Written permission and the consent form

What is very troubling here is how School District's strict compliance with federal and state requirements regarding the standard PR-05 consent form became a problem. The *Whose IDEA Is This?* booklet that was sent to Parent by Mr. Billau on May 5, 2005 is the resource guide sent to every parent who in writing requests an MFE or a due process hearing. In September 2003, the school psychologist sent her one, Tr. 335-36. Parent chose to review the information herself without meeting with Ms. Scott, and the booklet does contain an explanation of the requirement for written consent. The critical misunderstanding here was that written consent had to be on a particular state form and in addition to the written consent Parent had given in the mediation agreement.

School District emphasizes the definition of consent in OAC 3301-51-01(G)(2), School

District Post-Hearing Brief, n.5 at 9, and why the mediation agreement does not fulfill the requirement. The planning form the school psychologist sent her, Bd. Ex. F-1, however, was an optional School District form and not the issue. The definition of consent in the regulation and the parent resource guide are the same. School personnel involved in the identification and evaluation of students with disabilities have to know what forms are required by the state. Parents could access the forms and procedures on the ODE website, which is public information, but they shouldn't have to.

School District emphasizes Parent's lack of response and cooperation, but that was not hers alone.[10] With regard to the question of what written permission meant, her mistake is quite understandable. The mediation agreement does not substitute for the PR-05 consent form, but it is conceivable that a parent consenting to an initial evaluation could think so. School District is always represented by counsel during mediations; parents may or may not be. Even if they are, that does not guarantee that they know which specific forms ODE requires school districts to use unless they are told so. The kind of misunderstanding that occurred here is avoidable in the future if the requirements are made as clear to parents as to the School District's attorney made them in the offer to stipulate to an MFE at the start of this hearing.

DECISION

1. Based on all of the evidence in this matter and the findings of fact above, Parent

[10]The Start High School principal emphasized how busy he is with a big building to run and 1,800 students there. Tr. 160, 162-68, 170-71. It was evident, however, that he also took Parent's harassment complaint to Mr. Smith quite personally. *See* Tr. 214-15.

failed to meet her burden and did not prove that School District had knowledge of Student's potential disability before her expulsion. Parent's request for due process is, therefore, denied.

2. School District will in future mediations inform parents who agree to initial multi-factored evaluations that their signature is required on ODE Form PR-05, "Parent Consent for Evaluation," as well as the mediation agreement.

Veronica M. Murphy, Impartial Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Decision has been served via certified, postage prepaid, on Parent,; on Lisa E. Pizza, Attorney for School District, Spengler, Nathanson P.L.L., 608 Madison Avenue, Suite 1000, Toledo, Ohio 43604-1169; and via ordinary mail, postage prepaid, on the Office For Exceptional Children, Ohio Department of Education (Attention: Arron Gregory, Educational Consultant), 25 S. Front Street, Columbus, Ohio 43215-4183 this 15 th day of July, 2005.

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Veronica M. Murphy, Impartial Hearing Officer