

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

JOANN BARNHART, on behalf of	: NO. 18-0534
T.B., a minor,	:
	:
Plaintiff,	:
	: CIVIL ACTION
vs.	:
	:
MONTGOMERY AREA SCHOOL DISTRICT,	: <i>Appeal from</i>
	: <i>School Board of</i>
	: <i>Director's Resolution;</i>
Defendant.	: <i>Preliminary Objections</i>

MEMORANDUM OPINION

This matter concerns Joann Barnhart's ("Plaintiff") appeal, on behalf of her minor son T.B., of the Montgomery Area School District Board of Directors' February 27, 2018 Resolution ("Defendant") to expel T.B. from Montgomery Area School District until March 12, 2018 based on his terroristic threat regarding a firearm.¹ On April 13, 2018, Plaintiff filed her Appeal, requesting a *de novo* hearing.² On May 4, 2018, Defendant filed its *Answer to Complaint and New Matter*.³ On May 25, 2018, Plaintiff filed her *Response to Defendant's New Matter*.⁴ On May 30, 2018, this Court directed the parties to file appropriate briefing related to the appeal by August 1, 2018.⁵

On June 7, 2018, the certified record below was filed with this Court.⁶ On June 14, 2018, Defendant filed its *Preliminary Objections* to Plaintiff's New Matter, as well as

¹ Certified Record on Appeal, Ex. 3 at 3 (June 7, 2018) (hereinafter "Rec.").

² Plaintiff's Complaint and Petition for Hearing De Novo at 2 (Apr. 13, 2018) (hereinafter "Plaintiff's Complaint").

³ Defendant's Answer and New Matter (May 4, 2018).

⁴ Plaintiff's Response to School District Answer and New Matter (May 25, 2018).

⁵ *Joann Barnhart v. Montgomery Area School District*, No. 18-0534, Order: Scheduling Conference (May 30, 2018) (hereinafter "Scheduling Order").

⁶ Rec.

its *Brief in Support*.⁷ On July 2, 2018, Plaintiff filed her *Brief in Support of Appeal*,⁸ and, on July 6, 2018, Plaintiff filed her *Brief in Reply to Defendant's Preliminary Objections*.⁹ On August 1, 2018, Defendant filed its *Brief in Opposition to Plaintiff's Appeal*.¹⁰

On August 16, 2018, this Court heard argument regarding Plaintiff's appeal and Defendant's preliminary objections. The Court reserved decision. This is the Court's Memorandum Opinion on Plaintiff's appeal and Defendant's preliminary objections.

I. Defendant's Preliminary Objections

Defendant's objections are as follows:

- A. There is a partial lack of jurisdiction in this matter because this Court does not possess jurisdiction over Plaintiff's claims regarding special education services, as the Office for Dispute Resolution has exclusive jurisdiction over such challenges under the Individuals with Disabilities Education Act, 20 U.S.C.A. § 140 *et seq.*;¹¹
- B. Plaintiff's responsive pleading is improperly labeled as a "response" instead of "reply";¹²
- C. Plaintiff's responsive pleading fails to specifically admit or deny any of the averments raised in the new matter;¹³
- D. Paragraphs 3(A-D), 7, and 11 of Plaintiff's responsive pleading improperly attempts to offer evidence that is beyond the record made by the School Board below when there has been no determination by this Court that the record is incomplete;¹⁴ and

⁷ Defendant Montgomery Area School District's Preliminary Objection to Plaintiff's Response to School District's Answer and New Matter Pursuant to Pa.R.C.P. 1028(a)(2) (July 14, 2018) (hereinafter "Defendant's Objections"); Brief in Support of Preliminary Objections of Defendant Montgomery Area School District to Plaintiff's Response to School District's Answer and New Matter Pursuant to Pa.R.C.P. 1028(a)(2) (July 14, 2018).

⁸ Plaintiff's Brief in Support of Appeal (July 2, 2018) (hereinafter "Plaintiff's Brief").

⁹ Plaintiff's Brief In Reply to Defendant's Preliminary Objections (July 6, 2018).

¹⁰ Defendant's Brief in Opposition to Appeal (August 1, 2018) (hereinafter "Defendant's Brief").

¹¹ Defendant's Objections, ¶¶10-15.

¹² *Id.*, ¶¶18-19.

¹³ *Id.*, ¶25.

¹⁴ *Id.*, ¶31.

- E. Plaintiff's responsive pleading contains scandalous and impertinent matter regarding two students whom accused T.B. of making the threat designed to prejudice Defendant and influence this Court.¹⁵

For reasons that will be clear below, Defendant's preliminary objections are moot.

II. Plaintiff's Appeal

Plaintiff raises the following issues on appeal:

1. Defendant's investigation failed to consider whether the Individuals with Disabilities Education Act Regulation § 300.534's criteria for protections applied;¹⁶
2. Defendant failed to comply with 22 Pa. Code § 12.8(c) regarding the informal hearing by not providing the parents with due process in the form of notice and a right to call witnesses;¹⁷
3. Defendant failed to comply with 22 Pa. Code §12.8(b) regarding the formal hearing by limiting the number of witnesses Plaintiff could call and the amount of time said witnesses could speak;¹⁸ and
4. Defendant "poisoned the disciplinary process by releasing false information to students, parents, school employees, school board members, the media and general public concerning the alleged incident."¹⁹

Before the Court can proceed to the substance of Plaintiff's claims on appeal, the Court must first address the appropriate standard of review applicable here. In its May 30th Order, the Court directed that argument would proceed on the record below unless Plaintiff included in the brief "any argument that a full and complete record of the proceedings before the Board was not made."²⁰ While Plaintiff requested a *de novo* hearing in her complaint, she has failed to provide argument or support for such a

¹⁵ *Id.*, ¶¶43-61.

¹⁶ Plaintiff's Complaint, ¶5.

¹⁷ *Id.*, ¶6.

¹⁸ *Id.*, ¶7.

¹⁹ *Id.*, ¶8.

²⁰ Scheduling Order.

request. Title 2, Administrative Law and Procedure, grants this Court jurisdiction in this matter;²¹ however, it states the following regarding the standard of review:

(a) Incomplete record.--*In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand the proceedings to the agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.*

(b) Complete record.--*In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals).²²*

As Plaintiff has failed to present argument as to why this matter should proceed *de novo*, and no such defect appears on the face of the record,²³ the Court is bound to proceed on the record below. Because the Court is bound to consider the record below, Title 2 also directs,

A party who proceeded before a local agency under the terms of a particular statute, home rule charter, or local ordinance or resolution shall not be precluded from questioning the validity of the statute, home rule charter or local ordinance or resolution in the appeal, but *if a full and complete record of the proceedings before the agency was made such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to*

²¹ 2 Pa.C.S.A. § 752 (“Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).”).

²² 2 Pa.C.S.A. § 754 (emphasis added).

²³ See *Lamar Advantage GP Co. v. Zoning Hearing Bd.*, 997 A.2d 423, 436 (Pa. Commw. Ct. 2010) (“A ‘full and complete record’ is defined as ‘a complete and accurate record of the testimony taken so that the appellant is given a base upon which he may appeal and, also, that the appellate court is given a sufficient record upon which to rule on the questions presented.’” (quoting *In re Thompson*, 896 A.2d 659, 668 (Pa. Commw. Ct. 2006))).

*resolve such question) unless allowed by the court upon due cause shown.*²⁴

The Court finds that due cause has not been shown in this case. Indeed, Plaintiff's Brief in Support completely glosses over the standard and scope of review, ignoring their dispositive natures in the appellate process. Therefore, this Court must proceed on the issues raised below.

When reviewing the record below, the Commonwealth Court of Pennsylvania has held that appellants waive issues that are not "expressly raised" below, or based on "elicited testimony" below.²⁵ Based on the Court's review of the record below, specifically the transcript at the Board's formal hearing, Plaintiff failed to present or preserve the issues she now raises on appeal—with a single exception. There is one portion of testimony elicited at the formal hearing regarding proper notice for the informal hearing. This testimony is Mr. Barnhart's statement regarding the informal hearing held on Friday, February 23, 2018, "I was not given a chance to come to the school on that day because of the speed of which this was done. So since I was not allowed to come enough time to be there [inaudible]."²⁶ The Court views this testimony as sufficient to preserve Plaintiff's issue on appeal regarding proper notice under 22 Pa. Code § 12.8(c).

Pursuant to Title 22 of Pennsylvania law, informal hearings are required when a student's suspension from school exceeds three (3) school days.²⁷ Regarding the informal hearing process, Title 22 states:

²⁴ 2 Pa.C.S.A. § 753(a) (emphasis added).

²⁵ *Roomat v. Bd. of License & Inspection Review*, 928 A.2d 1162, 1165 n.2 (Pa. Commw. Ct. 2007).

²⁶ Rec. at ls. 299-301. This Court therefore finds the issue not raised and preserved below are waived.

²⁷ 22 Pa. Code § 12.6(b)(1)(iv).

(c) *Informal hearings.* The purpose of the informal hearing is to enable the student to meet with the appropriate school official to explain the circumstances surrounding the event for which the student is being suspended or to show why the student should not be suspended.

(1) The informal hearing is held to bring forth all relevant information regarding the event for which the student may be suspended and for students, their parents or guardians and school officials to discuss ways by which future offenses might be avoided.

(2) The following due process requirements shall be observed in regard to the informal hearing:

(i) Notification of the reasons for the suspension shall be given in writing to the parents or guardians and to the student.

(ii) Sufficient notice of the time and place of the informal hearing shall be given.

(iii) A student has the right to question any witnesses present at the hearing.

(iv) A student has the right to speak and produce witnesses on his own behalf.

(v) The school entity shall offer to hold the informal hearing within the first 5 days of the suspension.²⁸

Relying on *Dissinger v. Manheim Township School District*, Plaintiff argues that she was entitled to written notice prior to the informal hearing.²⁹ Defendant argues that *Dissinger* is factually distinguishable.³⁰ Alternatively, Defendant argues that the Court in *Dissinger* is incorrect as subsection (ii) concerns notice of the informal hearing and does not

²⁸ 22 Pa. Code § 12.8(c).

²⁹ Plaintiff's Brief at 9 (quoting *Dissinger v. Manheim Township School District*, 72 A.3d 723 (Pa. Commw. Ct. 2013)).

³⁰ Defendant's Brief at 14.

specify the necessity of a writing, whereas subsection (i) does so specify, but concerns a summary of the hearing after it has occurred.³¹

Plaintiff is correct that the Commonwealth Court in *Dissinger* held that the “lack of a written notice given in advance of the informal hearing means that the ‘hearing’ with either [the police officer] or [superintendent] did not satisfy the requirements of an informal hearing.”³² However, the Court further explained that if the written notice requirements were impractical given the necessity of the circumstances, then “the School District should have arranged for an alternative means of delivery or requested a written waiver of the written notice.”³³ In the present case, Defendant provided an “alternative means of delivery” when it contacted T.B. and his parents by telephone notifying them of an expedited informal hearing. Given the serious nature of T.B.’s threat to use a deadly weapon at school, the Court does not interpret *Dissinger* to require the School to forgo its safety concerns and delay holding an informal hearing or acquire a written waiver from T.B. or his parents before proceeding.

The lack of proper procedure in *Dissinger* also renders it distinct. The Court in *Dissinger* likely read §12.8(c)(ii)’s requirement of “sufficient notice” pre-hearing as an extension of §12.8(c)(2)(i)’s requirement of post-hearing written notice because the record was vague regarding the type of hearings that occurred.³⁴ In fact, the School District’s own witnesses could not agree whether a formal hearing occurred.³⁵ The police officer who initially interviewed the student believed his meeting satisfied the

³¹ *Id.* at 15.

³² See *Dissinger v. Manheim Twp. Sch. Dist.*, 72 A.3d 723, 730 (Pa. Commw. Ct. 2013), *rear’g denied* (June 6, 2013).

³³ *Id.*

³⁴ *Id.* at 726.

³⁵ *Id.*

informal hearing requirement and the superintendent's meeting satisfied the formal hearing component of §12.8.³⁶ Conversely, the superintendent classified both as informal hearings since he believed his later meeting did not satisfy the requirements of §12.8(b) relating to a formal hearing.³⁷ Based on such a substantial breakdown in procedure, the Court in *Dissinger* likely analogized the posture of the case to *Mifflin County School District v. Stewart by Stewart*.³⁸

The Court in *Dissinger* acknowledges that an "informal hearing does not need to be conducted before the suspension is effective, but it must be offered within the first five days of the suspension."³⁹ In *Mifflin*, the student was suspended *before* the informal hearing was held.⁴⁰ And based on the failure of due process, the Court in *Mifflin* ruled pursuant to §12.8(c)(2)(i) that proper procedure was not followed because written notice was not sent to the student or his parents after the suspension occurred.⁴¹ Indeed, the Mifflin County School District admitted that pre-hearing verbal notification was insufficient under the circumstances because the student was suspended before the informal hearing was scheduled and, thus, a combination of §12.8(c)(2)(i) and (ii) was necessary.⁴² To preserve the student's due process rights in *Dissinger*, the facts necessitated that the Court's analysis combine subsections (i) and (ii) of §12.8(c)(2).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See generally *Mifflin Cnty. Sch. Dist. v. Stewart by Stewart*, 503 A.2d 1012 (Pa. Commw. Ct. 1986).

³⁹ *Dissinger*, 72 A.3d at 727.

⁴⁰ *Mifflin Cnty. Sch. Dist.*, 503 A.2d at 1013.

⁴¹ *Mifflin Cnty. Sch. Dist.*, 503 A.2d at 1014.

⁴² *Id.* ("the district also admits that Stewart's parents did not receive the required written notification of the reasons for the suspension before the informal hearing took place.").

Therefore, it is this Court's view that based on the plain language of §12.8(c)(2) as well as the precedent in *Mifflin* and *Dissinger*,⁴³ subsections (i) and (ii) of §12.8(c)(2) are not to be read together *unless* the student is suspended prior to the informal hearing or the facts indicate a substantial deprivation of process. The present case does not involve a *Mifflin* situation where the suspension occurred first and lacks the substantial failure of process found in *Dissinger*. The record indicates that T.B. made the terroristic threat that he was going to "shoot the school down" on Tuesday, February 20, 2018; fearful complaints were made to the school counselor by two fifth grade students regarding his threats on Friday, February 23, 2018; the school immediately contacted T.B.'s parents early Friday morning and requested that they attend a meeting at the school to "discuss a threat that [T.B.] had made;" and T.B. was suspended for ten (10) days pending a decision from the Board at the formal hearing on Tuesday, February 27, 2018.⁴⁴ Based on the severity of the accusations and circumstances of this case, the Court finds that Defendant's notice was "sufficient notice of the time and place of the informal hearing."⁴⁵

Furthermore, while Mr. Barnhart was not ultimately able to attend the informal hearing,⁴⁶ Plaintiff has failed to explain how due process was denied when Ms. Barnhart

⁴³ See *Price v. Pennsylvania Prop. & Cas. Ins. Guar. Ass'n*, 795 A.2d 407, 412 (Pa. Super. Ct. 2002) ("When interpreting a statute, the court must begin with the plain meaning of the language used in the statute. Our canons of statutory interpretation instruct that the plain words of a statute cannot be disregarded where the language is free and clear from ambiguity. When a statute's meaning is plain, there is no occasion to further resort to rules of statutory interpretation when doing so would alter the plain meaning of the statute." (internal citations omitted)).

⁴⁴ Rec. at ls. 78-119, 389-399, Ex. 1.

⁴⁵ 22 Pa. Code §12.8(c)(2)(ii).

⁴⁶ Rec. at l. 300.


and her son were notified and present at the informal hearing.⁴⁷ Plaintiff does not argue that the written notice she received after the informal hearing violated subsection (i), and does not articulate how the later formal hearing at which T.B. and both parents were present failed to cure any due process concerns regarding the verbal notice prior to the informal hearing.

CONCLUSION

For the reasons discussed above, the Plaintiff's Appeal is **DENIED** and Defendant's Preliminary Objections are **DISMISSED** as moot.

IT IS SO ORDERED this 5th day of November 2018.

BY THE COURT,



Eric R. Linhardt, Judge

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⁴⁷ See 22 Pa. Code § 12.8(c)(1) ("The informal hearing is held to bring forth all relevant information regarding the event for which the student may be suspended and for students, their parents or guardians and school officials to discuss ways by which future offenses might be avoided.").