

VIRGINIA

DEPARTMENT OF EDUCATION (SPECIAL EDUCATION)



[REDACTED]

Parents,

v.

DUE PROCESS HEARING

[REDACTED]

PUBLIC SCHOOLS

IN RE:

[REDACTED]

PRELIMINARY STATEMENT

Pursuant to an appointment made by [REDACTED] Public Schools (LEA or [REDACTED]) on [REDACTED] 2002, the undersigned Hearing Officer was designated to hear the due process complaint brought by [REDACTED] (Father) and [REDACTED] (Mother), parents of [REDACTED] (Child).

An initial telephonic pre-hearing conference was held on [REDACTED] 2002, at which time a hearing was scheduled for [REDACTED] and [REDACTED] 2002. This schedule would have permitted the rendering of a decision within 45 days.

At a prehearing conference on [REDACTED] 2002, Child's advocate advised that the Mother wished a typed transcript of the hearing, which would of necessity delay the issuance of the decision. Believing it to be in the Child's best interest, the time for the rendering of the opinion was extended until [REDACTED] 2002.

A few days after the [REDACTED] hearing, the Hearing Officer was advised that the Mother sought [REDACTED] replacement because it was felt that the decision would be delayed due to his planned vacation. The Virginia State Department of Education advised the Hearing Officer that he would not be replaced. An additional prehearing hearing was held on [REDACTED] 2002, during which a continuance of the hearing date was requested by the Mother based upon the fact that Child's experts were unable to schedule classroom observations in time for the original hearing dates. Again, believing it to be in the Child's best interest, a continuance was granted to [REDACTED] and [REDACTED] 2002.¹

Day 1 of the hearing began on [REDACTED] 2002 at 9:35 a.m. and ended at 6:15 p.m. Day 2 started at 9:35 a.m. and again ended at 6:15 p.m. Day 3 began at 9:35 a.m. and ended at 8:16 p.m. The LEA was represented by [REDACTED], Esquire. The Parents were represented by [REDACTED] Advocate. A total of 15 witnesses testified, generating more than 1,200 pages of court reporter transcript. More than 175 exhibits were offered and admitted without objection. The

¹ Subsequently, the expected date of the decision was again extended because of the unexpected length of the hearing requiring additional time for transcription by the court reporter.

Hearing Officer has reviewed the exhibits, the transcript and notes taken of the testimony at the hearing and conducted appropriate research into the law governing the issues in this proceeding

ISSUES OF DUE PROCESS HEARING

The Parents allege that the Child has been denied a FAPE. Due to deficient IEPs, they argue, [REDACTED] has received inappropriate basic services as well as related services. Additionally, they argue that the LEA has violated certain procedural safeguards.

FACTUAL EVIDENCE²

[REDACTED], a speech language pathologist, testified that the Child has "central auditory processing" problems and needed to be taught in a structural setting with a ratio of one teacher to two or three students. She was critical of [REDACTED] 2001-2002 IEP because it did not address [REDACTED] auditory processing problems. The [REDACTED] program or one like it was needed for the Child to help overcome this problem. She also criticized [REDACTED] IEP because the speech language pathologist should have been seeing him 30 minutes per day, rather than 20 minutes per month.

[REDACTED] has a masters in Special Education; he taught the Child in the fourth grade. He reviewed the IEPs and time lines for achieving goals. He could not explain why there was a reduction of speech services in 2001 from reviewing the 2001-2002 IEP.

[REDACTED] is the clinical director of [REDACTED], which has a program designed to deal with problems like those experienced by the Child. There are other programs providing some similar types of teaching strategies. According to her, the Child tested at grade level in some areas, but read at second grade level (while in fifth grade).

[REDACTED] holds a masters in Special Education. He tested the child in October, 1997, and again, in January, 2001. His reports have been provided to the LEA and he has attended two IEP meetings in [REDACTED]. He, too, stated that the child has processing problems and needs to be reading in a structured environment. In math the Child tested at the first grade level, while in the fourth grade. He testified that the IEP goals were not inappropriate as ultimate goals but were as current goals because they exceeded his then level of ability.

[REDACTED] qualified as an expert in Education, Speech Language Pathology, Audiology and Auditory Processing disorders. Rather than labeling the child with having an auditory processing disorder, he preferred to call it language or information integration problem. Based upon his testing he recommended a neuropsychology examination. Like other experts testifying, [REDACTED] thought the Child needed a well-suited language-based program. [REDACTED] also testified as to his inability to observe the child in class as he would like. [REDACTED] did give some criticisms of the layout of the Child's

² Because the transcript is in excess of 1,200 pages, only that evidence most pertinent to the Hearing Officer's decision will be set out.

class and the "draft" 2002 IEP.

██████████ is a board certified pediatric neuropsychologist. He first saw the child in March, 2002, and tested ██████████ for 6-7 hours. He believed that the Child's problems in school are secondary to brain damage. He criticized both the 2001-2002 and "draft" 2002 IEP as having unrealistic goals. He provided a large number of potential intervention strategies, beginning with returning to the levels at which the Child stopped learning. Because of problems the Child was having in the Spring of 2002, he recommended ██████████ receive homebound instruction.

██████████ was a special education teacher for the Child from January 2002, until he withdrew from school. The evidence revealed that he had sent progress reports home with the Child in which goals from an earlier IEP had been used to measure his progress. This was described by him as a "clerical error." He found the error a couple of weeks after generating the progress report and corrected it but did not inform the Child's parents.

In response to questions from the LEA attorney relating to specific academic areas of the Child's performance, ██████████ said he was teaching the child math probably between first and second grade level, that he was doing addition and subtraction (Tr. 2, p. 150). He further testified in response to a question as to whether ██████████ was making progress in math that at times it seemed like ██████████ was and at other times would seem to fall back "a little bit" (Tr. 2, p. 153). He believed that the Child was functioning in language arts at a higher fourth grade level and was successful with spelling (Tr. 2, p. 154). In response to a question as to what progress the Child made over the four months ██████████ was taught by ██████████, he replied "over the four months I didn't see extensive progress" (Tr. 2, p. 158).

He defended the 2001-2002 IEP as appropriate for the child because ██████████ needed work in those areas (Tr. 2, p. 181). When asked if the "draft" IEP was appropriate, he replied that it was because the goals in the two IEPs were similar (Tr. 2, p. 182).

██████████ also was questioned about a requirement in the 2001-2002 IEP regarding taping. He stated that he did not implement that objective because he didn't "feel comfortable taping students", but made no effort to amend the IEP (Tr. 2, pp. 106-107).

██████████ was a co-case manager for the child along with ██████████. Her assessment of the Child's academic performance was somewhat higher than that of ██████████ (Tr. 2, pp. 238-240). She also testified as to her role in the March, 2002, meeting to review the draft IEP and the controversy surrounding the nature of the notice sent to the Mother.

██████████ is the Director of Special Services for ██████████. She explained that she denied the request for a neuropsychology evaluation because it was not needed. She said such evaluations, designed to establish the physical causes of a child's problems are not helpful to educators. She felt that the LEA had enough information about the Child.

██████████ testified in detail as to the events surrounding the ██████████ 2002 and ██████████ 2002 meetings dealing with IEPs, requests for additional evaluations, the nature of notices sent to the Mother and the events which took place at those meetings.³

In response to a question concerning the appropriateness of IEP goals, she testified that they should be achievable in 12 months (Tr. 2, p. 329).

██████████ is the mother of the Child. The Mother testified extensively as to her experiences and efforts on the part of the Child with the LEA. Additionally, she testified as to her version of the events surrounding disputes over production of documents, notices of meetings, her complaints about the conduct of the LEA and what happened at the ██████████ 2002 and ██████████ 2002 meetings. Again, because of the decision I reach in this case, it is not necessary to review this testimony in detail. It is sufficient to say that the Mother declined to be part of the formulation of an IEP for 2002-2003 because she felt that the LEA was first obligated to deal with her request for a neuropsychology evaluation. She later refused to sign an IEP changing the child's status to homebound because she was not permitted to pen certain information on the IEP developed at the ██████████ 2002 meeting.

██████████ is the principal of ██████████ School, which the Child attends. She testified about her role in the production of documents after the initiation of due process. Additionally, she was involved in requests for visitation by the Child's expert, also after the initiation of due process. For the reasons previously stated, it is not necessary to describe these events.

██████████, Fine's secretary, testified about the events surrounding the production of documents issue.

██████████ was the speech language pathologist who saw the Child for 20 minutes per month. She agreed that he has an auditory processing deficit. ██████████ discussed the IEP language goals and why she thought they were appropriate. Based upon Doctor ██████████ suggestions, she thinks an IEP meeting needs to be held involving decisions as to the Child's future planning in the areas of speech language (Tr. 3, pp. 285-286). She also testified to making the same "clerical mistake" as did ██████████ with the progress reports.

During her testimony, it became apparent that there were certain notes of hers which were to have been produced in discovery for the hearing but which Ms. ██████████ the Child's advocate, said she had not received. The witness retrieved them from her file and was questioned about them.

██████████ is the Special Education Coordinator for ██████████ Like others before her, ██████████ described the events surrounding the March, 2002 meeting. She testified that at that meeting, the LEA was given the ██████████ and ██████████ reports. Only after an institution of due process, did they receive reports from ██████████ and ██████████

³ Because of the decision I reach in this case, it is not necessary to review these events in detail.

Based upon the new information, she testified that a new IEP meeting should be convened (Tr. 43, pp. 358-359). Nevertheless, she stated the "draft" IEP developed in the March meeting is appropriate.

DECISION

1. APPROPRIATENESS OF IEPs/FAPE

Under Federal and Virginia law, a child with a disability who qualifies is entitled to a FAPE. In determining whether a child has received the legally mandated services it must first be determined whether the legal procedures have been adequately complied with and secondly whether the IEP is reasonably calculated to enable the child to receive educational benefits, Board of Education v. Rowley, 102 S.Ct. 3034 (1982). Both prongs of this test are issues in this proceeding. In view of my decision that the IEP in this case is not reasonably calculated to enable the child to receive educational benefits, I need not address the procedural arguments.

The "current" IEP governing the educational services for the child covered the period from March 2001 to March 2002. The "draft" IEP proposed by the LEA was not agreed to and has not been officially implemented. Likewise, the proposed IEP for homebound placement was not agreed to by the Mother for reasons already described. The LEA argues, correctly, that the Mother consented to the 2001-2002 IEP. Further, they argue, it is unfair to attack the "draft" IEP when they did not have the full cooperation of the Mother and not all relevant information was given to them to develop 2002-2003 IEP. It is true that they did not have all the reports presented in this hearing at the time of the 2002 IEP meeting. They were, however, given the [REDACTED] and [REDACTED] reports at the meeting and considered them in the following days (Tr. 3, pp. 353-355). Since due process started, they have been given the three remaining reports. Moreover, the LEA defends both the current and the draft IEPs as appropriate, even after being provided with the reports by the Mother.

The consensus on the part of the LEA and the Child's witnesses is that the child's learning problems flow chiefly from an auditory processing dysfunction.⁴ This manifests itself primarily in his difficulty in processing verbal information. Associated with it are a lack of organizational skills and as a result of [REDACTED] age (5th grader) the attendant social and emotional issues.

The LEA witnesses, both experts who teach the child and those that do not, uniformly support the IEPs as appropriate and that the goals, objectives and methodologies are those that should be utilized. The Child's witnesses uniformly argue that more services are needed and, to some extent, different methodologies, as well. The LEA correctly argues on page 23 of its brief that deference

⁴ Dr. [REDACTED] testified that there is no such thing as an "auditory processing disorder" and that the child has a language or information integration problem (Tr. 1, pp. 385, 390-391). This strikes the Hearing Officer as being largely a quibble about professional nomenclature. In any event [REDACTED] (see Tr. 1, p. 53), [REDACTED] (see Tr. 3, p. 280) and [REDACTED] (Tr. 3, p. 369) all use the term.

should be given to the school division's choices or methodologies. This case involves, however, more than a disagreement as to the methodologies and amount of services.

I find Dr. [REDACTED] analysis to be most credible and comprehensive. [REDACTED] evaluation of 6-7 hours was performed in the past few months and, therefore, cannot be discounted as outdated. As a result of the Child's attention deficit disorder, Dr. [REDACTED] says, [REDACTED] needs to start over because [REDACTED] has not "gotten the fundamentals down" (Tr. 2, p. 22). As he testified, it is not inappropriate to have an ultimate goal, for example, that the Child be able to do multiplication and division but the IEP goals are beyond the child's capability (Tr. 2, op. 27). This analysis is consistent with the testimony of [REDACTED] as to the Child's performance.

Although, [REDACTED] answered affirmatively to general questions as to the appropriateness of the IEP, his specific testimony did not support this conclusion. His testimony as to lack of progress and low level performance is set out in detail on page 3 of this opinion and need not be repeated here. Suffice it to say that the Child does not appear to be making much progress, particularly in math. As Dr. [REDACTED] testified, he needs to go back to the areas he has failed to master before he can be expected to achieve some of the unrealistic goals of the IEPs. The Child's own teacher's evaluation best demonstrates the failure of [REDACTED] IEPs to be reasonably calculated to achieve educational benefits.

The actions on the part of [REDACTED] and [REDACTED] in sending progress reports based upon incorrect IEP goals is also of concern. These were described by the witnesses as "clerical errors." I cannot accept that explanation. Generating a progress report, in which a child is graded upon a different set of goals than those which would be appropriate manifests an appalling lack of familiarity with those goals. It is not unreasonable to assume that the appropriate goals were not being utilized in the provision of services. Additionally, [REDACTED] apparently unilaterally declined to follow the IEP requiring taping, apparently without communicating it to anyone and clearly without seeking a revision or amendment of the IEP. Both LEA counsel and witnesses for the LEA have suggested that it would be appropriate to have a new IEP so that the new information provided by the reports from the Mother can be studied and incorporated, as appropriate, in a new IEP. I concur.

The LEA argues in its brief (pp. 21-22) that the Parents' failure to cooperate should bar them from relief in this due process proceeding. It cites two cases in support of this principle. Neither is applicable. Patricia P. v. Board of Education of Oak Park and River Forest High Sch. Dist No. 200, 203 F.3d 462 (7th Cir. 2000) and M. E. v. Board of Education for Buncombe County, 186 F. Supp.2d 630 (W.D.N.C. 2002). Both involved the unilateral private placement of a child without cooperating with the school diversion in the development of needed services. Clearly, it would be unfair to require payment for unilateral private placement where the school district might have been able to meet the needs of the child had the parents cooperated. There is no evidence that the child has been placed in a private educational setting. In fact in their brief parents request continued services from [REDACTED].

For the foregoing reasons I find that the child has been denied a FAPE and that a new IEP

meeting should be promptly convened. Should the Parents be dissatisfied with the results of that IEP meeting, they could institute due process to have it reviewed.⁵

Finally, as previously related, these are allegations of procedural deficiencies involving IEP meetings, notices of those meetings and the extent to which Parents were given appropriate opportunity to contribute. These issues do not involve disputes as to legal requirements. Rather these are differences between the parties as to the facts. Because a new IEP process will be instituted, factual, as opposed to legal, issues involving the old IEPs need not be addressed.

2. REIMBURSEMENT FOR IEEs

In the request for due process, dated [REDACTED], signed by the [REDACTED], requested reimbursement for evaluations by [REDACTED], [REDACTED], [REDACTED], and [REDACTED].⁶ Additionally, they seek reimbursement for a summer placement at [REDACTED] and the [REDACTED]'s lost wages.

Regulations Governing Special Education Programs for Children with Disabilities in Virginia (Virginia Regulations) 8 VAC 20-80-70(B)(1) provides that "a parent has the right to obtain an independent evaluation of the child" (emphasis added). This would not appear to permit the public to be required to pay for multiple IEEs. Case authority supports this interpretation. See Hudson v. Wilson, 828 F.2d. 1059 (4th Cir. 1987); Lawyer v. Chesterfield County Sch. Bd., 20 IDELR 172 (E.D. Va. 1993). Accordingly, I will agree to compensate [REDACTED] as authorized by the LEA and deny the remaining requests.

The LEA argues that it should only have to pay \$420.00. This is based upon their "customary payment." (See SB 56). I am aware of no authority by which the LEA can unilaterally limit the amount it will pay for an IEE. The Hearing Officer believes [REDACTED] has the authority to consider payment on the basis of what is customary and reasonable considering the nature of the services provided. The only other evidence introduced of a customary fee for such evaluations is the [REDACTED]'s testimony that "called around" and was quoted fees from \$1,600.00 to \$2,400 (Tr. 3, p. 80). I also note that [REDACTED] testified that [REDACTED] spent 6 to 7 hours in [REDACTED] evaluation (Tr. 2, p. 54), and reviewed "about a two inch thick file," provided by the [REDACTED] (Tr. 2, p. 16). Finally, [REDACTED] report (MC 56) is over 35 pages long.

[REDACTED] bill for the IEE was not presented at the hearing. The [REDACTED] testified that it

⁵ In light of my decision that the development of a new IEP is required, it is not necessary to consider other arguments relating to alleged deficiencies in the IEPs of a more technical nature. The new IEP will form the basis for any dispute between the LEA and the Parents.

⁶ In their post-hearing brief, Parents seek compensation for services not listed in the due process request. As such, they will not be considered.

was \$1,950.00 or \$1,940.00 (Tr. 3, p. 80). This was not challenged by the LEA, nor was [REDACTED] questioned about it in cross-examination. In the Child's post-hearing brief, a number of bills from [REDACTED] are included. The first, dated [REDACTED], is for a consultation (\$250.00). The second, dated [REDACTED], is for an evaluation (\$1,500.00). The third, dated [REDACTED] is for "review" (\$200.00). The remaining bills for a summer tutorial program, records production and court appearance will not be considered because not a part of the requested relief in the due process hearing; however, the charge for records, if in response to a subpoena, is properly billable to the party requesting the subpoena.

The first three bills, collectively, would match one of the numbers testified to by the [REDACTED]. Nevertheless, the purpose for the "review" on [REDACTED] is unclear to me. Since I cannot determine if it were an integral part of the IEE, a review conducted in order to prepare for due process, or otherwise, I will not consider it. This leaves the two bills totaling \$1,750.00. Based upon the foregoing evidence, I believe that is a reasonable and customary fee for the IEE performed by [REDACTED] and order that the LEA reimburse the Parents in that amount.

As for the [REDACTED] bill, it will be denied for the reasons stated in the [REDACTED] and Buncombe County cases. In this case the Mother refused to consider a new IEP because she believed the LEA was obligated to either grant her request for a neuropsychology evaluation or seek due process. Assuming she is correct, that issue is independent of whether a new IEP should have been developed. Had the Mother cooperated with the LEA, there been a full and appropriate consideration of the [REDACTED] issue as well as others, and the LEA had denied compensation for it, it would be proper to make that an issue in this due process hearing. Because that did not take place and at least in part because of the [REDACTED]'s strategic decision to tie it to a consideration of the neuropsychology evaluation, it would not be fair to the LEA to order payment in this proceeding. Accordingly, I deny the request.

Finally, as to the [REDACTED]'s request for compensation for lost wages, I have been provided no authority, and am aware of none, which authorizes me to provide that relief. Accordingly, I deny the request.

POST HEARING MOTION

By letter dated [REDACTED], counsel for the LEA requested this Hearing Officer to disregard the brief filed on behalf of the Child because 1) the brief was not provided to [REDACTED] and 2) the brief contains new testimony and new documentation. By letter dated [REDACTED], [REDACTED] responded that [REDACTED] sent [REDACTED] brief by U.S. Mail and that the "new information" provided was copies of various bills, which [REDACTED] thought were appropriately attached.

Insofar as the failure to receive the brief is concerned, I have no knowledge of why it was not received. My secretary was called on [REDACTED], requesting a copy of the brief. It was made available on that day and picked up prior to 10:00 a.m. In any event I see no prejudice to the LEA as a result of its failure to receive the brief on [REDACTED].

The brief does contain new testimony and new documentation. As [REDACTED] stated, the "new documentation" consisted of various bills. I have already ruled upon those and further discussion is not required. The "new" testimony, found on pages 1-7 of the brief, described post-hearing communications by [REDACTED] with various entities relating to the licensure and certifications of LEA employees. Post-hearing allegations of this type are properly directed to the Office of Due Process and Compliance of the Virginia Department of Education. I will deny the request to reject the brief filed on behalf of the Child, but will not consider the material on pages 1-7.

ORDER

On consideration of all the evidence admitted in the hearing and, as appropriate, thereafter, I find that the [REDACTED] School District is not providing a free and appropriate public education to [REDACTED] and make the following orders:

1. The [REDACTED] School System shall conduct an IEP meeting at a time mutually convenient to the LEA and the Parents, but no later than [REDACTED]. The purpose of the meeting is to generate a new and appropriate IEP, designed to address the Child's educational needs. The Parents will be permitted to bring to the IEP meeting no less than two experts of their choice to provide input to the process.
2. The Parents will be reimbursed \$1,750.00 for the cost of the IEE conducted by [REDACTED].
3. All other relief requested by the Parents is hereby denied.

Date: [REDACTED] 2002

[REDACTED]
Hearing Officer

NOTICE

This Decision is final unless the party aggrieved by the finding and decision by this administrative review brings civil action in any state court of competent jurisdiction or any federal court within on (1) year.