

Received

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Dispute Resolution & Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS

DECISION

<u>Public Schools</u>	_____
School Division	Name of Parents
_____	_____
Division Superintendent	Name of Child
John F. Cafferky, Esquire	_____
Patricia A. Minson, Esquire	_____
Counsel Representing PS	Assisting Parent/Child
_____	_____
James M. Mansfield, Esquire	_____ and _____
Hearing Officer	Party Initiating Hearing

PROCEDURE

On August 30, 2012, _____ and _____ (“Parents”) requested a due process hearing on behalf of their son, _____ (“Student”). It was alleged that _____ County Public School (“PS”) failed to properly implement the Student’s IEP and failed to have Parents and Student participation as well as Transitional Agency participation, as more particularly identified at the prehearing conference scheduled in this matter; and that as a result the Student is being denied a free appropriate public education (“F.A.P.E.”). This Hearing Officer was appointed and a pre-hearing conference was held on Tuesday, September 11, 2012 at 3:30 p.m. at which time a hearing was scheduled.

The Due Process Hearing was held on October 2, 2012 and October 3, 2012. In attendance at the hearing were _____ and _____; _____, Post Adoption Specialist/Social Worker II on behalf of the Student; _____, Department of Special

Services, Due Process & Eligibility for PS; John Cafferky, Esquire and Patricia A. Minson, Esquire, Counsel for PS; the Hearing Officer and his legal assistant, Jayne Hall. Also present on the first day of the hearing without objection was Sue Essman as an observer (October 2, 2012 Transcript, Page 5). PS called the following witnesses:

- , Coordinator for Due Process and Eligibility for FCPS;
- Principal of High School;
- , Employment and Transitional Representative at High School;
- , Procedural Support Liaison;
- , Assistant Principal at High School;
- , Counselor;
- , IB Biology Teacher;
- , Chemistry Teacher;
- , Special Education Department Chair; and
- , Special Education Case Manager.

PS also offered into evidence Fifty-two exhibits, including case law, that were received into evidence without objection. The Parents called no witnesses but offered into evidence more than Eight Hundred pages of documents. PS objected to their admission and the matter was taken under advisement. The Parties also waived Resolution at that time.

A telephone conference was held on October 19, 2012 between the Parties regarding the admissibility of the Parents' Exhibits. It was determined that all of the Parents' Exhibits would be accepted into evidence. Many of the documents pre-date a prior Due Process Hearing and many of them concern the Parents' other children. To the extent they relate to the Parents'

assertion that there is a pattern of a denial of F.A.P.E., they are given the weigh to which they are entitled. The Parents also wanted to admit into evidence a tape recording of a meeting after the hearing was concluded. PS objected. The objection was sustained and the tape recording was not admitted into evidence.

ISSUES PRESENTED

The Parents allege their son is being denied a free appropriate public education in that:

- 1.) Improper accommodations;
- 2.) Improper IEP;
- 3.) There was no parental or student participation in the eligibility process;
- 4.) There was no parental or student participation in developing the current proposed IEP;
- 5.) Improper Transitional Plan;
- 6.) Improper Transitional agency;
- 7.) The proposed IEP was prepared without updated medical and educational documentation; and
- 8.) The proposed IEP was prepared without parental and Transitional Agency participation.

FINDINGS OF FACTS

The Student is a seventeen-year-old twelfth-grade student who is pursuing an advanced studies diploma at High School. He qualifies for special education services on the basis of a specific learning disability. (PS Exhibit No. 42). He has taken advanced academics classes and is receiving good grades.

The Student was most recently found eligible for special education services on October

28, 2009, on the basis of specific learning disability (“*id.*”). He is currently being provided services pursuant to the last agreed upon IEP dated May 19, 2011 (PS Exhibit No. 10) as amended September 12, 2011. (PS Exhibit No. 11). He receives 30 hours per month (approximately 7 ½ hours per week) of special education services, all in the general education classes. He has two team-taught classes, English 12 and U.S./Virginia History, where he participates in a class taught by both a special education and a general education instructor. The Student’s remaining courses are general education classes, many of which are at an advanced level. (PS Exhibit No. 18). The only other special education-related service he receives is 0.25 hours per month of time with an employment and transition representative, who speaks with him about the college application process.

During his eleventh grade year, he received an A-minus in his Engineering class, B-pluses in English 11, U.S./Virginia Government, and IB Biology 1, and C-pluses in Algebra 2 Honors, Geosystems Honors, and Spanish 2. (FCPS Exhibit Nos. 21-25). He also passed all of his Standard of Learning (“SOL”) exams, passing as “proficient” in Algebra II, Earth Science, and English Writing; and passing as “advanced” in English Reading. (PS Exhibit No. 16). His teachers reported that throughout the 2011-12 school year, the Student was increasingly advocating for himself. His Principal, who sees him daily at school, testified that: “He’s engaging, has a warm smile and has good friends.” (October 2, 2012 Transcript Page 123).

The Parents were invited to participate in an IEP meeting on May 16, 2012 to begin the Student’s annual IEP for the upcoming 2012 - 2013 academic year. (PS Exhibit No. 3). The Parents chose not to respond to the request or to attend. Instead, on May 15, 2012, the day prior to the scheduled IEP meeting, the Parents filed a request for due process.

In the context of that proceeding, the Parents participated in a Resolution Meeting on May 25, 2012 at which time they agreed to participate in the IEP process, and to dismiss their Due Process Hearing request without prejudice. (PS No. 31, Parents' Exhibit DH00715). Thereafter, the IEP team convened a meeting on June 11, 2012. The Parents refused to participate in that meeting because Ms. , the Student's case manager for the 2011-12 school year was present. (October 2, 2012 Transcript Page 42). It was agreed that the IEP team would reconvene with a new case manager on June 12, 2012. (*id.*). The Parents chose not to attend that meeting, sending an email that they would not attend. (*id.*). Following the attempt to have the June 12, 2012 IEP meeting, the Parents requested mediation. (PS Exhibit No. 29). Thereafter, on July 20, 2012, as the result of mediation, the Parents agreed in writing that they would allow PS to initiate the re-evaluation process for purposes of the Student's eligibility for special education services. (Parents' Exhibit Page DH00713 and DH00714).

PS attempted to convene the re-evaluation committee for August 3, 2012. The Parents refused to meet with the team because Ms. and Ms. were present. Following the attempt to convene the re-evaluation, the Parents again requested mediation.

PS and the Parents decided that the subsequent meeting to review and revise the Student's IEP would be conducted with the assistance of a mediator. PS and the Parents agreed that the re-evaluation and IEP meeting with the mediator's assistance would occur on August 28, 2012 and a meeting was scheduled for that date. (PS Exhibit No. 4).

When the Parents came to the scheduled IEP meeting on August 28, 2012 and learned that PS staff members Ms. and Ms. were going to be present on behalf of PS, they refused to participate in the meeting. (October 2, 2012 Transcript Page 49).

The members of the IEP team proceeded to draft an IEP on August 28, 2012. (PS Exhibit No. 15). The draft IEP was given to the Parents following the meeting and the Parents refused to sign it and initiated this Due Process Proceeding.

Further, the record also reflects that the Parents filed a Complaint with the Virginia Department of Education challenging, *inter alia*, the sufficiency of the Student's Transitional Services. (October 2, 2012 Transcript Page 36). The Virginia Department of Education issued a Letter of Findings in which it determined PS to be in compliance on the issue (PS Exhibit No. 30).

All of PS witnesses, who were qualified as experts in their fields without objection, and each of whom had direct dealings with the Student, testified that the proposed August 28, 2012 IEP is appropriate for the Student and that it is designed to provide him with a meaningful education benefit including the component providing transitional services. (October 2, 2012 Transcript Pages 174, 222; October 3, 2012 Transcript Pages 10, 93, 147). Ms. , who has been the Student's counselor for the past four years testified:

He is a great kid. He's always on time. I don't think he's ever gotten an unexcused tardy. He is in class and has his materials. He's very well liked by the staff and students. He challenges himself with difficult classes. He's actually one of the hardest working students I have. He knows how to get help and seek help and he gets it so he gets the good grades . . . (October 3, 2012 Transcript Page 78).

The Parents also made allegations that their son was being discriminate against by PS staff based on his race. (October 12, 2012 Transcript Pages 132 and 133). There was no evidence presented to support that contention and, assuming *arguendo*, absent a denial of educational benefit on that basis, this proceeding is not the appropriate venue to address such concerns. The Parents suggest that the Student should be placed in a different high school, which was the

subject of a prior Due Process Hearing. Based on *res judicata* and the applicable statutes of limitations, that issue is not subject to review in this proceeding.

CONCLUSION OF LAW

The Parents as the initiating party of this administrative Due Process Hearing, have the burden of proof. Schaffer ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005). They must meet that burden by a preponderance of the evidence. County School Board of Henrico County v. Z.P., 399 F.3d 298 (4th Cir 2005).

The Student's right to a F.A.P.E. is denied if the IEP developed for the child is not reasonably calculated to enable him to receive an educational benefit. Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). Moreover, educational services must be reasonably calculated to produce more than some minimal academic achievement. Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985).

The Student's 2009 IEP was the subject of a prior due process hearing. There it was determined that the 2009 IEP provide a F.A.P.E. and that the Student's placement at High School provided him with educational benefit in the least restrictive environment. (PS Exhibit No. 51).

Additionally, 20 U.S.C. § 1415(B)(1) provides:

The procedures required by this section shall include the following:

- (1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

8 VAC 20-81-110 E(1) similarly provides:

Each local education agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each IEP meeting or are afforded the opportunity to participate including: (34 CFR 300.322(a))

a. Notifying the parent(s) of the meeting early enough to ensure that they will have an opportunity to attend; and

b. Scheduling the meeting at a mutually agreed upon time and place.

8 VAC 2081-110 E(4) provides:

A meeting may be conducted without a parent(s) in attendance if the local educational agency is unable to convince the parent(s) that they should attend.

The Parents clearly have the right to participate in the IEP process. Here, the Parents were provided adequate notice of the IEP meetings and elected not to participate.

As for the Parents' objection to the participation of certain PS staff members, parents have no legal entitlement to choose whom their service provider is. *See Ipswich Public Schools*, 44 IDELR 1113 (SEA Mass. 2005). *See also District of Columbia Public Schools*, 112 LRP 29644 (February 10, 2012).

DECISION

The Parents are clearly zealous advocates for their child, however, PS has met their obligations to provide the Student with a F.A.P.E. And despite their difference, the evidence is clear that the Student is receiving an educational benefits and doing exceptionally well academically. After careful consideration of all the correspondence, exhibits, testimony, and for the reasons stated herein:

The evidence is that the Student's proposed IEP is designed to provide him with an appropriate education and that PS has developed a proper IEP for the Student to complete his

final year at High School. He has passed all of the SOL exams and has made strides in advocating for himself and is expected to graduate this year with the intention and ability to attend college. Accordingly, PS has provided the Student a F.A.P.E.. There was no credible evidence to the contrary.

Accordingly, PS is the prevailing party in this matter.

APPEAL NOTICE

Finally, this decision is final and binding unless either party appeals in a Federal District Court within ninety (90) calendar days of the date of this decision or in a state court within one hundred eighty (180) days of the date of this decision.


Signature Hearing Officer


Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Decision was sent via email and first-class mail on this 21st day of November, 2012 to:

John F. Cafferky, Esquire
Patricia A. Minson, Esquire

, VA

Ron Geiersbach, Coordinator of Due Process Services
Virginia Department of Education
Office of Dispute Resolution and Administrative Services
PO Box 2120
Richmond, Virginia 23218

and was sent via facsimile, on this 20th day of November, 2012 to:

John F. Cafferky, Esquire
Patricia A. Minson, Esquire

Ron Geiersbach, Coordinator of Due Process Services
Virginia Department of Education
Office of Dispute Resolution and Administrative Services

Post Adoption Specialist/Social Worker II
Dept. of Community & Human Services

, Department of Special Services
Due Process & Eligibility
County Public Schools


James M. Mansfield