

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

DECISION (Corrected)

School Division

Ed.D.

Division Superintendent

John F. Cafferky, Esquire and
Robert M. Falconi, Esquire
Counsel Representing LEA

James M. Mansfield, Esquire
Hearing Officer

Name of Parents

Name of Child

William B. Reichhardt, Esquire and
Grace E. Kim, Esquire
Representing Parent/Child

William B. Reichhardt, Esquire
Party Initiating Hearing

This request for a Due Process Hearing was filed on behalf of ("Student") and his parents, and ("Parents") on March 11, 2015 by William B. Reichhardt, Esquire. It is alleged that Public Schools ("PS") denied the Student a Free Appropriate Public Education ("FAPE") pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* and that it failed to properly find the Student eligible for accommodations under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 ("Section 504"). The Parents request that PS be ordered to develop an appropriate IEP for the Student and request compensatory services and reimbursement for a private placement together with an award of attorney fees. For the reasons stated herein, I find that the Student was properly found eligible as a student with a disability and that PS developed appropriate IEPs for the Student and otherwise provided and made a FAPE available.

PROCEDURE

In response to the Request for a Due Process Hearing, this Hearing Officer was appointed to the case on March 12, 2015, and a pre-hearing conference, *via* telephone, was conducted in the matter on March 16, 2015 to schedule a Due Process Hearing and address other scheduling and procedural matters raised by the Parties.

Participating in the pre-hearing conference were: Dr. , representative of PS; John Cafferky, Esquire and Robert M. Falconi, Esquire, Counsel for PS; William B. Reichhardt, Esquire and Grace E. Kim, Esquire, Counsel for the Parents and Student; Reginald

B. Frazier, Esquire, Evaluator, Virginia Department of Education; and the Hearing Officer. As evidenced by those in attendance, all parties concerned were represented by counsel. Also, as evidenced in the Request for Due Process, the Parents declined mediation. However, at the time the Parties reported that they were actively pursuing resolution and neither Party ever waived that right.

The Due Process Hearing in this matter was initially scheduled for May 5, 6 and 13, 2015. Subsequently, however, it was rescheduled to April 29, 30 and May 13, 2015. Exhibit and Witness Lists were scheduled to be exchanged between the Parties on or before April 22, 2015. By agreement the Hearing was held at the PS Education Center, Street, Room , Virginia . The Parents requested that the Hearing be closed to the public. PS provided a court reporter for the Hearing.¹ Neither Party requested any special accommodations for themselves or their witnesses.

PS requested the issuance of four (4) Subpoena *duces tecum*. Parents' counsel requested an opportunity to review the Subpoenas and to note any objection. No objection was received and the Subpoenas were issued on March 18, 2015. Also, subsequent to the pre-hearing conference there was a disagreement concerning the Parents' request for the issuance of a Subpoena *duces tecum* to PS. On March 30, 2015 a telephone conference was held to address the issue which was resolved and a revised Subpoena thereafter issued.

By letter dated March 23, 2015 PS filed a Motion to Dismiss and Answer to the Due Process Hearing Request. The Motion to Dismiss asserted that the Parents' Request for Due Process raised claims barred by IDEA's two-year statute of limitations, 20 U.S.C. § 1415 (b)(6)(B), and any claims raised under Section 504 of the Rehabilitation Act of 1973 failed to state a cause of action. Additionally, PS challenged any claim for attorney fees asserting that the Hearing Officer lacks authority to grant such relief.

The Parties timely exchanged Witness and Exhibit Lists and the Due Process Hearing convened as scheduled on April 29, 2015. At which time PS's Motion to Dismiss was taken under advisement. (April 29, 2015 Tr. Part One p. 7). Both Parties' Exhibits, previously exchanged and as supplemented on the record, were received and admitted into evidence without objection. (April 29, 2015 Tr. Part One pp. 12-13). Counsel each presented opening statements followed by the presentation of testimony of their witnesses. The Parents' witnesses were , Ph.D., , Ph.D., and . On behalf of PS testimony was received by , Ed.D., and . Closing arguments were presented and, at their request, both sides submitted post hearing Proposed Findings of Fact and Conclusions of Law.

¹ On the morning the first day of the Due Process Hearing, no court reporter was present. In order to proceed with the Hearing, both Parties agreed to electronically record the proceeding until a court reporter arrived. (April 29, 2015 Tr. Part One p. 6).

ISSUES PRESENTED

As identified in the Second Pre-Hearing Report filed in this matter, the issues presented by this case are:

1. Did PS violate IDEA in that it failed to timely find the Student eligible for special education services?
2. Did PS violate IDEA in that it failed to develop an appropriate IEP for the Student?
3. Did PS violate Section 504 of the Rehabilitation Act of 1973 in that it failed to provide accommodations necessary for the Student to access the same educational aids, benefits or services as non-disabled students?
4. As a result of these alleged violations, is the Student entitled to compensatory services?
5. As a result of these alleged violations, are the Parents entitled to reimbursement for the expenses incurred in the Student's private placement, as well as other expenses the Parents incurred as a result?

As a preliminary matter, Counsel for the Parents clarified for the record that they were not seeking an award of attorney fees at this stage of the proceeding, and merely reserve on that issue, aware of the appropriate forum in which to raise such claims. (April 29, 2015 Tr. Part One, p.9). Additionally, the Parents withdrew without prejudice any claims they may have based on alleged violations of Section 504 (May 13, 2015 Tr. p. 245) and, accordingly, these issues are not addressed.

FINDINGS OF FACTS

The Student is a ten (10) year old boy currently enrolled in fourth grade at the Lab School of _____ which is located in the _____ ("Private School"). He previously attended _____ School ("_____") in _____, Virginia where he resides with his parents and older sister. He attended _____ from kindergarten through third grade.

The Student progressed well in kindergarten (PS Exhibit No. 2) but problems with his handwriting were noted. (PS Exhibit No. 3). While progressing in all other areas, he continued to have problems with written communications and staying on task in first grade. (PS Exhibit Nos. 8 and 9). In February of that academic year an Intervention Assistance Team met and developed an Intervention Plan which proposed certain intervention strategies and accommodations to assist the Student. (PS Exhibit No. 12). Overall he made satisfactory progress and was promoted to second grade.

In second grade the Student was initially progressing in all subject areas in a general education curriculum. (PS Exhibit No. 15). His teacher reported that he was a good solid student, but that he struggled a little bit with writing and spelling (May 13, 2015 Tr. p. 17) and that he was experiencing trouble with written homework. (May 13, 2015 Tr. p. 19). As a result there were discussions with the special education teachers and the Parents regarding tests and evaluations for an eligibility determination. (*Id.*).

Ultimately, a number of evaluations were performed and a special education eligibility committee met on May 3, 2013 to review the assessment information and determined the Student was found eligible for special education and related services due to the educational disability of Specific Learning Disability as defined in 8 VAC 20-81-10. (PS Exhibit No. 35). An IEP was prepared and agreed to by the Parents on May 31, 2013.

During the summer of 2013 the Student was evaluated by Dr. . She prepared a Psychoeducational Report containing her findings and recommendations which was provided to PS. (Parents Exhibit No. 8; PS Exhibit No. 38). Dr. also saw the Student for therapy in April of 2014 for behavioral problems centered around homework and increased difficulties in school. (April 29, 2015 Tr. Part Two p.74). Additionally in July of 2013 the Parents engaged the services of , a qualified special education provider who tutored the Student during the Summer of 2013 thru August of 2014. She meet with him three or more times a week to work on areas that included phonemic awareness, decoding, as well as his anxiety issues. (April 29, 2015 Tr. Part Two p. 135). She testified that she meet with the Student's Special Education teacher only once and that she did not meet any one else from PS. She observed that the Student's September 2013 IEP identified a social emotional need but that it did not provide a service to address that need and she opined for that reason it was not appropriate. (April 29, 2015 Tr. Part Two pp. 153-155).

Upon the Student's return to school in September 2013, PS convened another IEP meeting to consider, among other things, Dr. 's evaluation. At that time another IEP was proposed and agreed to by the Parents. The Student was provided services and received accommodations pursuant to the September IEP throughout the 2013-2014 academic year.

Sometime in early 2014 the Student's Parents became increasingly concerned about what they perceived to be the lack of progress and behavioral difficulties he was experiencing. (April 29, 2015 Tr. Part Two p. 250). They reported that he was a different person, on the edge of a cliff. (*Id.*). He could not get through his homework, he would get angry and pound his fists. (April 29, 2015 Tr. Part Two p. 251). These concerns were brought to his teachers' attention and a meeting was scheduled. His teacher also observed that the Student was experiencing anxiety and stress and at times he would tear up when presented with certain assignments. (May 13, 2015 Tr. p. 59). A meeting was held in February 2014 and further educational evaluations were authorized. (PS Exhibit No. 52).

Around this time the Parents began exploring other educational options for the Student, in particular focusing on the Private School. (April 29, 2015 Tr. p. 256). In April of that year the Student was accepted by the Private School and the Parents signed an Enrollment Contract

obligating them to pay tuition. (PS Exhibit Nos. 53 and 55). The Parents testified, however, that they had purchased tuition reimbursement insurance in case they ultimately decided the Student was not going to the Private School for fourth grade. (April 30, 2015 Tr. pp.117 *et seq.*)

In May PS noticed an another IEP Review Meeting which was ultimately convened on June 6, 2014 and resulted in agreed IEP for the Student for the 2014-2015 academic year. (PS Exhibits Nos. 56, 59, 60, 62 and 63).

, the Student's second and third grade teacher, testified extensively concerning his academic progress and the difficulties he experienced during those two years. (May 13, 2015 Tr. pp. 12 *et seq.*). , the Student's third grade special education teacher, testified that she worked with the Student for more than two hours every school day during the 2013-2014 academic year and that she drafted his June 2014 IEP. The Parents testified that both of these educators were advocates for the Student. (April 29, 2015 Tr. Part Two p. 245). , qualified as an expert witness in Speech and Language Pathology, testified that she personally performed student evaluations, and , who qualified as an expert in the field of school psychology, testified that she performed psychological evaluations of the Student (PS Exhibit No. 29) and participated in his eligibility determination. Each of these witnesses testified to the appropriateness of the Student's IEPs and the academic progress he made while enrolled in PS.

On July 6, 2014 the Parents sent PS an email advising that the Student was accepted by the Private School for the fall and would no longer be attending PS. (PS Exhibit No. 65). By letter dated August 20, 2014 the Parents wrote to PS advising that they rescinded their consent to the June 6, 2014 IEP stating that they had come to believe that it was not reasonably calculated to offer sufficient services, accommodations or placement, and that the letter serves as prior written notice of their intent to withdraw the Student from PS and enroll him at the Private School at public expense. (PS Exhibit No. 65). The Student was enrolled in Private School for fourth grade in September 2014. , Ph.D., Curriculum and Technology Coordinator for the Private School's elementary program, described the school and the Student's program there. (April 29, 2015 Tr. Part One pp. 34 *et seq.*). She also testified that she reviewed the Student's 2014 IEPs and found them deficient in that, while they identified social and emotional needs, they failed to identify any corresponding goals and services to address those needs. (April 29, 2015 Tr. Part One pp. 64-65). She further testified that the Student needs support in a small environment and that he could not meaningfully benefit from social and emotional work in a general education classroom as contemplated by PS. (April 29, 2015 Tr. Part One p. 69). In response to the Parents' August 20, 2014 letter, PS advised the Parents that the Student remained eligible for special education services which they would continue to make available to him and that they would convene another IEP team meeting to receive and act upon additional requested evaluations. (PS Exhibit No. 66).

Parental consent for the Requested Assessments and scheduling of an IEP team meeting was not forthcoming and, after some negotiations between the Parties (Parent Exhibit. No. 1; PS Exhibits Nos. 69 and 70), the Parents filed this Request for a Due Process Hearing.

CONCLUSION OF LAW

First, the Parents as the party initiating this proceeding challenging the sufficiency of the Student's IEPs and PS's delivery of special education services and accommodations, have the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005). Additionally, in order to prevail on their reimbursement claim, they also carry the burden to show that the Student's private placement is appropriate. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

It is well established that children with disabilities are entitled to receive a free appropriate public education and that requires meaningful access to public education that is reasonably calculated to confer some educational benefit on the disabled student. *Board of Educ. v. Rowley*, 458 U.S. 176, 73 L.Ed. 2d 690, 102 S.Ct. 3034 (1982) and its progeny. Moreover, that educational benefit must be provided to the extent possible in the least restrictive environment with participation with non-disabled students. However, the law does not require that a disabled student be provided with the best education possible. *Id.*

To be appropriate, an IEP must contain the student's current level of functioning, annual achievement goals, a description of services to be provided and establish objective criteria for evaluating progress. 20 U.S.C. § 1414 (d)(1)(A). Here, the record amply supports the conclusion that while the Student did not master all of the goals contained in his IEPs, he did make progress toward those goals during the 2013-2014 academic year. Each PS witness who testified appeared to be knowledgeable about the Student and his particular needs and their demeanor demonstrated a genuine concern for his educational well being. They all testified that the IEPs developed for the Student with parental participation and approval were appropriate and reasonably calculated to provide a meaningful educational benefit in the least restricted environment with ample contact with his non-disabled peers. The courts have held that this type of testimony is entitled to deference. *Hartman v. Loudoun County School Board*, 118 F.3d 996 (4th Cir. 1997).

Conversely, while all of the Parents' witnesses were credible and obviously sought the best for the Student, they were not as involved in the delivery of educational services as were the PS educators, especially Ms. _____ and Ms. _____. Accordingly, on conflicting evidence, testimony of the PS educators is entitled to greater weight. *See Doyle v. Arlington County School Board*, 806 F.Supp. 1253 (E.D. Va. 1992), *aff'd*, 39 F.3d. 1176 (4th Cir. 1994).

Finally, based on the finding that PS provided the Student a FAPE, it is unnecessary to determine whether or not the Parents meet their burden of demonstrating that their unilateral placement of the Student in the Private School was an appropriate educational placement under IDEA. Similarly, it is not necessary to decide whether the Parents' agreement with the June 2014 IEP is a bar to their claim for reimbursement for the Private School tuition. It is also unnecessary to determine whether or not the Parents had decided to unilaterally place the Student at the Private School prior to the development of the June 2014 IEP.

