

Received

SEP 09 2016

Dispute Resolution &
Administrative Services

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

DECISION

Public Schools
School Division

Name of Parent/Guardian

Division Superintendent

Name of Child

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

N/A
Representing Parent/Child

James M. Mansfield, Esquire
Hearing Officer

Party Initiating Hearing

PROCEEDINGS

This request for a Due Process Hearing was filed on behalf of _____ (“Student”)
by a Request for Due Process Hearing dated April 18, 2016 made by _____ (“Parent”).

The Parent alleged that _____ Public Schools (“ PS”) denied the Student a Free
Appropriate Public Education at Public Expense (“FAPE”) pursuant to the Individuals with
Disabilities Education Act (“IDEA”). *20 U.S.C. § 1411 et seq.* The Parent initially sought the
following relief:

- A functional behavioral assessment of the Student to include a behavioral intervention pan in the Student’s IEP;
- Speech and language evaluations;
- Additional educational services for the Student;

- Expungement of the Student's disciplinary records; and
- Compensatory education services.

This Hearing Officer was appointed and a pre-hearing conference, *via* telephone, was held on April 22, 2016 at 12:30 p.m. to determine the status of the resolution efforts by the Parties; to clarify the issues to be decided at the Due Process Hearing; to establish certain deadlines and schedule a date and time for the Due Process Hearing; and to address any other scheduling or procedural matters raised by the Parties. Participating in the pre-hearing conference were: the Parent, on behalf of the Student; Patricia A. Minson, Esquire, Counsel for PS, Dr. _____, representative for PS; and the Hearing Officer.

The Parties advised the Hearing Officer that they were engaged in meaningful discussions to resolve all issues presented by the Parent's Request for a Due Process Hearing. However, at that time the Parent declined to withdraw the Request for Due Process. Accordingly, based on PS's representations, and in order to afford the Parties an opportunity to explore settlement, the pre-hearing telephone conference was continued to May 2, 2016. In the meantime, PS agreed to an Independent Educational Evaluation ("IEE") for the Student in the areas of speech and language. By email dated April 22, 2016 PS provided the Parent names and contact information of suggested Evaluators. PS also agreed to work with the Parent to address concerns regarding behavioral assessment and a behavioral intervention plan for the Student.

The Parties further advised that they were not pursuing mediation and that they were not waiving Resolution. Also, without objections from the Parent, PS reserved on the issue of challenging the sufficiency of the Parent's notice. The Parties further agreed to an extension of time for PS to file its Answer to the Request for Due Process. Also, in compliance with

statutory requirements, the Due Process Hearing in this matter was scheduled for June 1, 2016.

On May 2, 2016, a second pre-hearing conference was held telephonically. Participating in the pre-hearing conference were: the Parent, on behalf of the Student; Patricia A. Minson, Esquire, Counsel for PS, Dr. , representative for PS; and the Hearing Officer. The Parties advised the Hearing Officer that they had secured a provider to conduct an IEE for the Student in the areas of speech and language and that their evaluations, or their recommendations, should be available for consideration at the Student's IEP Committee Meeting which was rescheduled for May 23, 2016. Additionally, PS reported that a behavioral assessment of the Student would be available for the Committee's consideration on or before May 23rd as well.

Based on the progress the Parties were making in working to resolve the issues raised by the Request for Due Process, the Due Process Hearing was rescheduled to June 28, 2016. Also, the Parties agreed that PS's Response to the Parent's Request for Due Process was extended to June 1, 2016. PS agreed to provide a stenographer to transcribe the Hearing. The Parties were instructed to exchange witness and exhibit lists, with a copy to the Hearing Officer, on or before June 21, 2016. Finally PS was reminded, if they hadn't already, to provide the Parent with a copy of procedural safeguards, together with information concerning the availability of mediation, as well as the availability of any free or low-cost legal and other relevant services that may be available.

A third pre-hearing conference was requested by the Parties and held telephonically on June 17, 2016. Participating in the pre-hearing conference were: the Parent, on behalf of the Student; Robert M. Falconi, Esquire, Counsel for PS and Dr. , representative for

PS; and the Hearing Officer. The Parties advised that additional testing and evaluations for the Student had been performed and a proposed IEP for the Student's 2016-2017 academic year had been developed. Together with its Answer to the Request for Due Process, PS filed a Motion to Dismiss and an Objection to the Sufficiency of the Parent's Request for a Due Process Hearing. These matters were taken under advisement and, based on the additional testing and the proposed IEP, the issues to be decided at the Due Process Hearing were narrowed to the issues of the Student's entitlement to Compensatory Services for PS's alleged violations of the IDEA by failing to provide the Student with a FAPE during the 2015-2016 academic year, and whether or not the Student is in need of a behavioral intervention plan in order to address behavior that interferes with the Student's learning. It was also determined that the Hearing Officer has no authority concerning the expungement of the Student's disciplinary records and, accordingly, that issue is beyond the purview of this proceeding and will not be addressed.

Prior to the Due Process Hearing, the Parties requested another pre-hearing conference, which was held telephonically on June 23, 2016. Participating in the pre-hearing conference were: the Parent, on behalf of the Student; John F. Cafferky, Esquire and Robert M. Falconi, Esquire, Counsel for PS, and Dr. , representative for PS; and the Hearing Officer. Based on the number of witnesses expected to testify at the hearing and other evidentiary issues, the Parties requested an additional day for the Due Process Hearing. The Parent also requested leave to Amend her Request for Due Process to include a request for additional Compensatory Services for the Student for PS's alleged failure to provide the Student a FAPE for prior academic years. PS did not object to the Amendment, provided it was limited to the 2014-2015 academic year. Leave to amend the Parent's Request was granted. The hearing remained

scheduled for June 28, 2016, with an additional day and time to be scheduled for the hearing at that time.

The Due Process Hearing convened as schedule on June 28, 2016. A court reporter was present. Both Parties made opening statements and, as previously agreed, PS proceeded with its presentation of evidence first, notwithstanding its position that the Parent, as the party requesting Due Process, had the burden of proof on all issues presented. At the end of the day the Parties had not concluded their presentation of evidence and the hearing was adjourned. By agreement of the Parties the hearing was continued to July 25, 2016.

On July 25, 2016 the Due Process Hearing reconvened as scheduled with a court reporter present. The Parties concluded their presentation of their cases, all exhibits offered by the Parties were admitted into evidence, and each side made closing arguments. The hearing was concluded and together with the testimony of the witnesses, the exhibits admitted into evidence, and the respective arguments of the Parties, the matter was referred to the Hearing Officer for Decision.

Based on the Parent's Amendment to the Request for a Due Process Hearing, the Decision in this matter is due on or before September 6, 2016.

ISSUES PRESENTED

The Parent alleges that the Student has been denied a FAPE by PS in that:

1. Services were not adequately provided based upon the agreed upon IEPs for the 2014-2015 and 2015-2016 academic years;
2. PS has not developed or implemented a behavioral intervention plan for the Student; and
3. As a result, the Student entitled to compensatory educational services.

FINDINGS OF FACT

The Student is a fifteen-year old who attended Middle School (“MS”) in the City of for the eighth grade during the 2015-2016 academic year. The Student also attended MS for sixth and seventh grades, and was first enrolled in PS in the fourth grade. The Student was initially found eligible for special education services on the basis of a Specific Learning Disability (“SLD”) in March 2009 while attending school in Louisiana. (PS Exhibit No. 1). In 2011 the Student was also diagnosed with ADHD. The Student currently receives special education services in Reading, Writing, Math and Organizational Skills under the category of Other Health Impairment (“OHI”) and SLD. (SP Exhibit No. 18).

During both the seventh and eighth grade academic years, the Student received special education services based on IEPs that were agreed to and signed by the Parent. (PS Exhibit Nos. 11 and 18). Although the Student passed all classes taken during the 2014-2015 and 2015-2016 academic years and advanced each grade level (PS Exhibit Nos. 8 and 37), the Parent challenges PS’s implementation of the Student’s IEP and maintains that the Student struggles academically, failed the Standards of Learning tests administered, has behavioral problems interfering with learning, and requires an inordinate amount of assistance outside of the classroom in order to make academic progress.

In addition, in the spring of 2016, the Student was removed from shop class, a general education elective, because of an incident where students were throwing blocks of wood and for other disruptive behavior including an incident where the Student turned off a main power switch. (Transcript at p. 341-343). As a consequence, the Student reported to the office for one

week during this class period until reassigned to another general education elective in a Reading Enrichment class. (*id.*).

All of the Student's teachers called on behalf of PS, each of whom qualified as experts in their fields of education and had direct contact with the Student, unequivocally testified that the Student's 2015-2016 IEP was appropriate, the services specified were provided and that the Student made progress toward the established goals. While the testimony of two of PS's six witnesses were given by deposition and one witness testified telephonically, all were credible and their testimony was uncontroverted. _____, a Behavioral Support Specialist for PS, testified that she performed a functional behavioral assessment and concluded that the Student did not require a behavioral intervention plan. (PS Exhibit No. 34). She testified that "[t]he strategies that the [Student's] teaching team had in place were working." (Deposition at p. 35). She also opined that adding an external structure, such as a behavior intervention plan, to the Student's IEP would be restrictive and was not necessary in this case. (Deposition at p. 35).

Conversely, the Parent elected not to testify and called five witnesses to testify. Although none of the Parent's witnesses were offered or qualified as experts, all five were educators (four teachers and an assistant principal) who had worked directly with the Student. Their testimony did not contradict PS witnesses. To the contrary, they testified that the Student's IEPs were appropriate and that the services specified under them were provided to the Student.

CONCLUSIONS OF LAW

First, finding the Parent's Request for Due Process sufficient, PS's motion to Dismiss is overruled. Second, the Parent, as the initiating party of this administrative Due Process

Hearing, has the burden of proof on the issues presented. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The Parent 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). Moreover, while there is no express requirement for the Parent challenging the delivery of a FAPE to present expert testimony of any deficiency, in this case there was no testimony whatsoever that the Student's IEPs in question were in any way deficient or that any specified special education services enumerated in them were not provided.

IDEA requires that, in the case of a child whose behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavioral interventions, strategies, and supports to address the behavior. 8 VAC 20-81-110 F. 2. (34 CFR 300.324(a)). In this case, at the Parent's request, a functional behavioral assessment was performed and the findings were considered by the Student's IEP team, and it was determined that a behavioral intervention plan was not necessary. Other than the incidents occurring in the Student's general education shop class, there is no evidence to the contrary. On this point no causal connection between the event and the alleged denial of a FAPE was established.

Concerning the standard to be applied in evaluating whether a student has received a FAPE, the Fourth Circuit Court of Appeals recently reviewed the issue and in answering the question of whether the standard for a free appropriate education under IDEA has changed since the Supreme Court case of *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982), the Court held that "[i]n this circuit, the standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services. *O.S. v. Fairfax County*

Public Schools, 804 F.3d. 354 (2015). Here the unrefuted evidence is that the Student's IEPs were reasonable calculated to provide an educational benefit and that the Student made progress toward the established goals.

Since PS developed and implemented appropriate IEPs which provided the Student a meaningful educational benefit, the Student is not entitled to compensatory education services.

DECISION

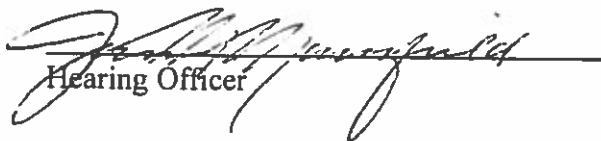
It is abundantly clear to the Hearing Officer that the Parent is passionately concerned for the Student and is a zealous advocate for the child and should be commended for the determination and commitment demonstrated in obtaining the best possible education available for the child. However, after careful consideration of all the pleadings, correspondence, testimony of the witness and exhibits introduced in this matter and applying the law as it has been developed and applies to this case, the Parent did not meet the burden of establishing by a preponderance of the evidence that PS failed to provided the Student with a FAPE, and PS evidence established that the Student has received an educational benefit and is progressing academically, despite any apparent disparity between academic potential and performance.

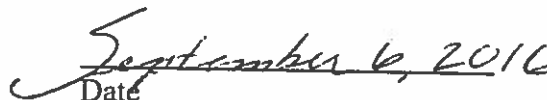
The evidence is that the Student's IEPs for the academic years in question were reasonably calculated to provide a FAPE and that the services required under those IEPs were made available to the Student. Accordingly PS provided the Student with a FAPE. There was no credible evidence to the contrary presented.

Based on the above, PS is the prevailing party in this matter.

APPEAL NOTICE

This Decision is final and binding unless the Decision is appealed by a party in a state circuit court within one hundred eighty (180) days of the issuance of this Decision, or in a federal district court within ninety (90) days of the issuance of the Decision.


Hearing Officer


Date

CERTIFICATE OF SERVICE

I certify that on this ____ day of September 2016, a true and accurate copy of this Decision was emailed and sent *via* first-class mail, postage prepaid, to:

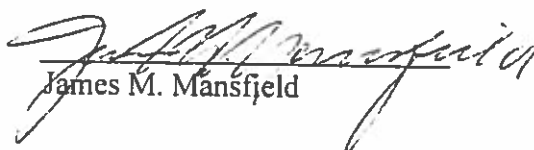
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