

Received

FEB 24 2017

Dispute Resolution & Administrative Services

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

DECISION

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

PROCEEDING

This request for a Due Process Hearing was filed on behalf of _____ (“Student”) and her parents, _____ and _____ (“Parents”) on September 13, 2016. 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 as a result the Parents unilaterally withdrew the Student from _____ PS and placed the Student in a private school that they allege is providing the Student with an appropriate education. The Parents now seek to have _____ PS reimburse them for the costs associated with the private placement.

This Hearing Officer was appointed to the case, and a pre-hearing conference was scheduled and held telephonically. Participating in the pre-hearing conference were:

("Parent") on behalf of the Student; Patricia A. Minson, Esquire, Counsel for PS and , representative for PS; and the Hearing Officer.

The Parties advised that they were actively exploring Resolution regarding the issues raised in the Parents' Request for Due Process. In addition, PS has filed a Motion to Dismiss, an Objection to the Sufficiency, and an Answer to the Request for Due Process. The Motion and Objection were taken under advisement, but the matters to be considered at the due process hearing are limited by the IDEA's two-year statute of limitations. 20 U.S.C. § 1415(b)(6)(B). Finally, in compliance with statutory requirements, a two day due process hearing was scheduled and held on November 10 and 11, 2016.

By agreement of the Parties, PS proceeded with its evidence first without waiving the issue of which party has the burden of proof in this proceeding. (Transcript p. 21). Both Parties made opening statements. (Transcript pp. 7 - 21). PS called six (6) educators, all of whom were offered and accepted as experts in their respective disciplines without objection from the Parents. (Transcript pp. 25, 90, 170, 238, 319 and 390). PS's Exhibits numbers 1 through 65 previously provided to the Parents and the Hearing Officer, plus two additional exhibits that were all submitted and accepted into evidence without objection from the Parents. (Transcript pp. 376 - 377). The Parents offered no exhibits into evidence. The Student herself was the only witness called by the Parents. (Transcript pp. 463 - 486). At the conclusion of testimony, both Parties made closing statements. (Transcript p. 492 *et seq.*). No post-hearing briefs or memorandum were required or filed by the Parties.

ISSUES PRESENTED

1. Was the student denied FAPE in that PS did not adequately provide services that

would enable the Student to make any meaningful academic progress under her June 2015 and April 2016 IEPs?

2. Was the proposed July 2016 IEP reasonably calculated to provide the Student FAPE?
3. Did the Parents' unilaterally place the Student in an appropriate academic setting?
4. Are the Parents entitled to reimbursement for the tuition for the Student's private placement?

FINDINGS OF FACT

The Student is in the seventh grade currently enrolled in the _____ School ("_____") in _____, Virginia where she was unilaterally placed by her Parents. Prior to attending _____, the Student was enrolled in _____ PS which she attended since the first grade. The Student was initially referred to a local screening committee in the third grade because she displayed an "inability to retain information once it is taught especially in math." (_____ PS Exhibit 24). An initial eligibility meeting was held in January 2013 and the eligibility committee found the Student was not eligible for special education services. (_____ PS Exhibit No. 27). While the committee found that the Student had a "deficit in visual memory" it determined that there "was no significant discrepancy between [the Student's] ability and her achievement in any academic area." (_____ PS Exhibit 28).

The Student was again referred to a local screening committee in April 2015 by her classroom teacher with concerns that the "Student continues to perform significantly below grade level in all academic areas despite various intervention and teacher support." (_____ PS Exhibit 32). Based upon updated testing and teacher narratives, the committee determined that the Student was eligible for special education services. (_____ PS Exhibit No. 43).

After being found eligible for special education services, an agreed upon Individual Education Program (“IEP”) was developed for the Student in June 2015 and in place for the start of the Student’s sixth grade 2015 - 2016 academic year. (PS Exhibit No. 45). The IEP provided for goals in the areas of reading comprehension, written comprehension and mathematics, with accommodations, curriculum and classroom modifications, and fifteen hours of special education services a week. (*Id.*).

In October 2015 while the Student was attending PS and receiving the services outlined in her agreed IEP, the Parents made application to unilaterally place the Student at . (PS Exhibit No. 48). By correspondence to the Parents from in December 2015 and February 2016, the Parents were advised that could not offer the Student a “mid-year” placement but confirmed a placement for the Student for the fall of 2016. (PS Exhibit No. 51).

In April 2016 an IEP team reconvened to develop an IEP for the remainder of the Student’s sixth grade year and to transition her to middle school. (PS Exhibit No. 53). That IEP was agreed to by the Parents (*Id.*). At that time it was determined that the Student demonstrated she was progressing in achieving the goals established in her IEP. (PS Exhibit No. 54). The Student was performing and reading at grade level (Transcript p. 395) and she received a satisfactory Progress Report for sixth grade. (PS Exhibit No. 46).

Subsequently, the Parents indicated they wanted a private school placement for the Student. An IEP meeting was scheduled in July 2016 to address the issue and amend the Student’s IEP. (PS Exhibit No. 56). At the conclusion of the IEP meeting, the team determined that a private placement was not warranted and recommended that the Student attend

Middle School (“ ”), her neighborhood school which her sibling attends. The team found to be an appropriate placement in that it provided the Student with the least restrictive environment with team taught math, science, social studies classes and self contained language arts class. (PS Exhibit No. 58). The Parents did not agree with this proposed IEP and privately placed the Student at . They then requested this due process hearing seeking reimbursement for the tuition.

In support of their position that the Student was provided FAPE, PS called six educators to testify. All six witnesses qualified and were received as experts in their respective disciplines without objection. (Transcript pp. 26, 90, 185, 239, 321 and 391). Each of the witnesses either had first hand experience with the Student or had reviewed the Student’s academic records and participated in the Student’s IEP meetings. Each of these expert educators unequivocally testified the Student’s June 2015 IEP (PS Exhibit No. 45) was reasonably calculated to provide the Student with FAPE and that the services outlined in that IEP were delivered. They further testified that the Student made meaningful progress towards the educational goals outlined in that IEP. Moreover, the witnesses testified that the July 2016 proposed amended IEP was reasonably calculated to provide the Student FAPE at the her local middle school where she would attend general education classes, while receiving special education services and instruction in the least restrictive environment, together with her sibling and other age-appropriate peers. (Transcript pp. 403 - 404). PS evidence established that while the Student struggles in some areas and that she did not pass her Standards of Learning Tests (“SOL”), she nevertheless made significant academic progress and was otherwise performing at grade level. (Transcript p. 395). The expert testimony being that SOL scores only

measure “a moment in time” and are only one factor to be considered, but not determinative of a student’s educational benefit and academic advancement through out the course of a year of instruction. (Transcript p. 69).

The Parents presented no evidence to the contrary. The only evidence introduced by the Parents was the testimony of the Student herself. (Transcript p. 462 *et seq.*). That testimony consisted of her answering questions concerning her academic experience at PS and rudimentary academic questions which the Parent herself was unsure of the correct responses. (Transcript 483 - 487). There was absolutely no evidence introduced concerning the Student’s placement at and how it was an appropriate academic setting. Neither was there any evidence introduced concerning the Student’s academic progress at . There was also no evidence introduced concerning ’s curriculum. And there was no evidence introduced regarding tuition or of any expenses incurred by the Parents for the private placement at

CONCLUSIONS OF LAW

First, finding the Parents’ Request for Due Process sufficient, PS’s motion to Dismiss and Objection to the Sufficiency are overruled, in part, and sustained to the extent that the issues presented as previously noted are limited by the applicable two-year statute of limitations. § 20 U.S.C. 1415(b)(6)(B). Second, the Parents, as the initiating party of this administrative due process hearing, have the burden of proof on all issues presented. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The Parents must carry this burden by a preponderance of the evidence. *County School Board of Henrico County v. Z.P.*, 399 F.3d 298 (4th Cir. 2005). And while there is no express requirement for a party challenging the delivery of FAPE to present

expert testimony of any deficiency, here there was no evidence presented or introduced by the Parents that the Student's IEP or the proposed IEP were in any way deficient. Neither was there any evidence introduced that the services specified in the prior IEPs were not delivered. Additionally, in order to prevail on a tuition reimbursement claim, the Parents have the burden to prove both that PS's proposed placement was inappropriate for the Student and that their unilateral withdrawal and private placement of the Student is appropriate. *School Comm. of the Town Burlington v. Department of Education of the Commonwealth of Massachusetts*, 471 U.S. 359, 105 S.Ct.1996 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993).

The Fourth Circuit has also made it clear that the standard to be applied in evaluating whether a student has received a FAPE under IDEA remains unchanged since the 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). The un-refuted evidence in this case is that the Student's IEPs in question were reasonably calculated to provide an educational benefit and that the Student made progress toward the established goals. The Court in *O.S. v. Fairfax County Public Schools* was also clear that great deference must be given to the judgment of the education professionals in implementing IDEA's requirements. Here the testimony and demeanor of all PS witnesses were credible and un-controverted that the Student made academic progress and that she received an educational benefit from the special instruction and services developed and implemented by

PS bases on her June 2015 and April 2016 IEPs. The expert testimony was also unequivocal that PS's proposed July 2016 IEP for the Student's seventh grade was also reasonably calculated to provide the Student with a meaningful educational benefit in her neighborhood middle school.

DECISION

"Hard cases make bad law" is a legal maxim that is appropriate in this case. The Parents obviously want to provide their child with the best education services available to compensate for an identified learning disability. However, that is not the obligation or standard imposed on

PS by statute and case law. Therefore, after careful consideration of all the pleadings, correspondence, testimony of the witnesses and exhibits introduced in this matter and applying the law as it has been developed and applies to this case, the Parents did not meet the burden of establishing by a preponderance of the evidence that PS failed to provide the Student with a FAPE. Moreover, there was no evidence whatsoever introduced that the Student's private placement was "appropriate," nor was there any evidence introduced concerning the cost of the private placement. Conversely, PS's evidence clearly and unequivocally established that the Student received an educational benefit and progressed academically while enrolled in the system and that the proposed IEP for the Student's 2016 - 2017 academic year was adequately designed to provide her FAPE. This is true despite any apparent disparity between the Student's academic potential and her performance on SOL testing.

The evidence is that the Student's IEP 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

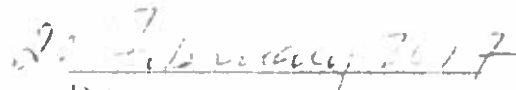
evidence presented to the contrary. Consequently, the Parents' request for reimbursement for their unilateral placement of the Student in a private school is denied.

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 21st day of February 2017 a true and accurate copy of this pleading was mailed, *via* first-class, postage prepaid mail, to:

, Virginia

, Virginia

John F. Cafferky, Esquire
Patricia Minson, Esquire
Blankingship Keith, P.C.
4020 University Drive, Suite 300
Fairfax, VA 22030

Ronald P. Geiersbach
Office of Dispute Resolution and Administrative Services
Coordinator of Due Process Services
Virginia Department of Education
P.O. Box 2120
Richmond, Virginia 23218

Reginald B. Frazier, Esquire
1998 Angora Drive
Chesapeake, Virginia 23325


James M. Mansfield