18-065

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EDUCATION

#  DUE PROCESS HEARING

In Re:

 represented by Public Schools represented by

 Joan H. Proper, Esq. John F. Cafferky, Esq.

# DECISION

This matter came to be heard upon the Request For A Due Process Hearing (complaint) filed by ’s parents pursuant to the Individuals with Disabilities Education Act, 20 USC § 1400 et seq. (IDEA) and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81.

The Parents’ complaint alleges Public Schools ( PS) failed to offer ( ) a free appropriate public education (FAPE) pursuant to IDEA for the 2017-18 school year and failed to provide services pursuant to an agreed “stay put” individualized education program (IEP). As the moving party the Parents assume the burden of proof in this matter. Schaffer v. Weast, 546 US 49 (2005). The standard of proof is upon a preponderance of the evidence. 8 VAC 20-81 O. 13.

# Issues Presented

1. Did PS fail to offer FAPE to for the 2017-18 school year?

2. Did PS fail to provide services pursuant to an agreed IEP in Autumn 2017?

# Findings of Fact

 is a ten year old girl with severe disabilities which impede her ability to receive educational services in a mainstream setting with a standard curriculum. has been diagnosed with pyruvate dehydrogenase deficiency (PDH). PDH is a rare genetic disorder that results in multiple neurologic problems. frequently suffers fatigue as a symptom. has bilateral hearing loss and cortical visual impairment. She is considered deaf/blind even though she has partial hearing and vision. also has a condition known as hyperacusis, an extreme sensitivity to certain noises. has hip dysplasia and limited mobility. She is able to “bunny hop,” a form of crawling, and walk with assistance. requires a special diet and feeding tube. has developed communication skills and uses assistive technology to communicate. has demonstrated an ability to learn and has made educational progress over time. ’s limited ability to communicate can be frustrating and she is prone to self injurious behaviors (sib) when she is exposed to noises she does not like or understand, when asked to perform tasks she does not prefer and often when exposed to new things. Hitting her head is a common sib for . often has difficulty tolerating high pitched sounds and has been upset by the sound of other children. Educational experts believe that can be educated in a public school with proper supports. It takes time and experience to learn the nuances of communicating with and her triggers for sib.

 was found eligible for special education services pursuant to IDEA by PS. has attended PS schools. PS and the have a history of disputes and litigation over ’s IEP and the delivery of services. This history is spelled out in the exhibits and testimony and will not be reiterated here as it is largely irrelevant to the current issues. Pertinent is an agreement reached by the with PS in 2016 which set forth the terms of a “stay put” IEP if no agreed IEP was developed by June 30, 2017.

In 2015, was withdrawn from PS by her parents. ‘s parents began home schooling her with a team of private providers. The wished to transition back to PS for the 2017-18 school year. IEP meetings were scheduled and conducted from March 2017 until June 2017 in an attempt to develop an acceptable IEP for . Draft IEP documents were produced covering all required areas. The proposed IEP designated a homebound placement. A transition plan was discussed and drafted in June 2017. No agreement was reached on ’s IEP.

During the Summer, PS and the continued to meet and communicate to try and reach an agreement on ’s IEP and a procedure to transition her to PS. The proposed IEP and transition plan did not set any strict deadline to fully integrate into a public school building. The expressed their fears that would not be integrated into the public school in a timely manner. PS wanted time to have its personnel get to know before she began attending school at a public facility. No agreement was reached and the 2017-18 school year began. PS began providing services pursuant to the 2016 agreement in the ’ home. The continued services from their private providers at the same time. IEP meetings were held on September 12, 2017 and November 21, 2017 with no agreement being reached. The proposed IEP in November changed the placement to a public school. On October 27, 2017, the gave PS a ten day notice that they would be placing in a private placement and seeking reimbursement for costs. is currently being educated at home by a team of private providers.

An “intervener” is a person who has received specialized training in deaf/blindness and the process of intervention. An intervener provides consistent one-to-one support to a student who is deaf/blind throughout the instructional day. An intervener does not work in isolation and participates as part of the instructional team. Interveners provide access to information and assist with communication and social issues for deaf/blind students. There is no state licensing requirement or formal government recognition necessary to be an intervener, however, specialized training and skills dealing with deaf/blind communication are a necessity for the position. There are university level credentials which may be obtained but these are not required under IDEA or Virginia law. Ultimately, an intervener must spend time with the student and get to know the student’s communication skills and techniques to be effective.

# Application of Law

1. Did PS fail to offer FAPE to for the 2017-18 school year?

# June 2017 IEP

The argue that was denied FAPE because her proposed IEP in June 2017 designated a homebound placement which was not the least restrictive environment (LRE) for her to be educated in. PS contends that the proposed IEP was appropriate because it started services in the home where was familiar with the environment and currently being educated and made a gradual transition to public school as could tolerate the increased time in the public school facility.

The IEP proposed in June 2017 by PS for contains all the required elements of an IEP. The IEP is very detailed and extensive. The IEP is clearly tailored for the specific needs of . The PS team of educators has all the same type of professionals as is on the private team employed by the . The IEP also contains a transition plan by reference. While a transition plan is not a required element of an IEP it can be made a condition of an IEP by agreement. The transition plan referenced by the IEP is also very detailed. While it does not set absolute deadlines it does set a schedule of procedures which include introducing to the school building, her classroom and the rest of the facility. The transition plan begins an introductory level of attendance within the first few weeks of the school year. The ’ fears, whether justified or not, that PS would not be prepared and not honor its obligation to transition to a public school in a timely manner do not negate the offer which was extended through the IEP. Once accepted and signed the IEP would be binding on PS and it would be obligated to follow its terms including the terms expressed in the transition plan. The terms of the transition plan never became an obligation of PS because the IEP was never accepted.

The June 2017 proposed IEP was appropriate at the time. PS staff had not had any regular contact with for over two years. While some observation of had occurred by June 2017, in preparation for a transition to public school, PS staff were not generally familiar with the nuances of communication with or the current techniques being used to present her educational program. The high risk that would engage in sib created a safety risk for PS which could be lessened by gaining familiarity with through first working with her at home. This sort of overlap between service providers was universally endorsed by the professional educators involved. The transition plan set a reasonable procedure for reintroducing to the loud and busy environment of a public school building. All of the educators agreed there was no way to be certain how would react to the public school environment and that there was a risk for sib. If PS staff were familiar with the techniques that had been successful in reducing ’s sibs they would be able to insure a reasonable level of safety and be more likely to be successful with ’s academic endeavors. These insights could be gained by working with at home and coordinating with her private providers.

The IEP must be looked at as a whole and not isolate phrases and terms. The IEP contemplates a transition for from home schooling to a public school. It does not indicate that will remain homebound and that is clearly not the objective of the program. Starting at home for the 2017-18 school year and making a gradual transition during the year was a reasonable plan. The clear objective of the IEP was to move her from the home school to a public school in a safe manner and thus the IEP did not deny education in the LRE.

# Procedural issue

The raise a procedural issue related to this issue. They claim that PS violated procedure by not considering any option other than homebound instruction. This claim is without merit. The were extensively involved in the IEP process and should take pride in the level of detail that is in ’s proposed IEP. The ’ influence in the preparation of the IEP is obvious. Transition from home to public school was discussed at length in numerous meetings and communications. Simply because an agreement is not reached does not mean that the alternatives were not discussed and considered. Consideration of options is all that is required. Whether would remain at home or attend a public school was a major topic in the preparation of the IEP. These options were considered and thus there was no procedural violation in this regard.

# November 2017 IEP

 PS continued to meet and communicate with the during the Autumn of 2017 to try and develop an IEP for . An IEP meeting was held in September where modifications to the program were offered. No agreement was reached. Another IEP meeting was held in November of 2017. At this IEP meeting PS offered placement at a public school building. The IEP proposed in November 2017 by PS for contains all the required elements of an IEP. The IEP is very detailed and extensive. The IEP is clearly tailored for the specific needs of . The PS team of educators has all the same type of professionals as is on the private team employed by the . The change of placement in the IEP eliminates the issue of LRE raised by the parents in the June 2017 IEP. The IEP offered by PS to is highly appropriate. It provides for to be educated in a public school setting where she will have an opportunity to develop to her potential. All of the educational professionals agree should be in a public school placement. To maximize ’s involvement in society needs to learn many more sounds and be desensitized to many more. The public school presents a perfect opportunity and a relatively safe environment for to expand her knowledge.

The contend that it is necessary to have the private providers they have hired work in the public school facility to transition . Even if this was desirable it is not required under the standards of IDEA. The statute requires that an IEP be reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. Endrew v. Douglas City School Dist. , 137 S.CT 988 (2017); Board of Education of the Hendrick Hudson Central School Dist. v. Rowley, 102 S.Ct 3034 (1982). Thus PS is required to offer a reasonable program but not necessarily one of the parents choosing or the best program. PS has a highly trained staff of professionals available to work with and provide her with educational and related services. PS has offered these services through the November 2017 IEP. The are free to choose their own providers, however, they cannot dictate personnel to the local school system. Likewise the are free to place in a more restrictive environment than is necessary for her education but cannot then claim the school system is blocking her from an education in the least restrictive environment. By withdrawing from PS in November 2017 the voluntarily placed in a more restrictive environment than is necessary for her education. This is not an appropriate placement under the standards of IDEA.

The also contend that PS is not ready to perform the IEP. PS has made significant efforts to prepare for admitting into public school. PS has hired staff, trained staff, purchased equipment, arranged for a private classroom, acquired educational materials and arranged schedules to accommodate . The ’ inference that PS has taken these actions in response to litigation may be true but is irrelevant. The motive for preparing is not important, it is the fact that PS is ready to receive currently that matters going forward. PS has never been obligated to be fully prepared to receive because the IEP has never been agreed to. Despite this PS appears fully prepared to receive her now.

To receive reimbursement for expenses from a unilateral placement the parents must prove that the school district’s IEP is not appropriate and that the parent’s placement is appropriate. Burlington v. Dept. of Education, 105 S. CT 1996 (1985). The evidence failed to demonstrate that the PS IEP was inappropriate or that the parent’s placement was appropriate.

2. Did PS fail to provide services pursuant to an agreed IEP in Autumn 2017?

When the and PS failed to reach an agreement on a new IEP by June 30, 2017, by agreement, PS was required to provide services to in her home. The specific provisions are listed at PS exhibit 23, page 16, paragraph 13 of the agreement. The presentation did not provide sufficient evidence that PS failed to provide the required hours or services listed in the agreement. The only evidence presented by the that these services may not have been provided was the observation of ’s mother that the PS staff did not bring any materials at first. This was consistent with the testimony of the PS providers who indicated their first visits were largely to observe and introduce themselves to . This is precisely what the experts had recommended to accomplish a smooth transition for . The PS witnesses described their interactions with and stated they had performed the required services. This testimony was uncontroverted. The agreement also contains a provision which does not require hours to be made up if they are missed because of ’s unavailability. often suffers extreme fatigue and frequently had other matters scheduled. The agreement also indicated that ...the Student’s IEP is deemed to be a homebased program provided exclusively by PS.” ’s private providers continued to work with her during the delivery of services by PS, which at times, obstructed PS from scheduling services. Thus no claim that the actual services required by the agreed IEP were not performed can be sustained.

The argue that was denied FAPE because it is necessary for her to have the support of her private providers to transition to public school. PS was not obligated to provide transition services during the “stay put” IEP in the Autumn of 2017. PS continued to prepare for but that was its own decision and reflects the difficulty the school system faced in June 2017. Without an agreed IEP that created a plan to transition to public school, PS was forced to decide how many resources it would use for a student who might never come to the school. We can only speculate if PS would have been ready for at the start of the 2017-18 school year because PS was never obligated to get ready when there was no agreement on the IEP. PS prepared to some degree but clearly did not put every possible item in place during the Summer. Subsequently, PS has made the commitment to obtain all the materials and staff necessary to implement the November 2017 IEP. Whether in response to litigation or not, PS has prepared for even though it is not obligated to under the “stay put” IEP or with currently withdrawn from the school system. The additionally argue that PS failed to create a behavior intervention plan (bip), have material items in place and pay private providers for transition services. All of these items relate to the transition plan and were not obligations of PS under the “stay put” IEP that was agreed to.

The agreed “stay put” IEP for does provide ...that the accommodations in the November 19, 2015 IEP proposed by PS, attached hereto as Exhibit C , will be the Student’s “stay put” accommodations under IDEA.” The accommodations listed in Exhibit C include an “individual assistant trained in the competencies of working with deaf-blind students e.g. VA Deaf-Blind project, CEC guidelines.” The accommodations page states that this service will be provided “daily.” PS failed to provide this required service under the “stay put” IEP. While PS staff always came to the ’ home in pairs, often with highly skilled experts in their fields, it did not send an assistant trained in the competencies of working with the deaf/blind as is intended in the accommodations. The “individual assistant” named in the accommodations was intended to act as an intervener, a term that has been adopted into the November 2017 proposed IEP. was supposed to have this person available to her during the two hours of instruction and during related services. needs a trained assistant to access the instruction being provided by her teachers. While PS always put a body into the position, it did not fulfil the purpose and function of the assistant which was to have a person familiar with both for the purpose of receiving education and for the a possible transition to public school. PS sent possible candidates who could become interveners but at the time of service delivery were not qualified. Further, these staff members came inconsistently, some only once, defeating the fundamental necessity of the assistant to get to know ’s communication nuances. A trained intervener is key to transitioning to public school. The likelihood of a successful transition will be greatly enhanced if PS has an intervener for . did not receive this service under the “stay put” IEP as required and thus is entitled to compensatory services.

# ORDER

IT IS HEREBY ORDERED that Public Schools provide compensatory services to . These services shall include an individual assistant trained in the competencies of working with the deaf/blind who can work towards becoming an intervener for . Services provided shall be two hours per school day and during related services when practical. Services shall be provided for eight weeks. It is suggested these services be provided in the home in preparation for a transition to public school.

# Right of Appeal Notice

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.

 DATE Frank G. Aschmann, Hearing Officer