

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

DECISION

Public Schools
School Division

and
Name of Parents

, Ed.D.
Division Superintendent

Name of Child

John F. Cafferky, Esq.
Counsel Representing LEA

William L.P. Brownley, Esq.
Counsel Representing Parent/Child

James M. Mansfield, Esq.
Hearing Officer

William L.P. Brownley, Esq.
Party Initiating Hearing

PROCEEDINGS

By a Request for Due Process dated February 11, 2011, William L.P. Brownley, Esq. requested a Due Process Hearing on behalf of _____ (Student) and _____ Parents. As part of the request, the Parents declined mediation. Resolution was not waived. The Request for Due Process alleges, *inter alia*, that _____ Public Schools (PS):

1. Denied the Student a free appropriate public education (FAPE);
2. Violated its duty to maintain the privacy of the Student's educational records pursuant to the Family Educational Rights and Privacy Act (FERPA);
3. Failed to notify the Virginia Department of Education (VDOE) of the violation of the Student's privacy rights in a prior administrative proceeding;
4. Failed to notify the Hearing Officer in a prior Due Process Hearing of the violation of the Student's privacy rights and intentionally sought to conceal those violations;

5. Failed to fully implement the Student's January 16, 2009 IEP - including the failure to provide Extended School Year (ESY) Services;
6. Denied the Student equal access and enjoyment of educational programs in violation of a "Stay-put" 2008 IEP;
7. Denied the Student FAPE in that a proposed May 2010 IEP is not reasonably calculated to provide the Student with a meaningful educational benefit;
8. Violated § 504 of the Rehabilitation Act;
9. Violated the Americans with Disabilities Act; and
10. Violated the Virginians with Disabilities Act, § 51.5-1 *et seq.* of the Code of Virginia.

The Request for Due Process also alleges that the Parents unilaterally placed the Student in an appropriate private educational program.

As a result of these alleged violations, the Request for Due Process seeks:

1. An award of compensatory damages for the period the Student was alleged to have been denied FAPE;
2. Reimbursement for the Student's private placement;
3. A "stay-put" order for the Student's private placement;
4. An award of attorney's fees and costs under § 504 of the Rehabilitation Act;
5. An award of attorney's fees and costs pursuant to the Virginians with Disabilities Act; and
6. Such further relief to which the Parents and Students may be entitled.

By letter dated February 16, 2011, this Hearing Officer was appointed and a telephone pre-hearing conference was scheduled and held on February 17, 2011. Participating were:

, the Student's Parent, William L.P. Brownley, Esq., Counsel for the Student and Parents; , Ed.D. and John Cafferky, Esq. on behalf of PS; the Hearing Officer; and Brian K. Miller, Esq., the Case Evaluator for the Virginia Department of Education (VDOE). At the pre-hearing, a Due Process Hearing was scheduled for April 11, 12, 13, 14, and 15, 2011, with exhibit and witness lists to be exchanged between the Parties, with copies to the Hearing Officer, by April 4, 2011. Parents initially requested that the Hearing be open to the public, but prior to the hearing requested that it be closed. A second pre-hearing conference was scheduled for March 10, 2011 at 2:00 p.m.

The second pre-hearing conference was convened as scheduled. Participating were William L.P. Brownley, Esq. and Louis Nuzzo, Esq. on behalf of the Parents and Student; ; , Ed.D. and John F. Cafferky, Esq. on behalf of PS; and Brian K. Miller, Esq. on behalf of VDOE. A court reporter was present and transcribed the proceedings. Thereafter, on April 5, 2011 another pre-hearing conference was held where Parents' motion to continue the due process hearing was denied in part, however, due to extenuating circumstances the hearing was delayed one day with the hearing commencing on April 12, 2011. The Parties also agreed on an extension of time in which to exchange exhibits. Subsequently, as an accommodation to the Parents and their counsel, testimony would conclude early on Friday, April 15, 2011 and resume on Monday, April 18, 2011 and Tuesday, April 19, 2011. The Parents also filed a motion to have all "privacy" claims non-suited. PS had no objection to the motion and those claims are dismissed without prejudice.

FINDINGS OF FACT

During the 2008-2009 academic year the Student was enrolled in the fourth grade in Public Schools at School. The undisputed evidence was that

the Student had a disability and was in need of special education services. In fact she was receiving services pursuant to a March 2008 IEP which had previously been determined to deliver FAPE. (PS Exhibit No. 1.) . Moreover PS had proposed an IEP in January 2009. The Parents challenged that IEP and a due process hearing was held in the matter. At the conclusion of that hearing it was determined that services required under the March 2008 IEP had been properly delivered and that the Student received FAPE. *Id.* It was also determined that the proposed January 16, 2009 IEP was reasonably calculated to provide the Student with a FAPE.

PS then timely provided an implementation plan (PS Exhibit No. 4 and Parents' Exhibit No.20). Subsequently, PS notified the Parents that an IEP meeting was scheduled for June 23, 2009 to determine the delivery of extended school year services - five (5) days after the end of the school year (*i.e.*, June 17, 2009). The Parents and Student, however, were out of state on vacation and the IEP was ultimately rescheduled for July 15, 2009. Simultaneously with the due process proceedings and IEP, the Parents filed complaints against PS with the Virginia Department of Education. Ultimately VDOE found PS to be noncompliant by letter dated September 25, 2009. Thereafter PS convened a meeting to develop a Corrective Action Plan (CAP) to remedy any deficiency in services delivered to the Student (Parents' Exhibit No. 28). Also, in March 2009 the Parents applied for the Student's admission at a private school. (PS Ex. No. 55) The Student was accepted and enrolled in the private school in the fall of 2009. The Student also received tutorial services at a private placement during the summer of 2009.

CONCLUSIONS OF LAW

Where, as here, the Parents initiated this administrative due process hearing, they have the burden of proof. Schaffer ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005). The Parents 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).

Substantively the law is not in dispute: a disabled child is deprived of a FAPE if: (1) an LEA has violated IDEA's procedural requirements to such an extent that they seriously and detrimentally impact the child's right to a FAPE; or (2) the IEP developed for the child is not reasonably calculated to enable the child to receive an educational benefit. Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). There is no single standard to determine how much educational benefit is sufficient to satisfy IDEA, but 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). In Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) the Court opined that IDEA "calls for more than a trivial educational benefit" and requires that the child receive a meaningful benefit and an opportunity to receive significant learning. Here there is no issue concerning any procedural violation.

First, the Student's January 16, 2009 IEP was the subject of a prior due process hearing. It was determined that the 2009 IEP provided a FAPE and that the Student's continued placement at _____ provided her with educational benefit (PS Exhibit No. 1). Moreover, the Hearing Officer in that prior due process hearing specifically found that Student's March 2008 IEP provided FAPE and that the overwhelming evidence was that the IEP had been properly implemented through the date of his decision. Id. While the evidence is in conflict, PS presented credible evidence that services provided from the decision date of March 30, 2009 until the January 16, 2009 IEP was implemented on May 22, 2009 remained substantially unchanged. Accordingly, PS met its obligations and provided the Student with FAPE during that time period.

Second, concerning the January 16, 2009 IEP, the Hearing Officer in the prior due process hearing determined that the IEP was reasonably calculated to provide the Student educational benefit. Id. Based upon the testimony of PS expert witnesses, and teachers that actually delivered educational instruction and service to the Student, that IEP was substantially implemented for the remainder of the 2008 to 2009 academic year (*i.e.*, May 22, 2009 through June 17, 2009) and that the Student did receive an educational benefit.

However, the January 16, 2009 IEP required the delivery of ESY services. While PS met its requirement for implementation of the January 16, 2009 IEP, it failed to timely convene an IEP for ESY services. Specifically, it was not until after the end of the regular school year that such a meeting was proposed, and then only to determine if the Student was *eligible* for ESY services, despite the directive for those services in the January 2009 IEP. Then it wasn't until July 15, 2009 that a proposed IEP for ESY services was provided by PS (PS Exhibit No. 37).

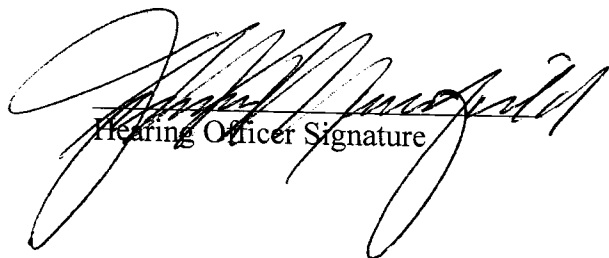
DECISION

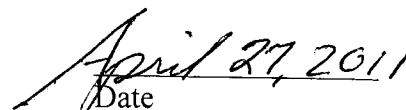
After careful consideration of all the pleadings, correspondence, hundreds of exhibits and extensive testimony over six days, and for the reasons stated herein I conclude: (1) based on the Parents' Motion to Dismiss certain claims without prejudice; the Motion is granted and the claims related to PS alleged failure to notify the Virginia Department of Education (VDOE) of violations of the Student's privacy rights in a prior administrative proceeding are dismissed without prejudice; (2) The Parents' claims that PS violated the Family Educational Rights and Privacy Act (FERPA); the Americans with Disabilities Act and the Virginians with Disabilities Act are not cognizable in the context of an IDEA Due Process Hearing and therefore they are dismissed without prejudice; (3) PS delivery of services under the 2008 IEP was previously

determined to be adequate and therefore the issue is barred by the doctrine of *res judicata*; (4)

PS failed to properly implement the January 16, 2009 IEP; however, the technical violation of the delivery of services from May 22, 2009 to the end of the school year, *i.e.* June 17, 2009 did not result in the denial of any educational benefit; (5) PS failure to implement the ESY Services for the Student for the Summer of 2009 did deny the Student FAPE and as a result PS must implement their proposed Corrective Action Plan (CAP) and provide the Student two (2) hours of reading per week and two (2) hours of math services per week for ten weeks by qualified instructors; (6) PS January 19, 2009 IEP was reasonably calculated to provide the Student FAPE for the 2009 - 2010 academic year and therefore any claim for reimbursement for a private placement is denied; (7) there was no evidence introduced concerning the Parent's § 504 claim and therefore any relief under that provision is denied; (8) PS's proposed May 2010 IEP was reasonably calculated to provide the Student FAPE. for the 2010 - 2011 academic year and any claim for reimbursement for a private placement is denied.

This decision is final and binding unless either party appeals in federal district court within ninety (90) calendar days of the date of this decision or in a state court within one hundred and eighty days (180) of this decision. PS shall develop and submit an implementation plan within forty-five (45) calendar days from the date of this decision. Based on the foregoing PS prevailed on all but one of the issues presented and the Parents prevailed on the issue of the delivery of ESY services for the summer of 2009.


Hearing Officer Signature


Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Hearing Officer's Decision was delivered *via* facsimile and mailed first class, postage prepaid, this 27th day of April 2011 to:

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