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2002-2003



### CASE CLOSURE SUMMARY REPORT

*(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)*

Public Schools

\_\_\_\_\_  
School Division

\_\_\_\_\_  
Name of Parents

\_\_\_\_\_  
Name of Child

\_\_\_\_\_  
Date of Decision or Dismissal

\_\_\_\_\_  
Counsel Representing LEA

\_\_\_\_\_  
Counsel Representing Parent/Child

Parents

Schools

\_\_\_\_\_  
Party Initiating Hearing

\_\_\_\_\_  
Prevailing Party

Hearing Officer's Determination of Issue(s): Issue of reimbursement for private school providing ABA therapy services for autistic child, from \_\_\_\_\_, to date. Question of LEA providing FAPE, and of ESY services. Hearing Officer concluded that the Schools did provide FAPE via the IEP and schoolyear, and as proposed in the IEP, and that procedures, etc. were adequately followed. Failure to provide ESY service was not critical. Issue of notice to LEA of removal to private school was not controlling.  
Hearing Officer's Orders and Outcome of Hearing:

Reimbursement denied, and case dismissed.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

\_\_\_\_\_  
Printed Name of Hearing Officer

\_\_\_\_\_  
Signature

DEPARTMENT OF EDUCATION  
DUE PROCESS HEARING



PUBLIC SCHOOLS  
(Schools, LEA)

(Parents)

(Child)

(date of decision)

(counsel for Schools)

(counsel for Parents, Child)

DECISION OF HEARING OFFICER

This proceeding was initiated by the Parents, on behalf of the Child, by Request for Due Process Hearing filed with Schools on . Prompt handling with the Parties lead to arrangement for hearing on , in the Schools offices. The Hearing Officer had no conflicts, and the Parties had no objection to the Hearing Officer. The hearing took place and was completed on , starting at 9:30 A.M. and ending at 6:40 P.M.

The Parties got together and submitted a compilation of 83 exhibits, all of which were received. The Parents presented 4 witnesses, including both parents, and the Schools presented 3 witnesses. Both sides made opening and closing arguments, and supplied copies of case decisions, and Schools submitted a memo of cases.

The Request for Due Process Hearing stated that Child "is a mild to moderate autistic with significant limitations in several area, including most particularly in expressive and receptive speech and the prerequisite facilities to function in a classroom setting." It also stated that the Child "requires 30 hours per week of Applied Behavioral Analysis therapy" and said that "This was requested as part of IEP and denied by the ...Schools" and that the "parents have obtained this therapy at private cost". The Request proposed resolution was "Provide reimbursement for 30 hours per week of Virginia Department of Education certified ABA therapy and make appropriate speech and occupational therapy services available in a compatible schedule."

THE FACTS: Child was born and is now years old. There is no dispute about autistic problems. is described as very attractive and likeable, and seems quite smart in various respects such as reading and computer usage. entered a public school program for pre-schoolers in the of with an IEP, dated , which was satisfactory to the Parents, who participated extensively in its preparation, and in its amendment dated , and asked for more mainstreaming during the year. was years old. also was on a special diet, and was receiving medication at school. Services were extensive including some one on one attention.

(2)

There was a request by the Parents for extended school year services (ESY) at the IEP meeting, and an indication that it should have been considered at the end of the schoolyear, which was not done. The Parents raised the question of ESY several times--- with the teacher in the , with someone the last week of the schoolyear, and several times thereafter by phone--- but neither party pushed the matter, and ESY services were not provided. In an official of Schools expressed regret about the handling and offered compensatory education services, which were declined by the Parents. Child had been placed in a private school program offering extensive ABA therapy services on , and continues there.

An IEP procedure was arranged to prepare for the schoolyear. A Family Assessment and Planning Team (FAPT) meeting took place on ; and a 5 hour IEP meeting took place on , where a detailed IEP was prepared. Parents were present at both meetings and raised the question of ABA therapy, and stated that Child would not be at the public school to start the year, but would continue at the private school getting ABA therapy. It was contemplated that the Child would return to the public school at some time in the future. ESY services were to be discussed in . The IEP planned for extensive and detailed services for Child, and the Parents had input, and had no objections except as to the lack of extensive ABA therapy. The Parents did not sign the IEP because it did not provide the ABA therapy. As a result, the IEP remains in effect, and is the "stay-put" program for the Child. At the meeting the Parents gave notice that the Child would be in the private school and they would go to due process for reimbursement.

The testified in detail, giving the Child history. was sent to the private school to avoid regression, and had progressed. Medical reports were presented supporting the need for ABA therapy. stated that several other public schools do provide ABA therapy. cited the several contacts with Schools regarding ESY. The testified as to notice to the Schools about using the private school in . also stated that the IEP was satisfactory except for failure to provide ABA therapy.

Parents presented two witnesses (in addition to themselves). One, the head of the private school, who is a PhD with excellent credentials, who testified as to the qualifications of the school, the program, the staff, and the merits of ABA therapy, and the advantages of the 30 hours per week the Child has been receiving. was critical of the IEP and Schools program as inadequate, but had not offered any specific criticisms at the IEP meeting, which attended for several hours. The second, was a senior member of the staff at the private school who was directly responsible for the services to the Child. had designed program, was supervising it, and felt was progressing. thought the Schools IEP was inadequate, but had not seen the Child at the public school and had not talked to the teachers, or seen the lesson plans.

(3)

Schools presented 3 witnesses. The first was Child's classroom teacher for the schoolyear described in detail the extensive arrangements, staffing, room facilities, and other program such as diet and medication. had been teaching pre-school special education for 9 years, had substantial experience with autism, had a Masters degree, and was licensed. class usually had 8 students, with 1-3 being autistic. does lesson plans, which are critical part of program for each child. Many details of the various problems discussed. Many progress reports were in exhibits. The Parents sought more mainstreaming in , and arranged. Child was felt to have progressed, and to need and benefit from some regular student exposure.

The Schools second witness was the Occupational Therapist who worked regularly with Child in the schoolyear. worked extensively with autistic children. felt that Child made progress in ability to interact, and needed to be with non-disabled children. agreed that ABA Therapy could help, but felt it was not the only approach. (The testimony of the Speech Therapist was stipulated to the effect that provided services to Child, and that progressed, and that the new IEP was appropriate, and that had not seen the Child since the schoolyear ended. )

The last witness for Schools was the special education coordinator, with a Master's degree, and special training in autism, and much experience, and a 25 year old son with autism, and who was familiar with Child. related that there were many ideas about how to treat autism, and there had been various trends, such as the current interest in ABA therapy. recognized that ABA had benefits, but stated that it was not the only way, and the use by Schools of many modalities and methodologies could also help. Schools uses the TEACCH methodology along with others. felt that Child's main problems required some time with peers, and that ABA was too isolated. Child had made progress last year. felt that the IEP did address the Child's needs, and can be amended at any time to accomodate changes.

Schools relied on a General Assembly study report on Autism (ex. 83) which discussed many techniques or methodologies and suggested that multiple approaches were better solutions for educating children with autism.

**THE APPLICABLE LAW:** It is fundamental, that in order to obtain reimbursement for private school costs, the Parents must establish that the Schools are not providing a Free Appropriate Public Education (FAPE) and that the arrangements proposed by the Parents do provide FAPE. Burlington v. Dept. of Ed. Mass., 471 U.S. 359 (1985). Related issues are that the Schools have complied with required procedures, and that the IEP is reasonably calculated to enable the child to receive educational benefits. Board of Education, etc v. Rowley, 458 U.S. 176 (1982).

The Parents argue that Schools failure to provide ESY services is a failure to comply with procedural requirements. However cases such as J.B. & W.B. etc v. Horry County, 36 IDELR 65 (USDC SC 2001), and cases cited therein, hold that technical or

(4)

procedural failure does not establish a denial of FAPE without a showing that such violation had a significant adverse effect on the child's education.

Schools argues that Parents did not give proper-timely notice of intent to use the private school; that there was no request for an IEP meeting to arrange for ESY; and that the technical imperfections related to ESY are not a denial of FAPE; and that compensatory education was offered; that some mainstreaming and least restrictive environment are desirable; and that the issue is one of methodology and the IEP does meet Child's needs.

Cases have held that IDEA does not require that a child be able to maximize potential, but that a plan must offer some educational benefits, and need not offer every special service necessary to maximize potential.

CONCLUSIONS: (1) The Child has autism, and defined problems and needs, and there is little, if any, dispute between the parties on these details.

(2) The IEP and public school program for the schoolyear \_\_\_\_\_ was satisfactory to the Parents, and provided a Free Appropriate Public Education (FAPE). The Child showed progress under this IEP. A separate argument regarding extended school year services (ESY) is discussed below.

(3) The IEP for the current schoolyear, \_\_\_\_\_, is detailed, and is only objected to because it does not provide extensive ABA therapy at the private school. Since this IEP was not signed by the Parents, the prior IEP remains in effect, and is the "stay put" condition applicable. However, the current year \_\_\_\_\_ IEP is before the Hearing Officer, who concludes that it too provides a FAPE for Child.

(4) Parents did give adequate notice to Schools at the \_\_\_\_\_ IEP meeting and by an e-mail sent on \_\_\_\_\_ that they intended to place Child in the private school for the start of the \_\_\_\_\_ schoolyear. However, it was still necessary to have an IEP for when they decided to have the Child return to the public school. Parents did not give notice that they intended to place Child at the private school starting \_\_\_\_\_.

(5) The fact that Schools did not provide ESY services in the \_\_\_\_\_ of \_\_\_\_\_ is not a procedural failure of substance in that it did not deprive Child of FAPE or a fundamental right under IDEA. There was no specific provision for ESY in the IEP. Reg. 20-80-60 I 2 specifies that ESY must be provided "only if" the IEP team determines that services are necessary. In \_\_\_\_\_ Schools offered compensatory education, and there is no evidence that such services would not have met the summer needs and helped with regression. Compare the \_\_\_\_\_ ISP meeting minutes dated \_\_\_\_\_ which refers to ESY as something to be reviewed in \_\_\_\_\_.

(5)

(6) ABA therapy was not shown to be critical to the Child's progress. While it is a recognized methodology, there are also other proper programs, and the Child had shown progress. Schools did not fail to provide FAPE because it did not provide the requested ABA therapy services.

(7) The Hearing Officer heard the witnesses, reviewed the exhibits, and has given the matter considerable thought, and concludes that the preponderance of the evidence supports the position of Schools that it did provide FAPE via the several IEPs, the services, and the procedure. The Parents have not met their burden of proof. Schools staff had worked with Child for a year, had excellent qualifications, and seemed fully motivated. The private school witnesses for Parents who favored ABA therapy were advocating a methodology which they used to the exclusion of others. Both sides stated that Child had progressed. The basic issue is one of details of methodology, and the Hearing Officer concludes that both school arrangements have merit, and that Schools has been and is offering to provide FAPE.

(8) There were no procedural objections, and the Hearing Officer finds that notices of meetings, etc. were timely given to Parents, and the necessary procedures were apparently followed.

(9) The sought reimbursement for the cost of the private school providing ABA therapy is denied.

ORDER: Reimbursement is denied. The proceeding is dismissed.

Either party has the right to appeal this decision by filing the appropriate action in a Virginia Circuit Court or U. S. District Court with jurisdiction. Any party wishing to appeal is advised to consult with legal counsel about procedures and deadlines. See Virginia Regulation 8 VAC 20-80-76 O Right of Appeal. Schools has a responsibility to submit an implementation plan to the parties, the Hearing Officer, and the SEA within 45 days.

dated: \_\_\_\_\_, Hearing Officer

cc: \_\_\_\_\_ Esq.; Virginia Dept. of Education;  
\_\_\_\_\_ Esq. ; \_\_\_\_\_, Public Schools