**#20-033**

VIRGINIA

# SPECIAL EDUCATION DUE PROCESS HEARING

XXXXXX and XXXXXX XXXXXXX,

Parents

In RE: xxxxxxx xxxxxx, Student CASE NO. 20-033

vs.

xxxxxxxxx xxxxxxxxx PUBLIC SCHOOLS,

LEA

# AMENDED FINAL DECISION AND ORDER

Issues

1. Whether the parents' pre-November 11, 2017 eligibility claims are barred by the IDEA two year statute of limitations and whether the parents are precluded from contesting the 2015 and 2017 eligibility determinations and all IEPs to which they agreed.

1. Whether the LEA has proposed an appropriate and least restrictive program for the 2019-2020 school year.

# PROCEDURAL HISTORY

Hearings were held on March 11, 2020; March 12, 2020; and March 13, 2020. Following the hearing, the parties submitted briefs on April 10, 2020. Due to the length of this hearing, the anticipated time to prepare briefs, and the required time to digest this information, the parties agreed to extend the decision date to April 20, 2020. The request for an extension was granted at the request of both parties after finding it was for good cause and in the best interests of the student.

The following people attended the hearing:

XXXXXXX and XXXXXX XXXXX, parents.

James Atkinson, attorney for the parents/student.

John F. Cafferky and Emily K Haslebacher, attorneys for the LEA.

Reggie Frazier, Evaluator

The following witnesses testified on behalf of the Parents:

XXXXX XXXXX, PH.D, as an expert in child psychology and child development.

XXX XXXX, as an expert in the field of special education.

XXXXXXX XXXXX, as an expert in speech and language pathology.

XXXXXXX XXXXXXX, founder of the XXXXXX School.

XXXX XXXXXXX, as an expert in autism and IEP development.

XXXXXXXXX, parent of the Student.

XXXXXXXXXX, parent of the Student.

The following witnesses testified on behalf of the LEA:

XXXXXXXXX, as an expert in the field of elementary education and special education.

XXXXXXXXXXX, as an expert in the field of school psychology.

XXXXXXXXXX, as an expert in the field of special education.

XXXXXXXX, as an expert in the field of special education.

XXXXXXXX, as an expert in the field of school psychology.

XXXXXXX, as an expert in the field of special education.

XXXXXXXX, as an expert in the field of elementary/special education.

Parent exhibits P-1 through P-47, excluding P-46, which was withdrawn, and LEA exhibits S-1 through S-58 plus 60 were admitted without objection at the commencement of the hearing.

# FINDINGS OF FACT

After considering all the evidence submitted by the Parties, including documentary evidence and testimony of witnesses, I find the following:

1. The Student is a XX year old sixth grade student at xxxxxx, a private education school located in Xxxxxxxxx, Virginia. XX began attending there at the start of the 2019-2020 school year pursuant to a unilateral parental placement. Previously, the Student attended xxx LEA neighborhood school, Xxxxxxxxx Elementary, from kindergarten through fourth grade.
2. The Student has the following diagnosis: Autism Spectrum Disorder; Attention Deficit Hyperactivity Disorder, Inattentive Type; Other Specified Neurodevelopmental Disorder with Visual Motor Integration Deficits; Specific Learning Disorder with Impairment in Reading and Reading Comprehension (Dyslexia) and Specific Learning Disorder with Impairment in Written Expression (P Ex. 7).
3. The Student was tested for special education eligibility in the beginning of first grade. The LEA conducted a psychological assessment of xxx in October, 2015. (P Ex 44) In this evaluation, the Student presented with difficulty in a number of different areas. These include: academic deficits in reading, writing and math, inconsistent focus, attention, fine motor skill development, visual spatial skills, working memory, processing speed, rapid symbolic naming, naming speed, executive functioning skills, and social skills. (P Ex 44 at 010) The evaluator specifically notes that “[Student's] teacher observed an elevated/at risk number of aggressive or defiant behaviors, atypical behaviors; and difficulties associated with maintaining positive relationships with peers.” She continues that the Student “has poor social skills and xxx is occasionally unaccepted by the group and occasionally has trouble keeping friends.” (P Ex 44 at 09) In her summary, she stated that “these behaviors should continue to be monitored.” (P Ex 44 at 010)
4. Throughout the Student's attendance at Xxxxxxxxxxx, both teachers and parents expressed concerns related to the Student's peer to peer interactions executive functioning skills and social skill development. The Student was required to carry a “behavior contract” in which xxx would mark down and self reflect on xxx behavior. Xxx also participated in social skills group. It is clearly documented that the Student had difficulty maintaining friendships, cut in line, interrupted staff and peers during conversations, purposefully made noises or interrupted during classroom activities or games and would show behavior that was not appropriate for xxx age.
5. Throughout the Student's attendance at Xxxxxxxxxxx, the parents on several occasions requested and inquired about additional evaluations. The LEA declined to conduct additional testing, claiming the Student was clearly eligible for special education services and that xxx deficits were being addressed.

1. From first through fourth grade, the Student received special education services through a series of IEPs, while attending Xxxxxxxxxx Elementary- all of which were agreed to by the parents. (LEA 10, 13,17, & 24)
2. At the end of the 2017-2018 school year, the parents withdrew the Student from the LEA and enrolled xxx in xxxxxxxxxxxxxxxxxx School, a parochial private non-special education school in Xxxxxxxxxx. The driving factor in transferring the Student was the parents' concerns about the Student socializing with other students. In short, the Student was unable to make friends at Xxxxxxxxxxx.
3. During the enrollment process, xxxxxxxx staff briefly reviewed the Student's December, 2017 IEP. After their review, the xxxxxxxxx principal emailed the parent stating:

Thank you for sharing [the Student's] IEP with me and Dr. Xxxxxxx. We

read over the IEP together and are impressed with the 17 hours of weekly

services [the Student] receives through Xxxxxxxxxxx Public Schools. Our

resources are limited at xxxxxxxxx, and we would not be able to match

or come close to xxx current services. Dr. Xxxxxxx and I both agree that

Xxxxxxxxx Public Schools are a better fit for [the Student] (LEA 26)

1. The Student attended xxxxxxxxx for the 2018-2019 school year. While there, the Student experienced teasing and bullying by xxx peers. (LEA 56, 57; 3/11/20 Tr.42-43, 92-93, 140-46,156-58) xxx was not making any friends.
2. Because of the Student's experiences at xxxxxxxxx, the Parents commissioned a private evaluation conducted by Dr. xxxxx xxxxx. From her report, and for the first time, the Parents learned the Student had Autism and ADHD. The Parents were upset that they had to learn this diagnosis through a private evaluation instead of from the LEA. The LEA, in subsequent evaluations conducted by their own evaluators, agreed with Dr. xxxxx’ report.
3. On May 24, 2019, the Parents informed the LEA of their concerns and intention to enroll the Student at the xxxxxxx School and of their desire the LEA pay the cost. (P Ex 21 & 24)
4. On August 28, 2019, the LEA convened the IEP team to develop an annual IEP for the Student. During this and subsequent IEP meetings, the Parents were upset and felt that the Xxxxxx School was not given serious consideration, that they were not given adequate notice of the meeting, and that they were not welcomed by the IEP team.
5. The IEP members did not agree with placement at the Xxxxxx School because the Xxxxxx School is not approved by the Virginia Board of Education as a school approved for placement of students with disability, does not provide special education services to its students, and does not require its teachers to be certified in special education. (3/11/20 Tr. 241; 3/13/20 Tr. 731-32)
6. The Parents rejected the proposed IEP and continued the Student's enrollment in the Xxxxxx School.

# CONCLUSIONS OF LAW AND DISCUSSION

# ISSUE NUMBER ONE

**Whether the Parents' pre-November 11, 2017 eligibility claims are barred by the IDEA 2 year statute of limitations and whether the parents are precluded from contesting the 2015 and 2017 eligibility determinations and all IEPs to which they have agreed.**

The parties have introduced significant testimony and evidence addressing the 2015 and 2017 school years. Contained within their closing briefs, both sides agree that any claim arising prior to November 11, 2017 are time barred. Parents argue that claims relating to the December, 2017 IEP are not time barred. I believe they are correct.

The LEA argues that the Parents are precluded from contesting the 2015 and 2017 eligibility determinations and all IEPs to which they agreed. It is conceded in paragraph 19 of Parents' brief that the Parents did sign the IEPs in agreement. The caselaw is clear on this issue. See: *Schaffer v. Weast,* 554 F3d 470 (4th Cir. 2009), where the Court said there on page 475-76, the district court properly “declined to use that evidence to Monday morning quarterback the school system”; *Ian H. v. Fairfax County Sch. Bd.,* No. 97-168-A, slip. op. At \*1-2 (E.D. Va. 1997); and *Vipperman v. Hanover County Sch. Bd.,*22 IDELR 796 (E.D. Va. 1995).

I find the Parents' position on this issue unpersuasive since the 4th Circuit clearly mandates that parents who fail promptly to utilize administrative remedies are estopped to argue the incorrectness of decisions which they could have prevented by asserting them earlier.

# ISSUE NUMBER TWO

**Whether the LEA has proposed an appropriate and least restrictive program for the 2019-2020 school year.**

For the Student's sixth grade year, 2019-2020, the LEA proposed appropriate IEPs and placements that would have provided xxx an educational benefit. The LEA proposed specific annual goals in all of the Student's areas of need: handwriting, attention/organization, reading decoding, reading comprehension, written expression, spelling, math reasoning, and social-emotional functioning. (LEA 45 at 11-14) Based on then current data gleaned from Dr. xxxxx' report, the LEA's evaluations, and Parent input, the LEA proposed that the Student receive similar services to those previously received while attending Xxxxxxxxxxx, which had enabled xxx to make social and educational gains. Additionally, the IEP incorporated many of the recommendations made by Dr. Xxxxx, including instruction in a class room with a small student-to-teacher ratio, environmental structure, multi-modal instruction, and frequent reinforcement. (3/11/20 Tr. 39; LEA 45) In that respect, the LEA proposed 17.5 hours of specially designed instruction per week. (LEA 50 at 14) Of those 17.5 hours, 10.25 hours would have been spent in small group special education or “self -contained” classes for reading, English, and instructional studies (to address executive functioning and social skills). (LEA 50) The Student would have been supported by a special education teacher for an additional 7.25 hours per week in team-taught science, social studies and math. (LEA50) Accordingly, the Student would have been supported by a special education instructor for all xxx core academic courses. (LEA 50) Finally, the IEP included numerous accommodations, as well as 30 and 45 minutes of Occupational Therapy (OT) services in the special education settings, respectively. (LEA 50) The IEP would have been implemented at Xxxxxxxxxxxx, the Student's neighborhood school and the least restrictive environment. (LEA 50)

Given that the Student would have been instructed and supported by certified education teachers for the entirety of xxx academic day, the programming that xxx would have received at Xxxxxxxxxxxx is substantially more robust than that at xxx current placement and is altogether appropriate. Indeed, it is hard to conceive that the school division's IEP and placements don't provide enough special education, when even at xxxxxxxxxx, the Student passed all of xxx classes and was promoted to the next grade- which *Rowley* is a key indicator of appropriateness- without any special education at all. (3/11/20 Tr. At 134; LEA 31) See: *Bd of Educ of Hendrick Hudson Cent. Sch. Dist, Westchester Cty. et al, v. Rowley,* 458 U.S. 176, 206 (1982)

Throughout the hearing, it became abundantly clear that the Parents' main concern with the Student was xxx social development. On page 414 of the 11/12/20 transcript, the mother stated:

Hearing Officer: I know that [the Student's] been diagnosed with autism

and dyslexia, ADHD, but if I were to summarize xxx problems and put

it in a nutshell, is your main concern [the Student's] socializing with

other students and his conduct?

Witness: Yes.

On page 430 of the 11/12/20 transcript, the father emotionally testified:

xxx doesn't-- like, you, know everybody has somebody. xxx doesn't

have anybody. … I didn't understand why xxx didn't have friends in

school.

The Parents removed the Student from Xxxxxxxxxxx because xxx had no friends there. They removed xxx from xxxxxxxxxx because xxx was bullied there and had not made friendships. They testified xxx had no friends at the xxxxxxx School. (11/12/20 Tr. 493)

The Parents repeatedly explained the type of educational environment they were seeking for their xxxx: “small class setting, individualized attention, and, probably most importantly of all, social skills, embedded into the curriculum.” (11/12/20 Tr. 444) What the Parents seek is exactly what the LEA is offering. Additionally, the LEA has a very impressive anti-bullying program.

Both sides presented convincing evidence that the Student requires the assistance of specially trained special education teachers. Yet, the Parents are asking that their Xxx be enrolled in the Xxxxxx School at the LEA's expense, a school with no special education teachers, no IEP and no success in tackling the Student's social development problems. This inconsistent position is unacceptable.

# Final Decision and Order

1. The Parents are barred by the Statute of Limitations for claims occurring prior to November 11, 2017.
2. The Parents are precluded from asserting claims as to the 2017-2018 school year under agreed IEPs, or portions of IEPs with which they did not disagree.
3. The LEA offered the Student FAPE for the 2019-2020 school year.
4. The Parents are not entitled to reimbursement for the tuition they paid to the Xxxxxx School. The Parents are entitled to reasonable reimbursement for Dr. xxxxxx' neuropsychological evaluation since a lot of her recommendations were incorporated into the proposed IEP.

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

Richard M. Alvey, Hearing Officer

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# SERVICE

By signature above, I certify a true copy was mailed, postage prepaid on \_\_\_\_\_\_\_\_ to:

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