

APR 04 2016

Dispute Resolution &
Administrative Services

**IN THE VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION & ADMINISTRATIVE SERVICES**

_____)	
COUNTY)	
PUBLIC SCHOOLS)	
Complainant,)	
)	
v.)	IN RE:
)	("Student")
MS.)	
Parent))	
)	
Respondent.)	
_____)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION**

INTRODUCTION

A. Procedural History

On February 16, 2016, The _____ County Public Schools ("CPS") filed a "Request for Due Process Hearing" ("Due Process Request") in regards to the Student. The parent did not file a response to the Due Process Request. The CPS filed the Due Process Request to implement an "Individualized Education Program" ("IEP") for the student based on a September 21, 2015 IEP meeting, which IEP was consented to by the parent on October 8, 2015 and to continue to explore private day placements for the student.

On February 18, 2016, the undersigned was appointed to serve as the hearing officer in the above captioned Due Process Hearing in accordance with the "Individuals with Disabilities Education Act" ("IDEA") 20 U.S. C. §1400. The CPS also provided the hearing officer with a copy of the Due Process Request it had filed with the parent. An initial pre-hearing conference call was held on February 26,

2016. The participants in the conference call were the parent, Ms. _____, and _____ representing CPS, Bradford A. King, Esq. and Dr. _____. The purpose of the initial conference call was to discuss procedural matters relevant for going forward with the hearing, including the date for holding the hearing, the deadline for the five (5) day disclosure of documents, the location of the hearing, party with the burden of proof, whether the parent wanted an open or closed hearing and the date for the final decision by the hearing officer. The parties agreed that the due process hearing should take approximately one (1) day and scheduled the hearing for March 15, 2016, with an additional optional date of March 18, 2016, with five (5) day disclosures due on March 9, 2016. Since the CPS filed the request for the due process hearing, the resolution session period of thirty (30) days was not applicable and accordingly the due date for the hearing officer's decision was determined to be April 2, 2016. Since the CPS filed for the due process hearing it had the burden of proof, and the parent requested the hearing be a closed hearing.

Notwithstanding the initial agreement to participate in the due process hearing on March 15, 2016, by email dated March 4, 2016, the parent stated she would not participate in the due process hearing and that she planned to withdraw the student from the CPS. Even so, CPS desired to proceed with the hearing to establish that the student had received a "Free and Appropriate Public Education" ("FAPE") in CPS and that the IEP developed on September 21, 2015 provides the student with educational benefit. By email dated March 7, 2016, CPS requested to proceed with the due process hearing as scheduled, notwithstanding the parent's decision not to participate in the hearing. Also, by email dated March 9, 2016, the CPS informed the hearing officer that the parent had provided it with a letter withdrawing the student from school. Also, by email dated March 9, 2016, the parent stated that she had withdrawn her consent to have the special education services delivered to the student by the CPS. By email dated March 10, 2016, CPS stated its intention to proceed with the due process

hearing and also by email dated March 10, 2016, the hearing officer informed the parent that the CPS intended to proceed with the hearing since it filed the request and again asked the parent if she intended to participate in the due process hearing, but consistent with her previous emails, the parent did not provide the Five-Day Disclosure documents and did not participate in the due process hearing, withdrew her consent to have CPS provide special education services to the student and withdrew the student from CPS. The hearing went forward with one witness called by the CPS, Dr. _____, Special Education coordinator for CPS.

B. Disclosures:

As required by the pre-hearing conference call of February 26, 2016, the CPS submitted its Five Day Disclosure documents on March 9, 2016 that included 143 proposed exhibits. The disclosure documents were provided to the hearing officer and to the parent. All disclosure documents were admitted into evidence at the hearing. The parent did not submit proposed exhibits based on her email dated March 4, 2016 that she would not participate in the due process hearing.

C. The Record:

The Record in this matter consists of the following:

1. The Request for Due Process dated February 16, 2016;
2. Transcripts of the Hearing March 15, 2016
3. CPSs Exhibits designated " CPS Ex. " and numbered from 1 to 143;
4. The Pre-Hearing Summary Report dated February 26, 2016: and Emails dated: March 4, 2016 @ 1:39 pm; March 4, 2016 @ 6:06 pm; March 4, 2016 @ 6:55 pm; March 9, 2016 @ 10:49 am; March 9, 2016 @ 12:16 pm; March 10, 2016 @ 5:20 pm; March 10, 2016 @ 4:03 pm.

FINDINGS OF FACTS

The student is an eighteen-years old male. His educational placement with CPS was at the High School at the time of the filing of the Due Process Request, along with CPS, is part of the Regional Special Education Program ("RSEP").

RSEP consists of CPS partnering with two other school divisions in order to have appropriate special education and related service as well as appropriate service providers for students with specific disabilities. Portions of the program are provided by CPS and there are also classrooms in County and County. (Tr. 10)

On June 18, 2015, an IEP was prepared for the student that determined he should be placed at High School in a public day school. (CPS Ex. 56; Tr. 21) The most recent evaluation of the student was on May 28, 2013 and determined him eligible for services for students with multiple disabilities including a diagnosis of cerebral palsy, autism, anxiety disorder and some respiratory illness. Educationally, he is a student with significant cognitive disabilities (Tr. 11; CPS Ex. 67).

Among other things, the student had a behavior plan (CPS Ex. 43) in place as a result of his use of profanity, spiting and aggressive behavior toward others. (CPS Ex. 56). Based on the IEP, the student was receiving reduced day services of two hours per day (Tr. 23). The parent signed the June 18, 2015 IEP agreeing to its implementation (Tr. 20; CPS Ex. E6). The student has been registered to attend school with the CPS for over two and a half years (Tr. 19).

Prior to attending school with the CPS he attended school in (CPS Ex. 2). Immediately prior to attending school with the CPS, the student received his special education services in County, but he was transferred to the CPS based on the boundary of the school divisions (CPS Ex. 4).

The student has some significant academic needs and has been provided with a functional curriculum and a vocational curriculum as part of his special education program. The CPS also provided the student with individual attention. The student has also received occupational and physical therapy as part of his special education program. (Tr. 17) Due to the student's disabilities, he has accessed his special education program with the use of a wheelchair and he also has used a walker for short distances. (Tr. 14).

The June 18, 2015 IEP provided for the student to have a one-on-one assistant, a behavior chart, and educationally he had basic math and reading goals. The IEP also provided for functional goals for self-care, vocational goals to prepare him to find a job. The student was also provided with accommodations such as adaptive keyboard and calculator manipulatives. In addition, he had related services of physical and occupational therapy (Tr. 21-22).

The last agreed upon IEP for the student was initially prepared at a September 15, 2015 IEP meeting but agreed to subsequently and developed at a September 21, 2015 IEP team meeting; the parent signed the IEP on October 8, 2015, giving the CPS consent to implement the IEP (CPS Ex. 68).

In order to provide the student with his special education program CPS had to address certain behavior issues that interfered with his education and that of other students; curses, spits, throws things and at times displayed aggressive behavior toward staff and other students who had to be removed from the classroom until the student was able to calm himself (Tr. 16).

On the second day of school for the 2015-2016 school-year, the student was suspended for behavior issues (Ex. 67) and has been suspended from school three times since the start of school (Tr. 22). Following the incidences, CPS conducted manifestation determination meetings and concluded the student's behavior was a manifestation of his disability (Tr. 22).

To address the student's behavior issues, the parent requested that CPS place the student full-time in either at High School or full-time at . She also requested that the student receive speech and language assessments and to have a behavioral specialist work with him every day and that the student have another teacher and receive counseling. (Tr. 23). The parent also requested that the student be provided with the services of a nurse to work with him to help with the student's behavioral issues. Dr. attempted to contact behavioral therapist contracting companies, because CPS does not have such in the school system on a daily basis. (Tr. 24; CPS Ex. 143). Dr. contacted approximately ten different providers, but was not able to recruit certain specialists to help the student as a result of the location of CPS and that service providers did not want to come to CPS for two or three hours a day to provide appropriate services for the student. (Tr. 26). CPS did not agree with the full-day placement in the public school or in the regional program due to the student's behavior. (Tr. 23)

On September 15, 2016 an IEP meeting was held regarding the student. (Tr. 26). Based on the student's suspension, CPS concluded the student required a more restrictive placement, particularly a private day placement due to the student's level of behaviors that he had been exhibiting the first two days of school. (Tr. 28-29). The parent expressed preferences for a placement in because she was familiar with the area and because the student's personal doctors were there (Tr. 29).

CPS had one local private school in the area called and agreed to look at as a potential placement for the student and agreed to look at other specific schools that the parent was comfortable with sending the student to and Dr. agreed to check to make sure the schools identified were on the registry for the state and then would arrange for tours of the schools (Tr. 29; CPS Ex. 67). The parent also indicated that she was comfortable with the School and School in . (Tr. 30; CPS Ex. 67)

The CPS IEP team reconvened on September 21, 2015 and developed an IEP for the student. With regard to placement considerations, the team determined the student should be placed in a private day school "Due to significant cognitive and physical deficits." Further, that the student would "benefit from the more restrictive setting and that he requires a high teacher/low student ratio to address his academic and behavior needs. The IEP team agreed that a reduced day program was appropriate as an interim placement while private day school is being determined and application is accepted." (Tr. 30-31;

CPS Ex. 68). The IEP developed at the September 21, 2015 IEP meeting continued the services that were developed in the June 18, 2015 IEP. The parent signed the IEP October 8, 2015 consenting to its implementation (Tr. 31; SCP Ex. 68, 26). At the IEP meeting, CPS agreed to continue the reduced day placement and also discussed providing home-based services, but the parent refused the home-based option. CPS had suggested the home-based instructions to supplement his reduced day program in order for him to get more instruction. (Tr. 32). The parent declined home-based services stating to the IEP team that she had tried it in the past and it didn't work. (Tr. 39). The parent did say she would agree with the IEP if it included a healthcare plan and the inclusion in the present levels of performance section of the IEP that discussed the student's medical needs, CPS agreed with this request of the parent. The IEP developed on September 21, 2015 is the last IEP consented to and signed by the parent.

CPS provided the parent with prior written notice to implement the IEP. Following the IEP meeting and the addendum signed by the parent, CPS attempted, but was not able to secure a private placement for the student. (Tr. 34).

CPS contacted the _____ and _____ School seeking a placement for the student (Tr. 34), but was not able to secure a placement at those schools. After _____ refused the student's application, the parent then requested that he receive services at _____

on a full-time basis or placed at the High School full-time. (Tr. 36); however, CPS refused this request. The parent then picked two other schools that she wanted CPS to provide application to, Academy in and School in . (Tr. 36).

On December 7, 2015, the IEP team met to consider the parent's request that the student be placed in the High School. (Tr. 38; Ex. 100); however, CPS refused the request (Tr. 38).

At the December 7, 2015 meeting, the IEP team agreed to continue the application process to private day placements for the student. A prior Written Notice was provided to the parent offering to consider three additional private day schools (Tr. 39); however, the parent did not consent to these placements. (Tr. 40).

By letter dated January 20, 2016 (CPS Ex. 132) Dr. , the Superintendent of CPS sent a letter to the parent outlining what CPS had done to accommodate the student to try to come to an agreement and stating that in the absence of an agreement, the only option for CPS was to file for due process. (Tr. 42). CPS concluded the student's behavior had escalated to the point that he was a danger to himself and other students and staff (Tr. 42). Dr. testified that an appropriate placement for the student would be a private day school or a residential facility; however, three private day schools had rejected his application. (Tr. 42). With regard to a residential facility, Dr. discussed this with the parent at the December 7, 2015 IEP meeting, but the parent did not agree with a residential placement.

The parent did not reply to Dr. 's January 20, 2016 letter; accordingly, Dr. sent a follow-up letter dated February 9, 2016 stating he received no response to his January 20, 2016 letter and also informed the parent that CPS would file for the due process hearing if he had not heard from her within another week. (Tr. 44).

On March 9, 2016, the parent withdrew the student from CPS and withdrew her consent for CPS to provide educational services for the student.

The Prior Notice provided to the parent resulting from the September 21, 2015 IEP meeting, among other things, the IEP team stated that with regard to "Actions proposed or refused by County Public Schools:" "the public schools are not able to provide FAPE at this time due to classroom behaviors." And furthermore, the student "will continue the reduced day placement for four days/two hours a day until the outside placement is finalized."

Also, the team concluded the student's "behavior has been dangerous at school and extremely disruptive to the other students' education." He "requires a reduced student to teacher ratio in order to access a free and appropriate public education. As a provision of FAPE until his outside placement is finalized, (the student) will receive a reduced day placement to address his academic goals."

Dr. testified that in her professional opinion the student required a placement that can address both his level of cognition and behavior issues. She further testified that the student's behavior issues had increased significantly in terms of frequency and aggressiveness, and that "behavior has been the crux of the issue" with the student (Tr. 22). She testified due to CPS being in a small area, it is difficult to obtain specialized providers for the student. Dr. further testified that the student was not admitted to certain school because the schools contacted indicated they could not serve the student or did not have space for the student. (Tr. 48-49). The hearing officer finds the testimony of Dr.

credible with regard to an appropriate IEP for the student; attempts to obtain appropriate providers for the student, the identification of appropriate placements and attempts have the student placed in an appropriate placement that could address the student's educational and behavior needs.

ISSUE:

Whether the IEP developed on September 21, 2015 and consented to by the parent on October 8, 2015 provided for a Free and Appropriate Public Education Program (FAPE) for the student.

CONCLUSION:

It is the conclusion of the hearing officer that the IEP developed on September 21, 2015, consented to by the parent on October 8, 2015 provides educational benefit for the student and appropriately considers placement options in the least restrictive environment for the student based on his educational needs and behavioral issues; accordingly, the IEP was prepared to provide the student with a Free and Appropriate Public Education. In *Board of Education v. Rowley*, 458 U.S. 176, 188 (1982), the United States Supreme Court concluded that the "free appropriate public education" requirement is satisfied by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." The September 21, 2015 IEP meets the *Rowley* standards.

Based on the evidence at the hearing and in the disclosures, it is evident that the student requires specific services to address both his educational and behavior needs. The record here primarily concerns placement considerations for the student, which had become a challenge due to the unavailability of providers in the location of CPS who could provide the services the student needed and that potential placements did not accept the student's application; accordingly, as of the hearing, a placement had not been secured. CPS documented its attempts to identify and determine appropriate types of programs that would provide FAPE for the student and made many attempts to have the student placed in educational facilities that potentially would have been able to provide FAPE. The record in this matter reflects positively on the efforts of CPS to address the needs of the student, including attempts to determine an appropriate placement. The questions here are not based on the quality of the IEP or the

identification of placements, but the inability of having the outside third parties and/or placements to find space for the student. It is concluded the IEP was prepared to provide educational benefit for the student in the least restrictive environment associated with the student's needs. Accordingly, the IEP meets the requirements of the IDEA (20 U.S.C. §1415 (b)(6)(A)).

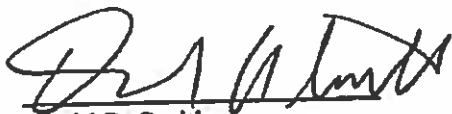
DECISION

IT IS HEREBY ORDERED as follows:

The CPS's IEP dated September 21, 2015 is reasonably calculated to confer educational benefit to the student and provides FAPE.

RIGHT TO APPEAL

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.


David R. Smith
Hearing officer

4-4-16
Date