

DEC 21 2007

VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

Dispute Resolution &
Administrative Services

POST-HEARING REPORT

Public Schools
School Division

Mr. & Mrs.
Parents

G. Rodney Young, Esq.
Counsel for School Division

Child

Attorney/Advocate for Child

F. Mather Archer
Hearing Officer

The Parents
Party Initiating Hearing

PURPOSE.

In this case, the Parents seek reimbursement of their costs and expenses of unilateral placement of () in a private facility for the school year 2005 - 2006.

ISSUES:

1. Are the parents entitled to reimbursement of costs and expenses incurred in their private placement of in the Virginia Institute of Autism for the year 2005 - 2006?
2. Was School Division's (SD) placement of in a self-contained classroom with other disabled children, with limited support an appropriate placement?
3. Was the proposed IEP developed in August and September, 2005 appropriate and sufficient for ?
4. Did procedural violations or deficiencies result in a denial of a free appropriate public education or of educational benefit, or adversely affect the Parents' right to participate in decisions regarding . ?

Preliminary Matters.

The exhibits listed in Page 4 of transcript volume 1 and Page 251 of transcript volume 2 are those admitted, except as noted otherwise below.

Parents exhibit 17 - page 329 of that exhibit was admitted.

Parents' exhibit 30 (a transcription from audio tapes) has been backed up by admission of the tapes themselves as exhibit 30 A, B, and C.

DECISION

Summary of the Case

This case concerns a 5 year-old boy, named _____, with multiple disabilities capped by autism. _____ has been educated through his pre-kindergarten school under Part C of the IDEA, the early childhood intervention program. In June, 2005, _____ was found to be a child with disabilities and eligible for special education and related services. In June through September, 2005, the IEP team prepared an IEP for _____ in transitioning into Part B of the IDEA. The Parents declined to accept the IEP drafted by _____ Public Schools (_____ PS or Schools), and, after giving notice, placed _____ in the Virginia Institute for Autism (VIA) without consent or referral by _____ PS. The Parents then requested reimbursement from the Schools for the school year 2005 – 2006 of their costs incidental to enrolling _____ in the VIA, which the Schools declined. The Parents then gave notice of their Complaint requesting a due process hearing seeking reimbursement of their costs. This matter came to hearing in _____, Virginia.

This due process hearing commenced on November 26th, continued on the 27th, and was concluded on November 28th, 2007. After receiving the evidence, and reviewing the testimony and the documents, it is this Hearing Officer's decision that the Parents are not entitled to reimbursement for their costs of \$38, 941.64 incurred in their private placement of their son in the Virginia Institute of Autism for the school year 2005 – 2006

Findings of Fact

Having heard and observed the demeanor of the witnesses, and considered the documentary evidence presented by the parties and admitted, I find the facts set out below.

1. _____ was born October 17, _____ to his parents, _____ and _____, in _____, Virginia, where he resided until August 21, 2006. From then until the present time, he and his parents have resided in _____, Albemarle County, Virginia.
2. From 2002 until October 1, 2005, _____ received Early Childhood education and services (Part C) before attempting enrollment in _____ Public Schools. During this period _____ received Part C services from Child Development Resources (CDR) and Dominion Pediatrics (DP). In addition, from September 12th to October 1st he received Part C services from Virginia Institute of Autism (VIA) in Albemarle County.
3. _____ is inflicted with a number of disabilities and medical problems. He has been evaluated by CDR as having global delays "in all domains". The eligibility committee

found him to be eligible as a child with disabilities, namely autism and severe disabilities, for specialized instruction “under dual categories.” (Ex J-10)

4. The Parents, on 8/1/05 gave notice to the PS of their rejection of the IEP as inappropriate and of their intention to privately place . In addition, they gave notice on 9/30/05 of their intention to place him in the VIA. On October 1st, his Parents privately placed in the VIA, where he continues his education. The PS did not consent to that placement, nor did the Schools refer and his Parents to the VIA. The Parents requested reimbursement of their expenses in their private placement of in the amount of \$38,941.64, which was denied by the Schools. (Exhibit J-19, J-23, P-55-56, J-24.
5. The IEP that was developed for is his initial IEP, developed by the IEP team over a span of 3 team meetings on 6/20/05, 8/1/05 and 9/30/05. The team consisted of the Parents at least one of whom was present in all meetings, -Speech/language Pathologist, an occupational therapist, -Physical Therapist -Special Education Teacher, and -then Assistant Principal (now Principal) of Elementary School. (Ex J-1)
6. The program that was designed for when he went to VIA uses the applied behavioral analysis (ABA) methodology, and has made some progress during the year that he has been in the program at VIA. The Schools have conceded the appropriateness of the VIA program for ’s education. (See Tr – I, pp 118-126.
7. There has been some progress achieved with since he’s been at VIA. Since was placed at VIA in October, 2005, he has moved from intensive one-on-one (and one instructor) in an isolated classroom to a classroom of 4 students and 4 instructors or aides, after a year in VIA. Beyond that, has made very little progress: his skill of imitating his peers remains a significant weakness, his joint attention skills are significantly weak, his distractibility is a significant problem, and he has difficulty generalizing; but he now notices people and things. (Ex P-7; Tr – I, pp 119-130)
8. The IEP proposed by the Schools, dated 6/20/05 (completed on 9/30/05) was not accepted by the Parents after reviewing the IEP at their home. At the 8/1/05 IEP meeting further efforts to refine and reach a final IEP, which the Parents attended. At that 2nd meeting the Parents read and presented their letter dated 8/1/05, which rejected the IEP and gave notice of their decision to privately place . The Parents rejected the proposed IEP because it didn’t specify the one-on-one instruction. They asked if the team had any comments and discussion. Being told that no one had any comments, the parents

- left the meeting. The remaining team members then reviewed the Parents' letter. (Tr I, pp. 221 – 236; Exs P-59, J-1, J-2, J-3, J-4, J-5, J-19, J-20;)
9. A new date was set, 9/30/05, to continue the IEP meeting to a conclusion. The Parents attended that meeting. (Exs J-8, P-30 and tapes P-30 A, B, & C)
 10. The Parents' principal concern was that receive one-on-one instruction but in an isolated setting with a teacher, free from the distractions of other children in the classroom from the beginning of his placement in PS, until he could be moved into a classroom like his current setting at VIA with 3 similarly disabled children and 4 adults. (Tr I, pp 222-233; Ex J-1, pp 24 of 27 – 27 of 27; Ex J-3)
 11. The IEP proposed by the Schools placed in an early childhood special education (ECSE) classroom from the beginning with 7 similarly disabled children, a special education teacher and a para-educator for an initial trial period to gauge's responses and progress, with revisions to the IEP and modifications and accommodations as from time to time might be necessary and appropriate. It was based on information and data gleaned from evaluations, observation, and other information furnished by the Parents. (Ex J-1; Tr II, pp. 356-362)
 12. The self-contained preschool classroom was chosen as the best placement for's initial placement in the Schools, even though it would not provide with the intensive one-on-one instruction with only a teacher as desired by his Parents. (Tr II, pp. 364-388)
 13. One-on-one instruction with teacher and alone has disadvantages affecting educational benefit to. (Tr II, pp 389-393)
 14. The initial placement for in the Early Childhood Special Education (ECSE) classroom (preschool classroom) was chosen because it was the least restrictive environment for, whereas the Parents' choice of one-on-one intensive instruction is a more restrictive environment. The IEP team, even with the Parents on the team, didn't have enough information and data, and had not been in a preschool classroom for observation over time to inform the team and staff, on which to base placing him in a more restrictive setting such as the Parents chose. The Schools needed time to watch in the preschool classroom over time before changing the IEP. (Tr II, pp. 430-437, 454-456)

Conclusions of Law.

Required Determinations:

The requirements of notice to the Parents were satisfied.

is a child with disabilities.
needs special education and related services
School Division (PS) is not providing a free appropriate public
education due to the fact that the Parents rejected the proposed IEP and placed privately
without consent of or approval by the School Division. 8 VAC 20-80-76.J.17.

Issue 1. Are the Parents entitled to reimbursement of costs and expenses incurred in their private placement of in the Virginia Institution of Autism for the year 2005 – 2006?

The answer to this question depends upon the two prongs of the test announced in *Burlington v. Board of Education*, 471 U.S. 359 (1985). There the court determined that the questions are (1) is the proposed IEP inappropriate and (2) is the private placement appropriate for the child's needs. If the answers are both answered in the affirmative, then the parents may seek reimbursement for the private placement cost, because the IEP would be inappropriate.

Here, the PS have conceded that the VIA private placement is an appropriate placement where would receive a free appropriate public education. However, the first prong of the test – the inappropriateness of the School's proposed IEP must be proved by the Parents.

Issue 2. Was the SD placement of in a self-contained classroom with other disabled children with limited support an appropriate placement?

As shown by the proposed IEP (Ex J-1) coupled with the testimony of Ms while the team were trying to work out the IEP, the Parents were proposing placing in a setting where he would receive constant one-on-one instruction in a wholly self-contained class with only a teacher and himself present until he could move to a 4-student classroom. The team members were working out a program with 2-3 adults together with and 7 other disabled children in an early childhood special education classroom. The team planned to try in that setting so that they could see any disadvantages of that program and use modifications and accommodations as necessary to fine tune the program.

The Parents never left their own idea of what was best for , but continued pressing for the more restrictive environment that was used by VIA. The VIA program was essentially an ABA program which the Parents felt advisable to bring along faster.

The problem is that the two programs are at opposite ends of the pole, and the PS, after a thorough, investigation considered it best for to apply their less speedy program. Thus, the IEP proposed by PS, providing as it does for the least restrictive environment through a well-crafted program, is an appropriate IEP and program for .

The Parents' efforts to prove the VIA program benefits, over against the Schools' IEP, actually resulted in their failing to realize that they were pressing for a more restrictive environment for than PS considered appropriate for him. I conclude that the Parents have failed to prove that the Schools' IEP is not appropriate under the law. *Frank G. et al v. Board of Education*, LEXSEE 459 F3d 356 (2d Cir 2006)

Issue 3. Was the proposed IEP developed in June through September 2005 appropriate and sufficient for ?

This issue is duplicative of Issue 2 and is decided as part of Issue 2.

Issue 4 Did procedural violations or deficiencies result in a denial of a free appropriate public education or of educational benefit, or adversely affect the Parents' right to participate in decisions regarding ?

The Parents saw a procedural violation in the fact that after they left the IEP meeting of 8/1/05 the remaining members of the team remained together and reviewed the Parents' letter. The Parents say that by that action, the members excluded the Parents from the IEP and continued with the IEP meeting without the Parents. The Parents presented no other evidence in support of their claim. To the contrary, they ignore the fact that it was the Parents themselves who created their absence from the meeting and closed the IEP meeting by their precipitous exit, having surprised the team with their 5-page single spaced letter just before they left the meeting. They simply gave the other members no opportunity to respond.

Nevertheless, the Schools continued trying to arrange another meeting to conclude the IEP after the aborted 8/1/05 meeting. The Parents finally agreed to meet on 9/30/05 and did attend. At that meeting the team discussed with the Parents their 8/1/05 letter. The Parents simply reiterated their stand that they rejected the proposed IEP and had enrolled in VIA.

The Parents' action, by leaving the meeting ended the IEP meeting. For all these reasons, if there was a procedural violation it was created by the Parents and, furthermore was harmless and neither denied a FAPE for , nor denied the Parents their right to participate fully in the IEP meeting, nor denied any educational benefit to

ORDER

Accordingly, the Parents are denied reimbursement of their costs of private placement of in the Virginia Institute of Autism for the year of 2005 – 2006.



F. Mather Archer
Hearing Officer

December 12, 2007.

Cc: Parties and counsel
Virginia Department of Education

NOTICE

This decision is final and binding. It may be appealed within 90 days from the date hereof to a Federal District Court without regard to any amount in controversy; or to a Circuit Court of the Commonwealth of Virginia within 1 year from the date hereof.