

10/34

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION FOR COMPLIANCE
OFFICE FOR SPECIAL PROGRAMS



POST-HEARING DECISION

██████████ Public Schools School Division	██████████ Name of Parents
██████████ Division Superintendent	██████████ Name of Child
██████████ Esquire Counsel for LEA	██████████ Esquire Counsel for Parent/Child
██████████ Esquire Hearing Officer	██████████ Party Initiating Hearing

INTRODUCTION AND ISSUES DEFINED:

This matter came upon the Parents' and ██████████ (collectively "Parents") appeal from the decision contained in the Individual Education Program ("IEP"), dated ██████████ Exhibit 46 introduced by the ██████████ Public Schools ("PS") ("IEP"). The parties established several issues as contained in the "Request for Due Process Hearing" and "Allegations of Substantive and Procedural Violations," both filed by the Parents.

Before the hearing, the issue of burden of proof was argued by counsel. As stated on the record, the burden of proof was placed on the Parents as the party seeking to change the IEP. See *Bales v. Clarke*, 523 F.Supp. 1366, 1370 (E.D.Va. 1981); *Hartmann v. Loudoun County School Board*, 118 F.3d 996, 1000-01 (4th Cir. 1997), cert. denied, 118 S.Ct. 888 (1998); *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), aff'd, 486 U.S. 883 (1984); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990), cert denied 500 U.S. 905 (1991) relying on *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), and *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), aff'd 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984) where the Court found that the burden of proof was placed on the party "challenging the student's IEP," based on the statutory "presumption" in favor of the education placement; thus, the party "attacking the IEP" has the burden of showing why the IEP was deficient.

During the Hearing, the Parents objected to the testimony of several ██████████ PS witnesses on the basis that they had violated the "Rule on Witnesses," issued at the beginning of the Hearing. During the Hearing, a witness disclosed that ██████████ had seen a video with other witnesses who

discussed its contents as well as [REDACTED] transition to the [REDACTED] from [REDACTED] home. These discussions occurred before anyone testified. A review of the record and the affidavit filed herein reveal that these witnesses did not violate the Rule and, therefore, their testimony shall be admitted/considered. See *Bennett v. Commonwealth*, 236 Va. 448, 466 (1988), wherein the Court opined that the judge has the discretion to allow the witness' testimony even where the Rule is actually violated.

As stated below, the Parties, during the Hearing, entered into an agreement which addressed reimbursement and compensatory education issues.

PROCEDURAL BACKGROUND

On [REDACTED], the [REDACTED] PS held the requisite meeting which generated the IEP. The Parents duly appealed. Several Pre-Hearing Conferences were held and were unremarkable with exception that the parties established issues and deadlines, by agreement. (See prior Pre-Hearing Reports.) The hearing on the merits was held on [REDACTED] and [REDACTED] at which time the parties presented evidence and argument.

At the end of the Hearing, the parties requested the opportunity to file memoranda in support of their position. As a result, the parties filed their memoranda on [REDACTED]. The date for the decision was [REDACTED], which date was continued to [REDACTED], due to a family emergency. These dates were in the best interests of [REDACTED] on the basis that the complexity of the issues required a thorough understanding of the facts and law.

FACTUAL FINDINGS

While the factual evidence was not in dispute, the opinions of the experts conflicted.

In regard to the evidence, [REDACTED] ("[REDACTED]") is an [REDACTED] year-old [REDACTED] with bilateral arachnoid cysts involving an absence of much of the temporal lobe of the brain, two brain cysts, genesis of the corpus callosum, hydrocephalus, a mixed seizure disorder and a mild optic nerve hypoplasia with cortical visual impairments. [REDACTED] has a severe loss of function in the temporoparietal lobes of [REDACTED] brain. This result, in the clinical signs and symptoms, was consistent with autism. This impairs [REDACTED] language, behavior, sensory integration visual, and social skills. [REDACTED] has virtually no communication skills. Secondary to [REDACTED] condition, [REDACTED] has been diagnosed with epilepsy, disruptive behavior disorder, mental retardation (moderate to severe) and central precocious puberty. [REDACTED] exhibits "target behaviors" which include, *inter alia*, hitting, pushing, head butting, head banging on hard surfaces, throwing [REDACTED] head backwards or head thrusts, foot drops, body tensing, refusal to comply with simple requests, avoidance by escape, inability to understand danger (*e.g.*, touching a hot stove, running into the street), screaming and patterns of aggressive behavior. Further, [REDACTED] cannot deal with transition or change in [REDACTED] environment, unless such is gradual. Small changes (such as, *e.g.*, loud noises, inappropriate peer interaction, blinking lights and other unanticipated stimuli), can trigger the occurrence of "target behaviors." To

complicate matters, [REDACTED] has surgically-placed shunts to drain fluids, maintain normal pressure and assure that no further damage to brain tissue occurs. As a result, the existence of "target behaviors" is life threatening. (In [REDACTED], [REDACTED] shunts were compromised as an apparent result of this behavior, causing a life-threatening situation.) The other parts of [REDACTED] brain are available for learning. As a result, [REDACTED] educational needs can only be satisfied by a consistent approach effectuated throughout [REDACTED] waking day.

At the [REDACTED] School in [REDACTED], the child's needs were, during the latter part of [REDACTED] second year, neglected; a different placement was required. According to [REDACTED], the environment was problematic because it lacked the necessary consistency and structure. As a result, [REDACTED] evidenced an increase in "target behavior" and a regression in skills.

Through the IEP process, [REDACTED] was placed at [REDACTED] a residential facility. [REDACTED] suffered a second period of decompensation, despite the utilization of highly-skilled and trained aides/professionals. As a result, [REDACTED] was discharged in the summer of [REDACTED].

In response to [REDACTED] PS's inability to place the child, the parents found the financial resources to place the child and the [REDACTED] ("[REDACTED]"). The result was miraculous. [REDACTED] target behaviors were neutralized or significantly reduced. The [REDACTED] created a detailed protocol to ensure [REDACTED] success in aftercare. This protocol included extensive use of the Applied Behavioral Analysis ("ABA").

[REDACTED] PS's initial response to [REDACTED] situation upon [REDACTED] release was diligent. [REDACTED] PS attempted to place [REDACTED] in residential treatment. However, the attempt failed, in part, because of the liability associated with the shunts and [REDACTED] target behavior. In the meantime, [REDACTED] PS offered a minimal amount of "homebound" services (five hours per week). This offer was rejected by the Parents as insufficient. In time, [REDACTED] PS developed the prospect of placement at the [REDACTED] school.

Several, inconclusive, IEPs were performed between [REDACTED] release from [REDACTED] and [REDACTED]. [REDACTED] PS searched for residential placement while the parents advocated "home-based" services. As a result, the [REDACTED] IEP was "tabled" to allow [REDACTED] PS the opportunity to investigate and generate an alternative for such services. [REDACTED] case manager for the IEP process and for services under the Comprehensive Services Act, testified that this task was ignored because [REDACTED] did not "know what a home-based IEP or instructional program might look like." As a result, the alternative of home-based services was never developed by [REDACTED] PS when generating the [REDACTED] IEP.

Meanwhile, after [REDACTED], the Parents developed their own, *de facto* "home-based" structure, based on the [REDACTED] protocol and using funds from CSA Family Assessment and Planning Team and other government/charity sources. [REDACTED] was trained at [REDACTED] to implement this protocol, and worked closely with staff from this facility to create a home environment consistent with the [REDACTED] protocol. As a result, [REDACTED] thrived at the home, educationally, socially, etc.

The IEP was generated and rejected by the Parents. According to the Parents, the document simply ignored the alternative of home-based services, the need for transition and, in general, [REDACTED] needs/problems. In response, during the Hearing, [REDACTED] PS committed to a transitional period whereby [REDACTED] would be placed in a room by [REDACTED] with professional staff, small group participation and trips into the community. One-on-one interaction with staff would occur as needed. To the detriment of [REDACTED] PS' position, it would not allow the same caretaker to conduct the interaction on the basis that [REDACTED] PS wanted to prevent bonding/dependence. In time, [REDACTED] would transition to small groups and/or a group setting. During the Hearing, [REDACTED] PS committed to a transitional period from home to school, lasting no more than one quarter of the school year. Further, [REDACTED] would be transported *via* taxi with an attendant/parent. (These commitments were not part of the IEP, despite extensive discussions regarding the necessity of a transition plan.)

All expert designations are accepted and incorporated by referenced. Further, their opinions and the factual basis for their opinions are incorporated by reference as if set forth in full. These opinions were considered and assigned the appropriate weight.

The experts who testified on behalf of the parents were given great weight on the basis of their level of expertise and extensive professional background with [REDACTED]. These professionals were not "hired guns." They showed no signs of bias. By their observations and demeanor, they provided true insight into [REDACTED] needs. Uniformly, they testified that [REDACTED] would not receive an educational benefit from the [REDACTED] Program at the [REDACTED]. Further, placement at this facility would cause [REDACTED] to digress. Further, they testified that [REDACTED] current situation provided [REDACTED] educational benefit. The testimony was based on extensive professional/social contact with [REDACTED], visits to [REDACTED] home, input from the Parents, input from the [REDACTED] and visits to the [REDACTED] including an interview with its Vice Principal. In contrast, the testimony from the experts who testified on behalf of [REDACTED] PS were, at best, "hired guns." They had little contact with [REDACTED]. While these experts had a goal or game plan regarding placement at the [REDACTED]; their supporting explanations were superficial. Their testimony was further discounted by their lack of expertise or empirical data regarding the extreme needs of [REDACTED]. For example, [REDACTED] defined "intermittent reinforcement," as a positive attribute, simply ignoring the ABA analysis. In short, the Parents "won" the "battle of the experts" in this case.

ANALYSIS:

I. Does the [REDACTED] IEP provide Free Appropriate Public Education to [REDACTED]?

In Board of Education v. Rowley, 458 U.S. 176, 207 (1982), the Supreme Court found that an IEP must be "reasonably calculated to enable the child to receive educational benefits." In Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir. (1985), the Court opined that no single substantive standard can describe how much educational benefit is sufficient to satisfy IDEA and that educational services must be reasonably calculated to produce more than

some minimal academic achievement. In Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), the Court stated that IDEA "calls for more than a trivial educational benefit," but requires the child to receive a meaningful benefit and an opportunity to receive significant learning.

behavioral needs cannot be separated from educational needs. requires the protocol (with its ABA-based approach) to be effectuated every waking moment to ensure any educational benefit from any IEP. As a result, the IEP did not provide Free Appropriate Public Education ("FAPE").

A. At This Time, The Behavior Transition Program at the Cannot Provide with FAPE.

The Program at the was PS' last and only available option, after attempting residential placement. This was evidenced by the PS emails, inability to provide a plan involving home-based services and the IEP audio tapes. This Program appears to be the last stop or holding ground for children who cannot function in other environments at the (or other facilities) because of their behavior problems, mental and physical limitations, etc. The goal is to address these problems and place the child in a less restrictive environment. PS failed to understand that this process was accomplished by with its ABA protocol. As a result, there exists little rationale to warehouse at this facility most likely indefinitely, despite PS' post-IEP commitments to transition. More importantly, however, is the reality that will reject this environment for a variety of reasons as contained in the testimony from the Parent's expert witnesses. (For example, testified that the was not set up to supply the necessary structure.) As a result, will decompose, exhibit the "target behaviors," and lose whatever stability gained from attendance at Further, the onset of "target behaviors" cause a life-threatening situation. At this time, this alternative appears to be, at best, PS' attempt to "roll the dice" and "hope for the best." The evidence showed that is at a crossroads because of the success of the protocol. The potential for failure outweighs any such hope.

Such failure would exist despite PS' attempt to implement a transitional plan (articulated during the Hearing, but not contained in the IEP). The overwhelming evidence is that this child cannot endure extraneous stimuli in environment. The cannot shelter from its own environment. As a result, the daily events of placing in a taxi, walking from the taxi to the 's door, walking down its hallway and interacting with different caretakers, dealing with small groups/peers, etc., would cause to decompose, as seen at in and in . Moreover, placement would cause the onset of the life-threatening "trigger behaviors."

B. Current Placement.

At this time, requires implementation of the protocol (with its reliance on the ABA) at home. This is effectuated by current placement. is familiar with the protocol, parents, caretakers and siblings. The environment was inspected and approved by

staff from [REDACTED] [REDACTED] was trained in the [REDACTED] aftercare. The result is [REDACTED] comfort. [REDACTED] is thriving. The data collected from [REDACTED] current caretakers reflect that [REDACTED] "target behaviors" are in the acceptable range, consistent with the goals of [REDACTED]. Further, as articulated by the Parent's experts, interaction with [REDACTED] siblings allows [REDACTED] learn technics/stimuli which can be generalized to the community including eventual placement at a residential setting and/or the [REDACTED]. In short, [REDACTED] educational, social and physical needs are satisfied as evidenced by [REDACTED] current placement.

C. Home-based Setting is the Least Restrictive Setting.

The last restrictive environment for [REDACTED] is a home-based instructional setting. As stated above and given the severity of the disabilities, home-based instruction is the least restrictive setting.

In Easton Area School District, 37 IDELR 25 (SEA Pa. 2002), the Administrative Officer set forth a two prong test on the issue of whether homebound (as opposed to "home-based") instruction: (1) is the child included (has the opportunity to interact with non-disabled peers), and, if not, (2) is he included to the maximum extent possible. *Relying upon Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989). The Court in D.B. v. Ocean Tp. Bd. of Educ., 985 F.S. 457, 503 (D.N.J. 1997), addressed the issues regarding "least restrictive setting" and placement at a residential facility by set forth nine factors to consider: (1) the efforts of [REDACTED] PS to determine if residential placement was necessary; (2) comparison of the benefits between the settings; (3) the effect of [REDACTED] inclusion on other students; (4) the physical and emotional conditions interfering with [REDACTED] ability to learn at the [REDACTED]; (5) the behaviors fundamentally interfering with [REDACTED] ability to learn in local placement; (6) the health or educational professional working with [REDACTED]; (7) [REDACTED] unrealized potential; (8) [REDACTED] past experiences which support residential placement; (9) the educational purpose for such placement. By analogy, these factors can be applied to the instant case.

As stated above, [REDACTED] condition is extreme. Placement at [REDACTED] School and [REDACTED] caused tremendous problems for [REDACTED]. While success was achieved at [REDACTED], the advantages gained therein must be maintained. Experts for the Parents were clear that placement at the [REDACTED] would be disastrous, causing re-emergence of the life-threatening "target behaviors."

[REDACTED] PS' transitional plan would have a negative effect on the other students. Experts from [REDACTED] PS related that [REDACTED] would be provided a room to [REDACTED], [REDACTED] was a priority. Unfortunately, the evidence would verify that other needy children would be displaced and, by implication, suffer a negative effect. In D.B v. Ocean Township Bd. of Educ., 27 IDELR 151 (1997), the Court considered the negative displacement of other, equally-problematic children, when implementing an IEP. This division of resources must be considered. While [REDACTED] PS' intention is clear, its implementation will undoubtedly have a negative effect on other needy children.

D. Procedural Errors.

1. The Cost for [REDACTED]

The Parents argue that [REDACTED] PS should bear the cost of staff provided by [REDACTED] ("[REDACTED]"). [REDACTED] involvement was crucial to [REDACTED] educational stability. Because the [REDACTED] IEP is inadequate and because [REDACTED] PS failed to address [REDACTED] educational needs in a timely fashion, such cost should be assessed against [REDACTED] PS. As stated earlier, the [REDACTED] IEP is inadequate. This, coupled with the delay, justified the Parents' utilizing [REDACTED]. See 20 U.S.C., Section 1400(c) which requires that "all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designated to meet their unique needs." Such services include psychological services as may be required to assist a child with a disability to benefit from special education. [REDACTED] is such a child.

2. [REDACTED] PS's Failure to Investigate and/or Provide Home-Based Services as an Alternative.

Despite the mandates of applicable state and federal statutes, [REDACTED] PS simply ignored its responsibility to develop an IEP alternative regarding home-based instructional services. See Section 300.551 and 300.26 and 8 VAC 20-80-64 of the Virginia Regulations which states "Home-based instruction shall be made available to children whose IEP's require the delivery of services in the home..." The [REDACTED], IEP was "tabled" to allow [REDACTED] PS the opportunity to investigate this alternative. [REDACTED] failed to comply with this directive. As a result, the IEP team was not provided the necessary information to allow the team to determine the proper placement and goals for [REDACTED].

3. [REDACTED] PS's Failure to Provide a Knowledgeable IEP team member as a violation of 34 CFR Sec. 300.344.

34 CFR Sec. 300.344 requires that a member of the IEP be knowledgeable about the availability of resources of the public agency. While the evidence revealed that [REDACTED] possessed knowledge of the resources of [REDACTED] PS, [REDACTED] testified that [REDACTED] did not have any knowledge of services required regarding a home-based placements. With that said, the evidence was not sufficiently developed as to whether other members of the IEP team possessed such knowledge. As a result, there is no factual basis to conclude that [REDACTED] PS violated 34 CFR 300.344.

4. The IEP process Was Not Dysfunctional.

The Parents argue that the IEP was dysfunctional and, therefore, violative of IDEA's due process guarantee, the Parents assert: (1) the failure of [REDACTED] PS to include [REDACTED] staff in the IEP process; (2) the ever changing [REDACTED] PS members to the various IEP meetings; (3) the often excessive numbers of [REDACTED] PS members at the IEP meetings; and (4) the often disparaging commentary that passed between [REDACTED] PS members; and (5) the failure over five months to clarify the parameters of a home-based IEP.

Assertions 1, 2, 3 and 4 do not render the IEP process dysfunctional; on these assertions, [REDACTED] PS complied with the applicable statutes. In regard to the fifth assertion, [REDACTED] condition is extreme and, therefore, [REDACTED] placement difficult. The delay was understandable as evidenced by [REDACTED] PS' great effort into finding a residential placement for [REDACTED]. While [REDACTED] PS's failure to investigate home-based services is violative of applicable statutes, it did not render the IEP dysfunctional. Accordingly, this argument fails.

5. The Decision to Place [REDACTED] at the [REDACTED] Was Not Predetermined by [REDACTED] PS.

While [REDACTED] inability to generate a home-based instructional setting is suspect, there is simply insufficient evidence to support a conclusion that the [REDACTED] PS members of the IEP team conspired to predetermine [REDACTED] placement at the [REDACTED]. In fact, [REDACTED] PS' diligent attempt to find a residential placement undermines this assertion. Further, upon the realization that residential placement was not available, the only [REDACTED] PS nonresidential placement was the [REDACTED]. Accordingly, the argument fails.

6. The Parents Were Provided Adequate Notice of the Nature of the Proposed Action.

Parent's Exhibit 175 provides adequate notice to the parents as to the nature of the placement. By argument, the Parents contend that they were precluded from introducing evidence upon their reliance that [REDACTED] PS failed to raise the issue at the PreHearing Conference. This argument is waived insofar as it should have been raised and addressed during the Hearing. However, of [REDACTED] specific need in the area of OT and S/L are evidenced by the exhibits provided by the parties such as, e.g., the prior IEPs.

II. **Prevailing Party Status.**

Based on the foregoing and a review of the Settlement Agreement, the Parents are designated the "Prevailing Party."

III. **Interpretation of the Partial Settlement Agreement.**

By letter, dated [REDACTED] Counsel for [REDACTED] PS provided a document, entitled "Partial Settlement Agreement," a copy of which is attached hereto as Exhibit 1. During the Hearing, the parties stipulated that issues regarding reimbursement and compensatory education were settled. As stated in the letter, the parties, by agreement, requested an interpretation of their agreement. After consideration, the amounts of Speech/Language and Occupational therapy to be provided under the Partial Settlement Agreement shall be designated as 10 hours per month, and 8 hours per month, respectively.

RELIEF GRANTED:

For the foregoing reasons, it is hereby ordered that [REDACTED] PS to take the following actions:

1. Execute an IEP for the [REDACTED] school year indicating that [REDACTED] placement is home-based instruction, using the [REDACTED] protocol/recommendations. The IEP is to remain in place for one year unless a review is requested by either party prior to the expiration of one year. The IEP should set forth a realistic goal or time of twelve weeks as the target date to transition [REDACTED] to the [REDACTED] residential treatment or other facility; however, the IEP should reflect that this target date can be adjusted after considering [REDACTED] situation/progress.
2. Revise the goals and objectives of [REDACTED] IEP to include parent input (and treating professionals/caretakers) and the progress made by [REDACTED] in the *interim*.
3. Authorize the [REDACTED] to hire the following staff to implement the goals and objectives of [REDACTED] IEP and to provide related services until such time as [REDACTED] is placed in another location, as follows:
 - A. An instructor to provide [REDACTED] with 1:1 discrete trial instruction for 20 hours per week for 48 weeks or until such time as [REDACTED] is placed in another location, *e.g.* [REDACTED]
 - B. Behavior management services to implement IEP goals relating to skills in the home and the community for 15 hours per week for 48 weeks or until such time as [REDACTED] is placed in another location, *e.g.* [REDACTED]
 - C. An ABA Program Consultant for 5 hours per week for 48 weeks or until such time as [REDACTED] is placed in another location, *e.g.* [REDACTED],
 - D. A Behavioral Psychologist or consultant to provide ongoing data analysis, consultation and training for eighty hours during the school year or until such time as [REDACTED] is placed in another location, *e.g.* [REDACTED];
 - E. A speech therapist to provide 2.5 hours per week of services for 48 weeks or until such time as [REDACTED] is placed in another location;
 - F. An occupational therapist to provide 2 hours per week of services for 48 weeks or until such time as [REDACTED] is placed in another location; and
 - G. A physical therapist to provide 2 hours per month of services for 11 months or until such time as [REDACTED] is placed in another location.
4. Seek an appropriate private placement forthwith.
5. Develop, in collaboration with those professionals working with [REDACTED], an appropriate transition plan to move [REDACTED] to an appropriate school setting.

6. Pay directly or reimburse the [REDACTED] for all costs associated with the implementation of the services ordered above.

And it is further ordered that the Partial Settle Agreement be effectuated in accordance with the interpretation that the amounts of Speech/Language and Occupational therapy to be provided under the Partial Settlement Agreement to be designated as 10 hours per month, and 8 hours per month, respectively.

And its further ordered and or declared that the Parents are declared the prevailing party.

APPEAL RIGHTS

Any appeal of this decision by either party must be instituted in a court of competent jurisdiction within one year of the date of its issuance.

[REDACTED]
Hearing Officer

[REDACTED] 2002
Date

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of this pleading was mailed, *via* facsimile and first-class, postage prepaid mail, this [REDACTED] day of [REDACTED] to:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Virginia [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Virginia [REDACTED]

and via first-class, postage prepaid mail:

Coordinator Due Process and Compliance
Commonwealth of Virginia
PO Box 2120
Richmond, Virginia 23218-2120