

VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES  
OFFICE OF DUE PROCESS AND COMPLAINTS

HEARING OFFICER DECISION



School Division Public Schools Name of Parents \_\_\_\_\_  
Division Superintendent \_\_\_\_\_ Name of Child \_\_\_\_\_  
Counsel Representing LEA \_\_\_\_\_ none  
Counsel Representing Parent/Child \_\_\_\_\_  
Hearing Officer \_\_\_\_\_ Party Initiating Hearing \_\_\_\_\_

- I. HISTORICAL OVERVIEW - \_\_\_\_\_ is the \_\_\_\_\_ of an autistic child who was found to be eligible for services on \_\_\_\_\_. An IEP was developed on \_\_\_\_\_. \_\_\_\_\_ became dissatisfied with \_\_\_\_\_ progress and unilaterally removed \_\_\_\_\_ from the \_\_\_\_\_ Public Schools (PS) and placed \_\_\_\_\_ at the \_\_\_\_\_. \_\_\_\_\_ then filed a complaint that the PS had failed to provide \_\_\_\_\_ child with a free and appropriate public education (FAPE) based essentially on \_\_\_\_\_ perceived lack of progress. \_\_\_\_\_ also complained that the school system had failed to hold a mandatory annual review of Individualized Educational Plan (IEP). The Office of Due Process and Complaints found PS to be in compliance and a Letter of Findings was sent to the parent on \_\_\_\_\_. In the said Letter of findings the parent was advised of \_\_\_\_\_ right to appeal the Finding and that \_\_\_\_\_ had a right to proceed to Due Process. \_\_\_\_\_ via \_\_\_\_\_ letter of \_\_\_\_\_ chose to do both. The compliance issue was referred to \_\_\_\_\_, an official Complaint Appeal Reviewer, and I was appointed the Hearing Officer to handle the Due Process Hearing.
- II. REVIEW OF DUE PROCESS PROCEDURE - \_\_\_\_\_ requested due process in \_\_\_\_\_ letter of \_\_\_\_\_. The undersigned Hearing Officer was appointed on \_\_\_\_\_. On \_\_\_\_\_ the Hearing Officer set the hearing to be held on \_\_\_\_\_ and the opinion deadline was \_\_\_\_\_. A continuance was requested by the parties who had conflicts with the date initially set and on \_\_\_\_\_ the Hearing Officer continued the hearing to \_\_\_\_\_ but the opinion deadline remained \_\_\_\_\_. After receiving word that the parties wanted to attempt mediation, the Hearing Officer granted the parties motion \_\_\_\_\_

to have the hearing date continued to \_\_\_\_\_ and set a deadline for opinion on \_\_\_\_\_. Because mediation may result in a plan that would be beneficial to the parties the continuance was granted. The mediation was unsuccessful and the parent requested another continuance due to the unavailability of \_\_\_\_\_ witnesses. A continuance was granted and the hearing was set for \_\_\_\_\_ with a decision date of \_\_\_\_\_. Because this is a "reimbursement case" and the child's private placement will be unaffected by the Hearing Officer's ruling and the fact that it would be beneficial to have all available witnesses present it was felt that the continuance was warranted and in the child's best interest.

III. ISSUES - The following issues were raised at the hearing.

1. Did the parent provide the PS appropriate notice prior to making a unilateral placement of \_\_\_\_\_ in a private school?
2. Has the parent shown by a preponderance of the evidence that the PS has failed to offer \_\_\_\_\_ a free and appropriate public education (FAPE) reasonably calculated to afford meaningful educational benefit?
3. Has PS offered \_\_\_\_\_ a free and appropriate public education program reasonably calculated to afford meaningful educational benefit for the upcoming school year?

IV. ANACHRONISMS USED IN THIS OPINION

FAPE	Free and Appropriate Public Education
IEP	Individual Educational Plan
LEA	Local Educational Authority
PS	Public Schools
VCU	Virginia Commonwealth University
VDOE	Virginia Department of Education

V. DOCUMENTS ADMITTED TO RECORD

The following records were offered as exhibits by the parties and admitted to record without objection from either party.

<u>Exhibit #</u>	<u>Date</u>	<u>Exhibit Description</u>
1	Various	Cumulative Health Record and Immunization Record
2	/	Hospital: Speech Therapy Initial Evaluation/Plan of Care

3	/	Comprehensive Physical Examination Report
4		Hospital Evaluation
5		Classroom Observation
6		Hearing Screening
7	/	Hospital Educational Release/Permission Form
8	/	PS Request for Release of Confidential Information
9	/	PS Educational Evaluation
10	Various	PS Documentation of Parental Contact Sheet
11	/	Student Emergency Information Sheet
12	Undated	Special Education Eligibility Update
13	/	PS Summary of Eligibility Committee Minutes
14		Individualized Education Program
15	/	Notice of Placement
16	/	PS Personal Data Card
17	/	Individualized Education Progress Report
18	/	Letter from to
19	/	( Updated Evaluation
20	Undated	PS IEP Progress Report
21	Various	Transcript/Attendance Card
22	/	Letter from
23	/	Letter from
24	/	Program
25		Letter from
26	/	Letter from
27		Letter from
28		Letter from
29		Progress Report
30		Letter from
31	/	Individualized Education Plan
32		IEP (with parent's handwritten notes)
33	/	Letter from to
34	/	Letter from to
35		Letter from to
36	/	Letter from
37	/	Notice of Complaint from Virginia Department of Education
38	/	IEP Progress Report
39	/	PS Response to VDOE Complaint
40	/	VDOE Letter of Findings
41		Letter from to (VDOE)
42	/	Letter from to

43	/	Notice of Appeal Request		
44	/	PS Response to Appeal		
45	/	Letter from		to VDOE
		Complaints Coordinator		
46	/	Letter from		to
		with attachments		
47	"	Letter from		to
		, Esq.		
48	/	Letter from		to
		re: Mediation		
49	/	Letter from		o
		VDOE		
50	"	Letter from	to	and "
51	"	Decision letter from		to
		and		
52	/	Letter from		to
53	/	Memorandum from		re: Mediation
		Scheduling		
54	/	Letter from		Esq. to
55	"	E-mail from	to	re:
		Mediation Dates		
56	/	Letter from	to	
57	"	Mediation Session Outline		
58		Cumulative Items Acquired Graphs		
59	Undated	Handout re: Autism Spectrum Disorders		
60	Undated	Various Pages from House Document No. 21 (2002): "Services Available for Individuals with Autism and Pervasive Developmental Disorders"		

The following records were admitted to record by the Hearing Officer.

- HO1. Letter from Hearing Officer to all parties establishing initial date for hearing.
- HO2. Letter granting continuance request by PS to
- HO3. Letter from to Hearing Officer regarding missing pre-hearing telephone conference.
- HO4. Request from PS for extension to allow time for mediation.
- HO5. Letter from Hearing Officer granting continuance to allow time for mediation and setting a control date of
- HO6. Letter from counsel for PS that mediation was not successful.

HO7 Pre-Hearing Report of Hearing Officer.  
 HO8 / Letter from requesting a continuance.  
 HO9 / Fax to PS counsel regarding the continuance of hearing.  
 HO10 / Letter to all parties granting parent's request for an extension and setting the new hearing date at  
 HO11 Letter from regarding the hearing.

VI. SUMMARY OF TESTIMONIAL EVIDENCE.

At the suggestion of the Hearing Officer it was agreed that the issue of whether the parent had provided notice to the PS prior to placing privately was addressed first. was the only witness with regard to the issue. indicated that on directed a letter to regarding concerns that needed one on one attention. (See exb. 22) also pointed out that on sent a letter to indicating that the IEP developed for did not offer a free and appropriate public education.

VII. RULING OF HEARING OFFICER

FIRST ISSUE - After an exhaustive review of the documents and the testimony of it appears to the Hearing Officer that the parent has failed to show by a preponderance of evidence that provided the PS with the required 10 business day notice that was going to place in a private facility. Accordingly, the PS is not liable to the parent for reimbursement of the private placement expenses.

SECOND ISSUE - Because the ruling with regard to the lack of notice resolves the reimbursement issue it is not necessary to determine if the IEP offered by PS actually provided the child with FAPE.

THIRD ISSUE - With regard to the third issue the parent and the PS both agreed that the IEP is appropriate and did offer the child FAPE. Accordingly, the issue of reimbursement for the current school year is resolved in favor of the LEA.

VIII. RATIONAL FOR RULING

This case concerned an autistic child. As so often happens it takes awhile before a diagnosis is made and a parent is made aware that the child may seek early intervention from the school system. was born on . and evaluated in | On the PS found to be eligible to receive services and on PS developed an IEP

that provided 3-4 hours per day of special education classes designed for students with developmental delays and one hour per week of speech therapy. (See exb. 14). The [redacted] seemed pleased with the services but after educating [redacted] about programs available for autistic children [redacted] made a decision to attempt to have [redacted] enrolled in the [redacted] Center. [redacted] directed a letter to [redacted] PS special education teacher, [redacted]. In the letter [redacted] thanked the teacher for all [redacted] had done but indicated that [redacted] hoped [redacted] would be accepted at the [redacted] Center. In fact [redacted] asked the teacher to pray that [redacted] was admitted to the program. [redacted] indicated that it was [redacted] opinion that autistic children need intense one on one early intervention. This letter was not addressed to [redacted] PS directly and it did not inform the school system that its IEP failed to offer FAPE or that [redacted] was seeking reimbursement.

On [redacted] [redacted] directed a letter to [redacted] PS in care of [redacted]. (See Exb. 23) In that letter [redacted] indicated that the program being provided [redacted] was not appropriate for autistic children and requested that a new IEP meeting be held soon to develop a more appropriate program for [redacted] education. This letter does not indicate that [redacted] was going to place the child privately for failure of [redacted] PS to provide FAPE or that [redacted] was going to request reimbursement.

On [redacted] [redacted] enrolled [redacted] at the [redacted]. Two months later on [redacted] [redacted] writes [redacted] former teacher, [redacted], and asks again for a new IEP meeting and indicates that [redacted] has already placed the child privately and that [redacted] will be requesting reimbursement.

*34 CFR §300.403 (d)* requires a parent to give notice to the LEA of [redacted] intent to place the child privately. The notice may be given orally at the most recent IEP meeting or in writing at least 10 business days prior to the enrollment of the child at the private school. The notice should inform the school system that the parent feels the LEA is not providing the child with FAPE, that the child will therefore be placed privately and that the parent will be seeking reimbursement from the LEA. Unfortunately for the parent in this case it does not appear this notice was given. The parent signed the most recent IEP and agreed to the proposed services. This was presumptively done because based on the parent's knowledge of autism at that time [redacted] felt it to be appropriate. When the [redacted] learned more about autism and the various approaches, [redacted] began to question the value of the IEP [redacted] had previously agreed to. Since [redacted] had not given the required notice at the time of the last IEP meeting the regulations required [redacted] to give a written notice. [redacted] did direct the letters mentioned above but neither letter individually or taken together informs the [redacted] PS of the information required by *34 CFR §300.403 (d)*.

There are aspects of the initial IEP which to this Hearing Officer raise questions as to whether it offered [redacted] a free appropriate public education reasonably calculated to provide meaningful educational benefit. It is noted that [redacted] PS did make

significant changes in the IEP it developed on . It seems that the purpose of 34 CFR §300.403 (d) is to give the LEA one last opportunity to offer FAPE. If an LEA has failed to offer FAPE to a child and is suddenly put on notice that it faces the possibility of paying for a private placement if it does not provide FAPE, then the LEA may act expeditiously to provide FAPE.

Prior to holding a school system liable for the cost of a private placement the parent should provide the LEA with the required notice. In most cases this occurs at the IEP meeting where the parent rejects the plan. Otherwise a written notice is required. In this case we have neither. The Hearing Officer also notes that even after the PS offered what everyone has agreed is FAPE the parent has indicated that intends to continue with the private placement. This may mean that the parent does not wish to expose child to another change in education environment. However, it may also mean that the parent simply prefers the private school placement irrespective of the programs available from the PS.

Assuming for the sake of argument that PS failed initially to provide with FAPE, it is the holding of this Hearing Officer that the lack of notice prior to the placement of the child in a private school system under the facts and circumstances of this case, is fatal to the parent's request for reimbursement.

- IX APPEAL RIGHTS - This decision is final unless one of the parties exercises their rights to appeal the decision within 12 months of the date of this decision to the Circuit Court for the or the United States Federal District Court for the

\_\_\_\_\_  
., Virginia State Hearing Officer

X. CERTIFICATION:

I hereby certify that I have on this done the following:

1. Sent the original of this opinion, the record and all exhibits to:  
Division Superintendent for the Public Schools at

As a matter of information no transcript was prepared prior to rendering this decision. A verbatim record was taken by shorthand reporter with the firm of and by law will maintain records beyond the appeal period from which a transcript may be obtained. office address is VA office

telephone is \_\_\_\_\_ or may be reached by e-mail at \_\_\_\_\_

2. Copies of this decision were sent to the following:

\_\_\_\_\_, VA 23218

Director of the Office of Due Process & Complaints,  
Department of Education, P.O. Box 2120, Richmond, VA 23218-2120.

\_\_\_\_\_, Hearing Officer \_\_\_\_\_ Date \_\_\_\_\_