

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION FOR COMPLIANCE
OFFICE FOR SPECIAL PROGRAMS



POST-HEARING DECISION

[Redacted] Public Schools
School Division

[Redacted]
Name of Parents

[Redacted]
Division Superintendent

[Redacted]
Name of Child

[Redacted] Esquire
[Redacted] Esquire
Counsel for LEA

[Redacted] Esquire
Counsel for Parent/Child

[Redacted] Esquire
Hearing Officer

[Redacted]
Party Initiating Hearing

INTRODUCTION AND ISSUES DEFINED:

This matter came upon the Parents' and [Redacted] (collectively "Parents") appeal from the decision contained in the Individual Education Program ("IEP"), dated [Redacted] Exhibit 17 ("[Redacted] IEP"). The parties established the following issues to be addressed:

PreHearing:

- Whether the child was provided Free Appropriate Public Education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA") via the [Redacted] IEP?

During the Hearing:

- Which party had the burden of proof?
- Whether the absence (from the [Redacted] IEP) of individual psychotherapy for the child, defined as regularly scheduled, individual therapy provided by a psychiatrist, psychologist or licenced social worker, rendered the [Redacted] IEP deficient in terms of providing FAPE for the child?

By Memorandum:

- Whether the Parents' Complaint that the [Redacted] IEP failed to provide individual psychotherapy for the child was timely raised?

Based on the evidence, the Hearing Officer finds that the [REDACTED] IEP provided FAPE.

PROCEDURAL BACKGROUND:

On [REDACTED] the [REDACTED] held the requisite meeting which generated the [REDACTED] IEP. The Parents duly appealed. Several Pre-Hearing Conferences were held and were unremarkable with exception that the parties established deadlines by agreement and stipulated that technical deficiencies regarding deadlines, notifications and similar procedural requirements involved in the [REDACTED] IEP process were waived. (See prior Pre-Hearing Reports.) The hearing on the merits was held on [REDACTED] and [REDACTED], at which time the parties presented evidenced and argument.

FACTUAL FINDINGS:

1. The Portion of "[REDACTED]'s Proposed Findings of Fact, Conclusions of Law and Argument" from page 3, the Section entitled "[REDACTED] Received ... Education Services" through and including page 15, Section entitled "The Parents have taken ... [REDACTED]" are incorporated herein by reference as if set forth in full. These statements are deemed true and accurate.
2. The following number paragraphs from Portion of the "Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of [REDACTED]" are incorporated by reference as if set forth in full. These statements are deemed true and accurate: Paragraph Nos. 1, 2, 3, 4, 5, 6, 7, 10, 11, 14, 16, 17, 19, 23 and 24. In regard to Paragraph 8, the Hearing Officer finds that the child's mental-health diagnosis was the subject of several evaluations and, to a certain extent, subject to a dispute as between the professionals. Based on the evidence and conflicting opinions, the written opinion of [REDACTED] M.D., as contained in [REDACTED] Clinical Resume, dictated [REDACTED] was considered and given great weight. ([REDACTED] Exhibit 57.) In this document, [REDACTED] opined that the child suffers from: (1) [REDACTED] disorder, recurrent. Rule out [REDACTED] [REDACTED]s." Although [REDACTED] did not testify at the hearing, [REDACTED] opinion is timely and consistent with other mental-health professionals who evaluated the child.
3. 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. In regard to MA-13, the letter report from [REDACTED] was considered; however, [REDACTED] was not designated as an expert and did not testify at the hearing. The opinion stated in MA-13 was considered and assigned weight, based on the premise that [REDACTED] was a neurologist as referenced on page 624 of the Transcript as well as [REDACTED] prior treatment of the child. In regard to [REDACTED] testimony was considered, but not as an expert.

4. The testimony of [REDACTED] designated as an expert witness in school psychology and special education (Transcript, Page 78, *et seq.*) is incorporated by reference as if set forth in full.
5. The testimony of [REDACTED] designated as an expert witness in special education (Transcript, Page 92, *et seq.*) is incorporated by reference as if set forth in full.
6. [REDACTED] testimony regarding a description of the [REDACTED] School, from page 437, line 16, through page 438, line 22 is incorporated by reference as if set forth in full, and deemed true and accurate.
7. Evidence that the child could not consistently effectuate homework assignments is incorporated herein by reference and deemed true and accurate.
8. Evidence that the child was consistently adverse to attending school (*e.g.*, Exhibit MA-41) is incorporated herein by reference and deemed true and accurate. However, the child's attendance record was unremarkable. ([REDACTED] Exhibit Nos. 35 and 88; Transcript, page 195.)
9. Evidence that the child experienced relationship or familial problems outside of school is incorporated herein by reference and deemed true and accurate.
10. Evidence that the child performed at home (outside-of-school) acts of violence, exhibited a behavior of sleep-pattern deviation, and communicated statements of suicide ideation are incorporated by reference, and deemed true and accurate.
11. Evidence that the child performed satisfactory academically at the [REDACTED] School, but did not accomplish [REDACTED] potential, is incorporated herein by reference as if set forth in full and deemed true and accurate.
12. Evidence that the child performed socially satisfactory at [REDACTED] School, with the exception of the cigarette incident and after-school incident, are incorporated herein by reference as if set forth in full and deemed true and accurate. The Hearing Officer found that these two incidents were minor in nature.
13. Evidence that the child did not have physically violent outbursts or rage attacks, destroy property or exhibited signs of self mutilation at school were deemed true and accurate.
14. Notification that the issue of whether individual [REDACTED], as defined by the parents as regularly scheduled, individual therapy provided by a psychiatrist, psychologist or licenced social worker, was raised for the first time on appeal.

ANALYSIS:

I. Which party had the burden of proof?

By agreement [REDACTED] introducing evidence initially was not a waiver regarding which party possessed the burden of proof.

After reviewing the authorities provided by the parties, the Hearing Officer concludes that the issue of which party has the burden of proof at the administrative hearing has not been addressed by the Fourth Circuit. The crux of the holdings in cases referenced by both Memoranda provide that the party who challenges the decision of the administrative process, *i.e.*, the decision of the hearing officer, has the burden of proof. (The holdings in Stemple v. Board of Education of Prince George's County, 623 F.2d 893 (4th Cir. 1998) *rev'd on other grounds by Burlington*, is distinguished because the placement of the burden of proof at an administrative hearing was established by Maryland statute.) The closest applicable decision is Bales v. Clark, 523 F.Supp. 1366 (1981) wherein the Court, after a bench trial, established the burden of proof on the plaintiff/parent to establish that the public-school placement was inappropriate and that private placement was appropriate. By way of analogy and consistent with the logic of the referenced authorities and applicable statutes, the Hearing Officer is persuaded that the burden of proof is on the party challenging the IEP, *i.e.*, the Parents. See 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. (As an aside, the decision that the child received FAPE would be the same even if [REDACTED] possessed the burden of proof; the strength of the evidence regarding the validity of the IEP was sufficient to carry this burden.)

II. Was the Child provided FAPE?

The child was provided FAPE. IDEA, 20 U.S.C. Section 1400 *et seq.*, has been called a "vague and difficult statute." Cefalu v. East Baton Rouge Parish Sch. Bd., 103 F.3rd 393, 397 (5th Cir. 1997). However, certain case law provides some guidance.

Allowing reimbursement for the placement at the [REDACTED] School requires the Hearing Officer to consider application of IDEA to a "voluntary" placement of the child in a restrictive private school. Under certain limited circumstances, IDEA does authorize full reimbursement for unilateral parental placements in private schools. School Comm. of Burlington v. Department of Education of Mass., 471 U.S. 359, 369 (1985). In order to require [REDACTED] to fund a residential placement, the evidence must show that such placement is essential for the child "any"

educational progress at all. Burke County Board of Education v. Denton, 895 F.2d 973, 980 (4th Cir. 1990). Further, IDEA does not require [redacted] to reimburse the Parents for a unilateral placement, if [redacted] had made an "appropriate educational program" which is reasonably calculated to offer a child some educational benefit." Board of Education v. Rowley, 458 U.S. 176, 206-207 (1982). The purpose of the IDEA is to provide a "basic floor of opportunity" to a disabled child and not to provide this child with a program designed to "maximize the potential" of such child. Rowley, 458 U.S. at 201. Equal to this mandate, IDEA further requires that [redacted] provide the child with the least restrictive environment as close as possible to the child's home. Given this standard, [redacted] provided this "opportunity" in the [redacted] IEP.

Placement at the [redacted] would have provided an educational benefit to the child. The child would have received regular and as-needed consultation with a clinical professional and group counseling in addition to the appropriate hours of education from teachers especially trained and experienced in working with students with [redacted]. Specifically, the [redacted] has professionally-trained staff members who could provide support to the child including a full-time psychologist and social worker, two counseling- resource teachers and a guidance counselor (Transcript, page 232.) The child could meet with the psychologist or social worker as needed or on a regular basis. (Transcript, pages 147, 286 and 384.) All teachers of the core classes are certified to teach students with [redacted] and/or [redacted] disabilities. (Transcript, pages 236, 289.) The clinical staff at the [redacted] provides services regarding the development of socialization skills, interpersonal relations, coping skills, and play and leisure skills. (Transcript, page 206-207.) This evidence was undisputed.

The Parents contend that the [redacted] was inappropriate and, thus, the [redacted] IEP denied the child FAPE. Further, the Parents contend that placement at the [redacted] School was appropriate and, therefore, [redacted] is liable for the cost thereof. In support of these contentions, the Parents rely on: (1) [redacted] letter opinion, MA-13; (2) [redacted] opinion; (3) the absence of individual psychotherapy at the [redacted] (4) the progress the child made at the [redacted] School; (5) the child's consistent desire to stay in bed and avoid school while at [redacted] School; (6) the child's inability to perform homework while at [redacted]; and (7) the child's mental instability and its effect on [redacted] familial environment. Based on the evidence, these issues are addressed:

- (1) In regard to MA-13, the Parents declined to introduce [redacted] testimony regarding [redacted] findings. Similarly, the Parents declined to call [redacted] to testify as to why placement at the [redacted] school was inappropriate (except on the issue regarding the need for individual psychotherapy). The absence of such testimony (without explanation) discounts (or even neutralizes) the value of [redacted] opinion as expressed in MA-13.
- (2) In regard to [redacted] opinion, [redacted] did not testify that the child absolutely needed residential treatment to obtain any educational benefit. Similarly, [redacted] did not opine that the child absolutely needed individual psychotherapy as a requisite

to [REDACTED] obtaining any benefit from [REDACTED]. Similarly, [REDACTED] did not opine that the child absolutely needed individual psychotherapy as a requisite to [REDACTED] obtaining any benefit from a school setting. Instead, [REDACTED] opined, from page 585 of the Transcript, that the [REDACTED] School provided, through its "wrap-around" approach, an "advantage" to the child's academic and social needs. In addition, [REDACTED] did not testify that the educational services provided by the [REDACTED] were inappropriate. [REDACTED] had never seen the facility and was not specifically aware of these services. This testimony fails to address or carry the burden of proof.

- (3) In regard to the need for individual psychotherapy, this issue is discussed below. In short, the [REDACTED] provided the necessary mental-health professionals to address this need and, as necessary, coordinate efforts with the Parents.
- (4) By implication, the Parents contend that the child's success at the [REDACTED] School supports the conclusion that placement at the [REDACTED] was inappropriate and that residential treatment was required. Evidence of the child's status at the private placement can be considered and was weighed by the Hearing Officer. Based on the uncontroverted evidence, the child is performing, in terms of education, average to above-average work at the [REDACTED] School. The evidence showed that the familial situation has stabilized insofar as the Parents, as part of the private placement, have been involved in family counseling, *via* telephone. That, coupled with the out-of-the-home placement, has allowed the family time to reflect to where the child's recent visit was amicable. In regard to peer relationships, the child still struggles as at the [REDACTED] School. Consistent with [REDACTED] opinion, the evidence supports the conclusion that placement at the [REDACTED] School has been advantageous to the child. However, a measure of success at the private placement has little relevance as to whether the child was provided FAPE under the IEP. Lewis v. School Board of Loudoun County, 808 F.Supp. 523, 52-527 (E.D. Va 1992). As stated above, the services provided at the [REDACTED] regarding both education and [REDACTED] health issues, would have addressed and/or provided the same and, most likely, better services than provided at the private placement, based on a comparison of the education and experience of the professionals between the two facilities. By all indications, the child would have thrived at the [REDACTED].
- (5) Evidence that the child consistently avoided getting-out of bed to attend school was introduced. The Parents contend that this condition mandates private placement. However, the uncontroverted evidence introduced by [REDACTED] was that this issue is routinely addressed and resolved by staff at the [REDACTED] (Transcript, pages 256-257.)

- (6) Evidence that the child failed to perform homework assignments consistently was introduced. The Parents contend that the child's inability to perform these assignment is best addressed by private placement. This issue was addressed by staff at the ██████████ School (Transcript, pages 266-268). Likewise, the ██████████ staff was also able to address this issue. (Transcript, pages 186-188.) The Parents argue that the child's grades at ██████████ School are, somehow, artificial because the staff at ██████████ School was willing to "forgive significant portions of the child's academic requirements." However, this suspicion is inconsistent with the evidence; the overwhelming evidence introduced by ██████████ negates this contention. Further, there simply is no evidence that the staff at ██████████ School committed fraud or otherwise improperly conspired to generate the child's acceptable grades.
- (7) The child's two hospitalizations, ██████████ disruptive behavior at home including ██████████ violent behavior towards ██████████ was introduced. The Parents contend that these facts mandate private placement. However, the Parents did not, by expert testimony or otherwise, show a relationship between these circumstances and the child's performance at school. The overwhelming evidence is that the child's behavior at school was appropriate. (Transcript, pages 127-128, 424-431). See Board of Education of Montgomery County v. Brett Y., 28 IDEA, 460 (4th Cir. 1998) where the Court, with facts identical to the instant case, denied funding of a residential placement for a previously hospitalized student with ADD, depression and anxiety disorder where placement was due to difficulties with family and other mental health issues. See also Sylvie M. v. Board of Education, 48 F. Supp.2d 681 (W.D. Tex. 1999) *aff'd*, 214 F.3rd 1351 (5th Cir. 2000) *cert denied*, 121 S.Ct. 190 (2000), where the Court held that residential placement was neither necessary nor in the least restrictive environment, despite the child's exhibiting difficulties similar to the child in the instant case.

Finally, the Parents did not address the issue of whether placement at the ██████████ School would violate IDEA's mandate to place the child in the least restrictive environment, close to home. Considering the mandates of IDEA regarding a least-restrictive placement, placement at a residential facility is an extreme measure, reserved for extreme situations. With the exception of evidence of disruptive behavior outside-of school and two the hospitalizations, the Parents did not address the undisputed evidence that the child received FAPE at the ██████████ School including emotional growth and academic success. (Transcript, pages 424-431). While outside problems are considered, the Parents did not introduce any evidence (expert or otherwise) as to how such problems require placement at the ██████████ School, as opposed to the ██████████. Based on the evidence introduced, the Parents failed to carry the burden on this issue as well.

Consistent with the law, the ██████████ IEP provided FAPE to the child.

III. Whether the absence from the [REDACTED] IEP of individual [REDACTED] for the child, defined as regularly scheduled, individual therapy provided by a psychiatrist, psychologist or licenced social work, rendered the [REDACTED] IEP deficient in terms of providing the child FAPE?

Section 504 mandates that [REDACTED] provide the child with "related services" to accomplish the goal of FAPE. The issue is whether the [REDACTED] failure to provide individual [REDACTED] as defined by the Parents as regularly scheduled, individual therapy provided by a psychiatrist, psychologist or licenced social work) equals failure to satisfy this mandate. The Hearing Officer finds that [REDACTED] satisfied this mandate. As stated by the [REDACTED] IEP and descriptions from [REDACTED], [REDACTED] provided such services and, if necessary, could increase the level of same in the event of necessity. For example, testimony from [REDACTED] states as follows:

We would be able to provide a psychologist and social worker on staff that could also work with [REDACTED] and the family in terms of support some of those issues and if there were any private therapies, could also coordinate with the family through that. (Transcript, pages 43-44)

Similarly, [REDACTED] opined:

For the purposes of making sure that [REDACTED] could avail [REDACTED] of the educational opportunities, there would be interventions that would involve one-on-one discussions with clinical staff, interventions designed by clinical staff that could ascertain what the difficulties were that were psychological in nature, and design interventions to address that for the educational program. (Transcript, page 146.)

.... At [REDACTED] there are clinical staff. There are licensed social worker, licensed psychologist who provide direct services for children in some cases on a regular basis. But it is not delineated as such in the IEP [dated [REDACTED] by [REDACTED]... And the reason [why it is not so delineated] is that because the way we write the IEPs and the way we formulate what is needed for the child is in the context of goals and objective. The services then follow. That's why we always look at goals and objective before the services. In the sense of [REDACTED] IEP what the IEP team considered was what does [REDACTED] need in terms of emotional and behavioral objectives, organizational, behavioral, the objective that revolve around not just so much reading, writing and arithmetic, but how [REDACTED] approaches tasks, how [REDACTED] handles and copes with stress, etc. And those goals were delineated through the umbrella of [REDACTED] services, 30 hours a week. That would be carried out by the clinical staff at [REDACTED]. But it is not delineated, licensed clinical social worker, one hour a week; licensed psychologist, two hours per week. It's all under the umbrella of services to

meet the needs that are presented by [REDACTED] emotional disability, and address the goals that are delineated in the IEP that are there in order for [REDACTED] to make academic progress in the educational setting. (Transcript, pages 157-158.)

[REDACTED] was simply required to provide an "opportunity" to the child to participate in an "appropriate educational program" which was "reasonably calculated" to offer the child "some educational benefit." Thus, the [REDACTED] IEP does not need to be perfect or satisfy the standard of "best interests of the child" as referenced by the Virginia Code, but simply provide the child with a vehicle to learn.

IV. Whether the Parents' Complaint that the [REDACTED] IEP failed to provide individual psychotherapy for the child was timely raised?

[REDACTED], in its Reply Brief on pages 10 through 14, raised the issue of whether the Parents waived their right to complain that the [REDACTED] IEP was deficient insofar as it failed to provide for individual psychotherapy as a "related service" under IDEA. The Hearing Officer finds that the Parents participated in the [REDACTED] IEP process and were given a full opportunity to communicate their objections thereto. Based on the evidence, the issue of whether the [REDACTED] IEP was deficient for not providing such psychotherapy was first articulated through cross-examination during the hearing. However, despite these findings, a decision regarding the legal ramifications of these facts is unnecessary.

In regard to the Administrative Hearing, this issue was preserved for argument insofar as the parties agreed to argue law and facts on the broad issue of whether the child had received FAPE.

CONCLUSION:

The Parents seek reimbursement for the cost of voluntary private placement. For reasons stated herein, the [REDACTED] IEP provided the child with FAPE. Thus, the appeal should be denied.

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]
Date

CERTIFICATE OF SERVICE

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

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

[REDACTED] Esquire
[REDACTED] Associates, P.C.
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED] Due Process and Compliance
Commonwealth of Virginia

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