VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING

[redacted])
)
v.) In Re: [redacted]
)
[redacted] PUBLIC SCHOOLS)
)

DECISION

This matter arose as a request for a Due Process Hearing made by counsel for the parents requesting an Independent Education Evaluation o[redacted] Public Schools [redacted] disagreed with the necessity for independent education evaluations but offered to fund a psychological examination for $1,000.00.

History

Because this matter has gone through multiple prehearings, several hearings, attempted resolution and agreements, the history is discussed below.

The initial telephone prehearing conference was held on [redacted] 2002 at 10:00 a.m.

A Due Process Hearing in the above styled matter was held on [redacted] 2002 at 10:00 and ran until 5:30 p.m. that day concluding the parent's case in chief. It reconvened [redacted] 2002 when [redacted]PS was scheduled to conduct its case in chief. Both parties agreed and the hearing officer concurred that a resolution was possible. All parties worked diligently throughout the day and a settlement agreement was negotiated.

At this time, counsel for the parents was [redacted] Esquire. The thrust of the resolution was that [redacted] would be tested at the [redacted] Center and that [redacted]PS would fund the testing at the cost of $425.00 and that all parties would reconvene later in the month.

On [redacted] 2002, the Due Process Hearing reconvened with the goal of negotiating a

final settlement. After five straight hours a settlement was agreed to by all parties and dictated to the Court Reporter who circulated it to all parties for editing. On [redacted] 2002 it was sent to [redacted] Public Schools ([redacted]PS) for final editing and issuance of signature copy. On [redacted] 2002, counsel for the [redacted] advised the hearing officer and counsel for [redacted]PS that the [redacted] had rejected the agreement and [redacted] advised us that was withdrawing as counsel. A telephone conference was convened covering this situation. An additional prehearing conference was ordered for [redacted] 2002 to establish a time to reconvene and finish the hearing.

On [redacted] 2002 at 10:15 a.m., a prehearing telephone conference was convened with the [redacted] new counsel, [redacted] and [redacted]PS counsel, [redacted] The issues were redefined and confirmed as funding of the two IEE's previously requested for the two doctors who have already testified, Dr. [redacted] and Dr. [redacted] and the requested third IEE.

Inherent in the request for IEE's is the issue of FAPE. Both parties requested that the hearing address only the IEE issue and that the FAPE issue be reserved for a subsequent date.

A supplemental prehearing telephone conference was reconvened on [redacted] 2002 for ruling on any motions and other preliminary matters.

The Due Process Hearing reconvened on [redacted] 2002. [redacted]PS and the [redacted] agreed that the [redacted] case in chief has already been put on. [redacted]PS' presentation of its case in chief was covered in the [redacted] hearing.

Following the [redacted] hearing a resolution was reached by both parties settling the FAPE issue so that the only remaining issues for the hearing officer to decide were the IEE issues.

A Joint Stipulation was entered withdrawing the parents' request for due process

consideration of the FAPE issue and of the [redacted] independent educational evaluation issue.

Both parties submitted summary briefs on [redacted] 2002 dealing with these issues. Therefore, we are ruling only on the indicated IEE matters.

Issues

Should [redacted]PS fund the IEEs of Dr. [redacted] and Dr. [redacted]

Should [redacted]PS fund an additional IEE?

Findings of Fact

1. [redacted] is a multiply-disabled child suffering from brain impairment, autism, apraxia, speech and language pathology, mental retardation inter alia.

2. Both parties are in fundamental agreement as to the extent and severity of [redacted]s disability.

3. [redacted] has been examined/evaluated on many occasions for many things, e.g. 9 or 10 assessments in [redacted] 2001 (TR 366) by County's Experts.

4. Parents requested an IEE on [redacted] 2001 (-04)

5. [redacted]PS replied [redacted] 2001 (-05)

6. [redacted]PS furnished an out of date list of qualified psychological examining providers (MS-06).

7. [redacted]PS furnished a listing of speech and language pathologists which [redacted] characterized as inaccurate. -5-7) (TR 221)

8. [redacted] is eligible for special education (stipulation).

9. While categorization of the child's disability is the entryway into special education and

the IEP ultimately determines exactly what will constitute the appropriate individual education plan for the child in question. (TR 370-371)

10. [redacted] has access and control over [redacted] augmentive communication device. However, [redacted] does not use it all the time or consistently. (TR 210, et seq., 437-438)

11. There is no dispute that [redacted] has an unique catalogue of syndromes. What is in dispute are the methods of dealing with them. [redacted]S feels it has a satisfactory program and the parents disagree. (testimony, TR 189, et seq.)

12. [redacted] is operating on a 2000 IEP signed by parent and an unsigned 2001 IEP after multiple meetings and a request by parents' counsel to table the matter. (Ex. F) (TR 342 - 346)

13. Parents have resisted additional testing (TR 199) and then demanded testing and independent evaluations (TR 204 and 216, et seq).

14. [redacted]PS does not disagree substantively with Dr. [redacted] s evaluations or with Dr. [redacted]'s evaluations (TR 442 and 461-463)

15. Dr. [redacted] states that [redacted] s syndrome is "very unique." This solecism does not contradict [redacted]PS position. (TR 107)

16. There is an obvious communication breakdown (TR 215) between parent and school despite multiple IEP meetings.

17. [redacted]PS agreed to $1,000 psychological IEE not because it was considered necessary but as an accommodation (TR 374 and 382, et seq)

Conclusions of Law

Board of Education v. Rowley, 358 U.S. 176 (1982) makes very clear that a Free Appropriate Education is not necessarily the best possible or the ideal. It must only deliver appropriate services. The question is whether the IEP is reasonably calculated to enable the child to receive educational benefits. In the instant case this applies. The Rowley concept is a difficult position for parents to understand or accept but it is accepted law.

The tenor of the [redacted]s testimony is to indicate that some more specific program should be provided to [redacted] in line with the somewhat inchoate and oblique suggestions of Drs. [redacted] and [redacted] Since [redacted]PS expert testimony indicates that appropriate programs are proposed and since the IEP is the vehicle for achieving this goal with the parent's partcipation further evaluation appears superfluous.

Lachman v. Illinois State Board of Education, 853 F2nd 290 (7th Cir.)

> "The Court, relying on Rowley, found that parents, no matter how motivated and well intentioned, do not have the right, under IDEA, to compel a school district to provide a specific program or employ specific methologies in providing for the education of a disabled child."

There was initially an indication that [redacted]PS was lax in not instituting a request for a Due Process Hearing when it first became evident that there was a dispute about the merits of more IEEs. 34 CFR 300.502 uses the phrase "without unnecessary delay." In the instant case, parent's counsel pre-empted the opportunity to accumulate "unnecessary delay" by requesting due process and thus rendering this question moot.

The necessity for supplemental evaluations in this case seem to fall very much in a

paralleling of the cruel dilemma of an arguably inappropriate program denying FAPE being kept in place during the review process in this case presumably being corrected by further evaluations which would clarify what was necessary for this child. Since [redacted]PS's perception was only augmented not changed by the [redacted] and [redacted] evaluations, they cannot be justified. Payment is more of an equity matter than a law matter. Certainly, there is no obligation for a series of corroborative tests. Hudson v. Wilson, 828 F.2d 1059, 1065 (4th Cir. 1989).

Similarly, there is no obligation on [redacted]PS to authorize or fund an IEE that does not change the diagnosis which leads to eligibility. Interestingly, both parties cite Broward County School Board, 35 IDELR 117 (2001) for opposite sides of this requirement.

[redacted]PS has evaluated and designed a program to benefit [redacted] [redacted]ack of achievement is frustrating, but even parents' expert, Dr. [redacted] states ". . . for a child like that that will never speak properly. [redacted] will never get beyond this current level of speech"(TR 104) and "[redacted] is just at the kindergarten area.) (TR 109)

It is settled law that while the Federal Regulations do not put a cap on IEEs, public entities are entitled to do so. The cap of $1,000 for psychological evaluation instituted by [redacted] [redacted] is not unreasonable. "Public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations." Letter to Thorne, 16 IDELR 606 (1990)

> "For example, public agencies can restrict the location of the private evaluator, require that the private evaluator possess certain qualifications, *and place a cap on the reimbursement fees allowed for IEEs - within the general guidelines expressed above. If fee limits are used, the Department of Education advises that they must not prevent parents from choosing from among the qualified professionals in the area and that they are aimed at eliminating unreasonably excessive fees* [emphasis added]." [redacted].PS Exhibit Z)

Discussion

There is no real dispute between [redacted]PS experts and parents' experts about [redacted]s diagnosis. The only dispute seems to be in the methods of reaching [redacted]potential. The parties have agreed on a methodology for dealing with these problems and the only issue remaining for this hearing officer is that of funding the IEEs. Clearly the [redacted]PS did not exercise the mandate to initiate a due process hearing when an IEE was in dispute. Equally clear it did make a $1,000 cap compromise offer. It gave outdated lists of qualified providers. Everyone acted reasonably. Ultimately, [redacted]PS offered a $1,500.00 compromise to settle all claims and also it funded the [redacted]evaluation for a further cost of $425.00.

Under the circumstances, the payment of the $1,000 cap appears reasonable.

Order

[redacted]PS to pay the One Thousand Dollars ($1,000.00) for Dr. [redacted] evaluation as agreed.

[redacted]PS to insure that its lists of approved providers for psychological and speech and language. Evaluations are current on at least an annual basis.

No other evaluations are authorized or funded.

It is strongly recommended that IEPs for [redacted]contain very specific goals and objectives couched in terms to which the parents can relate or other than in generalities as a means of improving communications between [redacted]PS and the parents.

Notice of Appeal Rights

The appeal rights in this matter are governed by the regulations in effect after January 1, 2001. Any party aggrieved by the findings of this decision may appeal directly to a Federal or State Circuit Court within one year.

Entered this [redacted] day of [redacted] 2002.

[redacted]
Hearing Officer

[redacted]