

VIRGINIA:

DEPARTMENT OF EDUCATION
DUE PROCESS HEARING



[REDACTED])
Complainants,)
vs.)
[REDACTED] PUBLIC SCHOOLS,)
Respondent.)

In Re: [REDACTED]

DECISION

This action arose as a request for a Due Process Hearing by the parents of [REDACTED] (hereafter [REDACTED]). [REDACTED] contest the appropriateness of [REDACTED] current Individual Educational Plan (hereafter IEP) placement. The [REDACTED] have placed [REDACTED] in a residential therapeutic school and seek reimbursement for the costs. The [REDACTED] also seek reimbursement for the costs of two former private school placements on the basis of procedural violations of the Individuals with Disabilities Act, 20 USC § 1400 et seq. (hereafter IDEA).

The [REDACTED] Public Schools (hereafter [REDACTED] PS) contend that [REDACTED] IEP is sufficient to meet the standards for a free appropriate public education (hereafter FAPE) as required by IDEA. [REDACTED] PS denies that the [REDACTED] are entitled to reimbursement for any of [REDACTED] private school placements and that the parents have failed to meet some of the procedural requirements of IDEA.

Findings of Fact

[REDACTED] is a [REDACTED] year old [REDACTED] of average intelligence who was first found eligible for special education services in [REDACTED] is other health impaired (hereafter OHI). [REDACTED] has received various diagnoses which have included complex seizure disorder, bipolar disorder, mood disorder, oppositional defiant disorder, attention deficit hyperactivity disorder, cerebellar dysfunction and developmentally disordered central nervous system. [REDACTED] has displayed behavioral problems since an early age. [REDACTED] has, at various times, had temper tantrums, explosive outbursts, separation anxiety, disruptive behavior in class, used vulgar language excessively, physical altercations with peers and school staff, run away from school, thrown and broken objects, damaged walls and made verbal threats and threatening gestures. The [REDACTED] have a high level of concern and affection for their only child and have been consistently and deeply involved in the process of [REDACTED] education and development.

entered the PS system in kindergarten. During second grade year was placed in the Center, a special education school which deals with children who have emotional disabilities. was successful in elementary school. earned good grades and was promoted regularly. In grade was doing so well began to add regular education classes to schedule through the program at Center which operates cooperatively with School. In grade, was essentially mainstreamed to School and received support services. From to grade, IEPs were developed for participated and agreed to the IEPs. The were provided with a written statement of their rights and procedures under IDEA.

An IEP was developed for grade year. PS and the agreed to place in School (hereafter is a regular education school). Support services were included in IEP. did not adjust well to and began to display significant behavioral problems. had difficulty with peer relationships at was, at times, bullied and threatened and had great difficulty dealing with these issues. In was suspended from school after an incident in which left school grounds. never returned to

served a five day suspension from to for the incident in which left school. also served a two day suspension on and for an incident which had occurred on the day before the incident in which left school. On new IEP was developed for received no educational services from until the IEP was put in place.

new IEP covered the time period from to The IEP provided with homebound instruction. completed grade on homebound instruction and earned all As and Bs in the fourth quarter.

The felt was unwelcome at and enrolled in a private school for the beginning of grade year. IEP expired in and no new IEP was developed at that time. The applied for enrollment at the private school on prior to the expiration of the IEP. PS and the had discussed placing in Center, a PS special education school, however, this placement was not offered in writing or put in an IEP. The orally declined placement in the Center.

In began grade year at and the program were not a good match. had difficulty almost immediately. frequently refused to do school work and wanted to go home. The school staff found to be disruptive and were unable to deal with behavior in an effective manner. By he administration had made the decision to ask to leave the school. left near the end of

On [redacted] [redacted] sent a notice to [redacted] PS of [redacted] intent to home school [redacted] for [redacted] grade year. On [redacted] [redacted] PS sent [redacted] a letter authorizing home instruction and describing the requirements for testing and documentation for home schooled students. The letter also stated that [redacted] remained eligible for special education services and an IEP meeting would be scheduled upon request. This same letter was sent to the [redacted] again on [redacted] in regard to the [redacted] school year. [redacted] completed [redacted] grade through home instruction by [redacted] parents.

The [redacted] enrolled [redacted] in [redacted] School (hereafter [redacted]) for the beginning of [redacted] grade school year. [redacted] began working in the [redacted] program in [redacted] and began attending the school in September. On [redacted] [redacted] was terminated from the [redacted] program. [redacted] had difficulty with peer and staff relationships, [redacted] failed to do school work and had behavioral problems. [redacted] was ultimately deemed a safety risk by [redacted] staff when screamed obscenities, refused to stop inappropriate behavior and barricaded [redacted] in a stairwell on [redacted].

[redacted] was out of school for approximately three weeks. During those three weeks, [redacted] displayed severe behavioral problems at home. [redacted] was destructive, abusive and violent. [redacted] was admitted to the [redacted] on [redacted] and remained in [redacted] until near the end of [redacted]. [redacted] condition improved and [redacted] was released with a "guarded" prognosis. [redacted] attended the [redacted] Program briefly.

In mid-[redacted] [redacted] contacted [redacted] PS about enrolling [redacted] in public school. [redacted] did not have a current IEP. [redacted] did not have a current evaluation. [redacted] tri-annual evaluation was due in [redacted] but was not conducted because [redacted] was not enrolled in [redacted] PS at that time. The [redacted] received no notice in regard to a tri-annual evaluation by [redacted] PS. The [redacted] were told [redacted] PS would have to update [redacted] eligibility.

On [redacted] [redacted] was referred to a local screening committee. On [redacted] the screening committee met and recommended an evaluation of [redacted]. Evaluations were conducted in early [redacted]. On [redacted] the eligibility committee met and [redacted] was found eligible for special education services in the category "emotional disability, other health impairment." An IEP meeting was held on [redacted]. A tentative IEP was drawn up. [redacted] attended the IEP meeting. [redacted] requested time to think about the IEP and discuss it with [redacted]. A second IEP meeting was held [redacted]. [redacted] School was the proposed placement at both IEP meetings. The [redacted] rejected the IEP at the second meeting.

[redacted] was enrolled in [redacted] PS in [redacted]. [redacted] attended [redacted] School from [redacted] to [redacted]. [redacted] PS and the [redacted] agreed to the placement while the special education process was taking place. [redacted] participation at [redacted] School was minimal and [redacted] did not return after leaving for the winter break.

██████████ is currently at the ██████████ School (hereafter ██████████). The ██████████ applied for admission to ██████████ on ██████████. On ██████████ ██████████ was accepted by ██████████. On ██████████ ██████████ began the ██████████ program. ██████████ is a certified special education school which deals with emotionally disabled adolescents. ██████████ is in a campsite setting on 550 acres of woodland and is a full-time residential school. ██████████ uses a system called positive peer culture to modify behavior and get students to develop emotionally. Students live and work in groups and are influenced by peer pressure. Staff meets with students one on one as necessary and a consulting psychologist is available. Academic classes are provided as the student earns and requests the opportunity. ██████████ has had difficulty adjusting to the program but has made some progress and has begun taking an English class. The program typically lasts 14-18 months. ██████████ is expected to modify ██████████ behavior and return to high school for graduation, earning some credits toward that goal at ██████████.

The ██████████ School (hereafter ██████████) is part of the ██████████ PS system and provides special education to high school students. ██████████ has small classes all taught by qualified special education teachers. The program operates on a "block" system allowing students to complete a year long course in one semester. The school has emotionally disabled students and controls behavior by setting rules, giving reinforcements, earning benefits and arranging schedules as needed. Teachers are trained to prevent improper behavior from escalating and there is a full time psychologist on staff for one on one counseling as needed. Group counseling is also available on a voluntary basis. ██████████ works in conjunction with local agencies to provide services at home. ██████████ is a certified special education school that offers a self-contained day program.

Conclusions of Law

██████████ is an emotionally disabled child who suffers from a condition which has been identified by numerous diagnoses. ██████████ is eligible for special education services under the provisions of IDEA and is entitled to FAPE as defined by IDEA.

I. Request for Reimbursement For Costs of ██████████

The ██████████ seeks reimbursement for the costs of sending ██████████ to ██████████ on the grounds that ██████████ was denied FAPE because of procedural violations of IDEA. They cite Jaynes v. Newport News, 35 IDELR 1 (4th Cir. 2001) as authority for their position. The theory that procedural violations can be a basis for denial of FAPE is a long standing principal. Board of Education v. Rowley, 458 U.S. 176 (1982); Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985). However, demonstrating a procedural violation alone is insufficient to establish a child was denied FAPE, it must be shown that the procedural violation was serious and actually caused the child not to receive FAPE or denied a fundamental right under IDEA. Burke County Board of Education v. Denton, 895 F.2d 973 (4th Cir. 1990); Hall, supra.; Doyle v. Arlington Co. Sch. Bd., 806 F.Supp. 1253 (E.D. Va. 1992); Jennings v. Fairfax Co. School Board, 35 IDELR 158 (2001); Board of Frederick Co. v. JD, 33 IDELR 182 (2000). The ██████████ argue that ██████████ was denied FAPE because no new IEP was created when ██████████ IEP expired on

[redacted] and no offer of placement was made in writing to them at that time. It is clear from the evidence that [redacted] PS did not complete an IEP for [redacted] to immediately follow [redacted] IEP which expired on [redacted] nor did [redacted] PS propose in writing placement at [redacted] Center. However, to the extent these actions may be procedural violations they had no effect on [redacted] educational program or the delivery of FAPE by [redacted] PS. The evidence from both parties acknowledged that [redacted] Center was discussed as a placement option for [redacted] and was deemed unacceptable by the [redacted]. The [redacted] made a unilateral decision to place [redacted] at [redacted]. This decision was made prior to the expiration of [redacted] IEP. There would be no purpose in having [redacted] PS develop an IEP for a [redacted] placement that would not be used. Having no IEP from [redacted] PS in no way altered or affected [redacted] participation in the program at [redacted].

[redacted] PS's offer to place [redacted] at [redacted] Center, even if only oral, demonstrates that [redacted] PS was willing to work with the [redacted] and provide [redacted] with FAPE. The evidence indicates that the [redacted] were unhappy with [redacted] PS after the negative experience [redacted] had at [redacted] and wanted to try a private school alternative.

The [redacted] also argue that [redacted] was denied FAPE because they were not notified of their rights under IDEA between [redacted] and [redacted]. Failure to provide notice of rights under IDEA can be a basis for denial of FAPE as a procedural violation. *Jaynes, supra.* However, the effect of such a procedural violation must be shown. *Denton, supra.; Doyle, supra.; Jaynes, supra.* In this matter there is no evidence that the [redacted] would have done anything differently had they received a rights notice during the [redacted] time frame. The [redacted] had received detailed notices of their rights under IDEA previously. They were dedicated to their [redacted] and deeply involved in the process of choosing [redacted] educational placements and services. The [redacted] were aware of IDEA and had been through the process of developing an IEP many times before. They were aware of the [redacted] PS services available to [redacted] and made a conscious decision to place [redacted] in private school. Thus, [redacted] was not denied FAPE based on procedural violations in regard to [redacted] placement at [redacted]. [redacted] PS is not responsible for the costs associated with that placement.

II. Request for Reimbursement For Costs of The [redacted] School

The [redacted] seek reimbursement for the costs of sending [redacted] to [redacted] on the grounds that [redacted] was denied FAPE because of procedural violations of IDEA. The [redacted] raise the same arguments as they did for the [redacted] and add that [redacted] did not receive a tri-annual evaluation in [redacted] to show [redacted] was denied FAPE.

At the time [redacted] entered [redacted] had been out of the [redacted] PS system for over one year. The [redacted] had unilaterally placed [redacted] in private school for [redacted] grade and followed up with home instruction to finish the year by their own choice when [redacted] was terminated from [redacted]. At the time this decision was made the [redacted] were aware that [redacted] PS had special education facilities available and were willing to convene an IEP meeting to develop

an educational program. The [redacted] chose, with the advice of the professionals they employed, to place [redacted] in [redacted]. Not having an IEP from [redacted] PS did not alter or affect [redacted] participation in the [redacted] program. It is unreasonable to expect the school system to develop an IEP for a student who was removed from the school system, who has not been enrolled and is not going to be enrolled. To the extent there is a procedural violation by [redacted] PS in not producing an IEP for [redacted] while [redacted] was not enrolled in [redacted] PS system, it had no effect which denied [redacted] FAPE while [redacted] was at [redacted]. [redacted] was simply another voluntary placement by [redacted] parents attempting to do the best thing for [redacted] education. Unfortunately, it was unsuccessful but that failure is not attributable to [redacted] PS.

The [redacted] argument that [redacted] was denied FAPE because they were not notified of their rights between [redacted] is without merit in regard to reimbursement for the costs of [redacted]. In [redacted] and again in [redacted], [redacted] PS sent letters to the [redacted] advising them that they could have an IEP meeting and seek special education services from [redacted] PS. [redacted] PS directly offered the opportunity for [redacted] to get FAPE through [redacted] PS. Any failure to provide notice in the [redacted] time period is irrelevant to the period when [redacted] was at [redacted] and did not deny [redacted] FAPE.

The evidence shows that [redacted] did not receive a tri-annual evaluation in [redacted]. [redacted] PS did not send a notice of the event or make a request to have one performed. While this may be interpreted as a procedural violation, it must still be shown that it had the effect of denying [redacted] FAPE. Denton, supra.; Doyle, supra.; Board of Frederick Co. v. JD, supra. The [redacted] consistently provided [redacted] with medical and psychiatric care. The educational placement choice they made for [redacted] at [redacted] was made with the information they had from [redacted] doctors and their own experience. At all times relevant to the [redacted] placement, the [redacted] were conscious that [redacted] had special needs. [redacted] was essentially being evaluated constantly. It is highly unlikely that another evaluation by [redacted] PS would have influenced their decision making process. The [redacted] had already rejected the recommendations of [redacted] PS and set out to find private sector alternatives for [redacted]. Based upon [redacted] PS's offer of [redacted] for [redacted] in [redacted] school and [redacted] S's current offer of [redacted] for high school, it can be inferred that a [redacted] evaluation would have resulted in a recommendation for one of the [redacted] PS special education centers for [redacted]. These placements have not been acceptable to the [redacted] since [redacted] left [redacted]. An evaluation in [redacted] by [redacted] PS would have only identified issues which were already known to the [redacted] and a recommendation for a school placement which was unacceptable to them. Thus, the failure of [redacted] PS to perform a tri-annual evaluation of [redacted] had no effect on the educational placements or services [redacted] received. [redacted] was not denied FAPE as a result of not having the tri-annual evaluation.

The procedural violations alleged by the [redacted] did not deny [redacted] FAPE in regard to [redacted] educational placement at [redacted]. [redacted] PS is not responsible for the costs associated with that placement.

III. Current Placement for [REDACTED]

[REDACTED] was enrolled in [REDACTED] PS at the time [REDACTED] was placed at [REDACTED] by [REDACTED] parents. The placement was a unilateral decision by [REDACTED] parents which [REDACTED] PS does not agree with. Thus, the [REDACTED] bear the burden to establish that [REDACTED] is an inappropriate placement for [REDACTED] and that [REDACTED] is an appropriate placement for [REDACTED] as defined by IDEA. Sch. Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass., 471 US 359 (1985); Bales v. Clarke, 523 F. Supp. 1366 (E.D. Va. 1981). To establish that [REDACTED] is an inappropriate placement the [REDACTED] must establish that [REDACTED] cannot receive FAPE in that facility. Rowley, supra. The standard for FAPE is that the student be able to make some educational progress. Rowley, supra.; Doyle, supra.

The evidence presented shows that [REDACTED] offers many services which [REDACTED] needs. [REDACTED] is a highly structured program taught by trained special education professionals who have skills which allow them to manage emotionally disturbed children. A psychologist is available full time for crisis management and one-on-one counseling. A system of rewards is used to promote and stimulate academic achievement. When compared to [REDACTED] the principals of the two programs are actually very similar. The methodology differs but this is not a factor which can be used to make a decision by law. Rowley, supra.; Springer v. Fairfax Co. School Board, 134 F. 3d 659 (4th Cir. 1998); Alexander K. v. Virginia Board of Education, Fairfax Co. School Board, et al., 30 IDELR 967 (1999). The significant difference between the two programs is that [REDACTED] is a day school program and [REDACTED] is a full time residential program. For [REDACTED] this is a significant difference.

As [REDACTED] has grown and entered adolescence [REDACTED] behavior has deteriorated and become more dangerous. In middle school and into [REDACTED] first year of high school [REDACTED] has engaged in several violent acts. [REDACTED] is no longer a small [REDACTED] who is easily controlled physically. [REDACTED] behavior threatens the safety of [REDACTED] parents, school staff and students. Behavior modification is essential for [REDACTED] to remain in any school setting where [REDACTED] can derive educational benefit.

School presents many stressful situations for [REDACTED]. Dealing with personal relationships, academics and transitioning environments all create stresses for [REDACTED] which often lead to emotional breakdown. To escape the stress of school [REDACTED] has repeatedly sought refuge by removing [REDACTED] from school, often by request and frequently by acting out with intolerable behavior. Having a day school program with a home to escape to when stress is high has been unsuccessful for [REDACTED] since leaving elementary school. [REDACTED] acts in dangerous ways which have compelled school authorities to remove [REDACTED] from school. [REDACTED] brings issues with [REDACTED] from one environment to the other creating disturbance both at school and at home. The result is [REDACTED] gets removed from school and makes no progress.

The twenty-four hour a day control by [REDACTED] of [REDACTED] behavior provides [REDACTED] with an environment which can modify and control [REDACTED] behavior so that [REDACTED] can make educational progress. [REDACTED] PS does not argue that [REDACTED] is an inappropriate facility, only that [REDACTED] is adequate. The evidence presented by the [REDACTED] demonstrates that [REDACTED] is appropriate for [REDACTED]. [REDACTED] provides educational benefit through academic classes and credits for various other activities which qualify

as sociology, home economics and physical education. [REDACTED] provides behavioral management continuously dealing with issues as they surface. There is no opportunity to escape the environment of the program to avoid program requirements. [REDACTED] has made progress in the program and it is hoped [REDACTED] will reach a level of success which will allow [REDACTED] to return to [REDACTED] PS and graduate from [REDACTED] school.

The [REDACTED] PS witnesses sincerely express pride in their schools and are clearly dedicated professionals who are confident in their ability to provide educational opportunity to the students in the [REDACTED] PS. The evidence shows that [REDACTED] is a fine school; however, it is inappropriate for [REDACTED] at this time because it is only a day school program.

The key evidence which shows this to be the case comes from [REDACTED] and [REDACTED] [REDACTED] presented as sincere, authoritative and credible. [REDACTED] had extensive contact with [REDACTED] and provided the history of [REDACTED] treatment. Extensive therapy and medication have all been unsuccessful in controlling [REDACTED] behavior leaving the conclusion that extreme measures are necessary to implement a successful behavior modification program thus allowing [REDACTED] to progress educationally. [REDACTED] testimony corroborated this point. [REDACTED] testimony detailed [REDACTED] need for a twenty-four hour a day regulated environment which would force [REDACTED] to face the consequences of [REDACTED] actions and remain in school.

Placement in the least restrictive environment is a requirement of IDEA. Rowley, supra.; DeVries v. Fairfax Co. School Board, 882 F.2d 876 (4th Cir. 1989); Doyle, supra. This requirement is, however, subordinate to the requirement that FAPE be provided. Rowley [REDACTED] requires a residential placement to control [REDACTED] behavior and provide an environment where [REDACTED] can gain educational benefit. This need is demonstrated by [REDACTED] increasing misconduct and dangerousness over time and [REDACTED] failure in less restrictive environments.

Thus the appropriate placement for [REDACTED] at this time is [REDACTED]

IV. Reimbursement for the Cost of [REDACTED]

The [REDACTED] have demonstrated that the program offered by [REDACTED] PS, [REDACTED] is inappropriate and that the unilateral placement that they made, [REDACTED] is appropriate. Therefore, the [REDACTED] are entitled to have the costs of [REDACTED] paid by [REDACTED] PS. All future costs of [REDACTED] should be included under a modified IEP for [REDACTED] designating [REDACTED] placement at [REDACTED]

[REDACTED] PS has raised a procedural violation as a defense to reimbursing all costs of [REDACTED] prior to the [REDACTED] notice. Virginia regulations governing special education matters provide that reimbursement may be reduced or denied if certain notice requirements to the school system are not met. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-80-66 B.4. It is clear the [REDACTED] did not meet the notice requirements of the Virginia regulations until [REDACTED]

The [redacted] began the process of placing [redacted] in [redacted] in [redacted] and actually placed [redacted] there in [redacted] yet did not inform [redacted] PS of this until after the fact. The [redacted] requested an IEP meeting in [redacted] after already placing [redacted] in [redacted]. It is clear from the timing that the [redacted] had already decided [redacted] educational placement prior to the IEP meeting. The [redacted] failure to notify [redacted] PS of their plans for [redacted] was improper. The Virginia regulations specifically require ten days advance notice of placement so that the school system can take appropriate action or modify its recommendations in regard to a student. [redacted] PS was denied this opportunity.

On [redacted], an IEP meeting was held and [redacted] PS became aware of the [redacted] desire to have [redacted] PS place [redacted] in [redacted] through IEP and fund education there. [redacted] PS continued to recommend [redacted] after that time.

For the above stated reasons, this Hearing Officer finds that the [redacted] are entitled to reimbursement for the cost of [redacted] dated back to [redacted].

Pursuant to the Virginia regulations, [redacted] PS obligation to pay reimbursement to the [redacted] for costs of [redacted] are properly reduced by the amount accrued prior to [redacted].

Order

Upon the findings of fact and the conclusions of law previously set forth it is hereby ordered that [redacted] PS shall modify [redacted] IEP to place [redacted] at the [redacted]. [redacted] PS shall be responsible for the costs of that placement. [redacted] PS shall pay reimbursement to [redacted] and [redacted] for the costs of [redacted] from [redacted] forward.

Upon request of either party a further hearing will be conducted to determine the exact amount of the reimbursement.

The requests for reimbursement for the costs of the [redacted] and [redacted] are denied.

Notice

Either party has the right to appeal this decision by filing the appropriate action in a Virginia Circuit Court or U.S. District Court with jurisdiction. Any party wishing to appeal is advised to consult with legal counsel about procedures and deadlines.

[redacted]
Date

[redacted]
Hearing Officer