

04-026

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES



CASE CLOSURE SUMMARY REPORT

_____, Public Schools
School Division

Name of Parents

Division Superintendent

Name of Child

_____, Esq.
Counsel Representing LEA

Counsel Representing Parent/Child

Hearing Officer

Party Initiating Hearing

Hearing Officer's Determination of Issue(s):

The Hearing Officer determined that _____'s proposed IEP did not provide for related health services required for the Student to obtain an educational benefit in _____ proposed placement. However, the Hearing Officer also determined that the Parent's lack of cooperation with _____ in obtaining the Student's medical records is partially responsible for _____ failure to develop a medical care plan that would enable _____ to deliver the related services the Student needs to receive FAPE. Based on the above, the Hearing Officer determined that neither party prevailed in the proceeding.

Hearing Officer's Orders and Outcome of Hearing:

_____ was directed to reconvene the IEP team, refer the matter to its Medically Fragile Committee, and develop a medical care plan that will deliver the related services required for the Student to obtain an educational benefit in _____ proposed placement. The Parent's request for reimbursement for a unilateral private school placement is granted as to 50% of the Student's tuition until such time as _____ offers an IEP that provides the Student with a free appropriate public education.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Signature, Hearing Officer

Date

VIRGINIA DEPARTMENT OF EDUCATION
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DECISION

_____ Public Schools
School Division

Name of Parent(s)

Division Superintendent

Name of Child

_____ Esq.
Counsel Representing LEA

_____ Esq.
Counsel Representing Parent/Child

Hearing Officer

Party Initiating Hearing

PROCEEDINGS

On _____ requested a due process hearing on behalf of _____ ("_____"), challenging the appropriateness of _____ Public Schools' ("_____") proposed educational placement of _____ for the 20____-20____ school year in violation of the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 *et seq.*

_____ alleged that the school system failed to provide _____ with a free appropriated public education (FAPE) and sought reimbursement for _____'s private placement at _____ School in _____.

On _____ this hearing officer was appointed. Thereafter, on _____ a formal, due process hearing was noticed for _____ and _____, with a pre-hearing conference scheduled for _____.

The pre-hearing conference was convened on _____ as scheduled. At the conclusion of the conference, a discovery and briefing schedule was established. The parties

stipulated that all notice requirements associated with this case have been satisfied; that has a disability and is health impaired; and that is entitled to special education and related services. These rulings, as well as rulings on other procedural matters, were memorialized in a letter to Counsel dated . No objection to these rulings was noted.

During the course of this proceeding timely requested that subpoenas *duces tecum* be issued to and 's health care providers, as well as and School. The same were issued without objection. By letter dated , advised that had not complied with the subpoena that had been issued to and that they would seek an order compelling production. Thereafter, the hearing officer was advised that produced documents responsive to the subpoena.

On or about , motioned to continue the due process hearing and a telephone conference to address the issue was held on . objected to the granting of a continuance. After hearing argument on the matter, 's motion was denied. Additionally, the parties stipulated that both 's proposed placement at School and mother's placement at School both offered an educational benefit academically. The issue for consideration at the hearing was thus narrowed to a question of what related health services were required for to realize that benefit.

The two day hearing in this matter was convened as scheduled on . Based on the stipulations of the parties, the central issues presented at the hearing were whether or not adequately provided with health related services essential for to obtain an educational benefit in the proposed placement, and if not, whether the deficiency was the result

of [redacted] lack of cooperation with [redacted] in obtaining [redacted] 's medical records.

For the following reasons, I find that [redacted] proposed IEP did not provide a provision for related health services required for [redacted] to obtain an educational benefit in [redacted] proposed placement. However, [redacted] 's lack of cooperation with [redacted] in obtaining [redacted] 's medical records is partially responsible for [redacted] 's failure to develop a medical care plan that would enable [redacted] to deliver the related services [redacted] needs in order to receive FAPE.

FINDINGS OF FACT

[redacted] is a [redacted] year old student presently enrolled at [redacted] School in [redacted]. Two days after birth, [redacted] suffered respiratory and cardiac arrest (Tr. I. at p. 85). [redacted] was subsequently diagnosed with panhypopituitarism and optic nerve hypoplasia (*Id.*) [redacted] also has significant developmental delay (Tr. I. at p. 86). Optic nerve hypoplasia is an embryological defect that has resulted in [redacted] having no significant vision in [redacted] right eye and impaired vision in [redacted] left eye (Tr. I. at p. 22; PS Exhibit No. 21 and 22). [redacted] is treated by [redacted], an ophthalmologist with [redacted] Medical Center in [redacted], for this condition. Panhypopituitarism is the defective formation of the pituitary gland which regulates the body's endocrine system (Tr. I. at p. 23). As a result of this condition, [redacted] lacks the necessary hormones and steroids necessary to regulate a variety of body systems (Tr. I. at p. 24). [redacted] condition is treated with hormone replacement therapy (Tr. I. at p. 25) requiring daily administration of medication. ([redacted] Exhibit No. 9). [redacted] must also be monitored for warning signs and "stressors" that can trigger a medical crisis requiring pharmacological intervention (Tr. I. at p.p. 26-28; PS Exhibit No. 48). The evidence is uncontroverted that [redacted] panhypopituitarism is a life threatening condition (Tr. pp. 25). [redacted] has been under the

care of _____, a pediatric endocrinologist at _____ Hospital in _____ since early childhood. _____ is also under the care of _____, M.D., a local pediatrician (Tr. I. at p. 21). However, it is unclear from the record when _____ first became aware of _____ involvement with _____ care.

From the age of one and one half _____ attended a full day program at the _____ (Tr. II. at p. 52). _____ withdrew from that program in September 20 _____ (Tr. II. at P. 58) because _____ was not receiving adequate medical services (Tr. II at p.p. 52-53). From _____ until _____, _____ took care of _____ self. _____ and _____'s father are divorced and _____'s father lives in _____

(Tr. II. at p.p. 17-18). _____, a licenced registered nurse, qualified as an expert witness without objection (Tr. I. at p. 84). She testified extensively regarding _____'s medical condition, symptoms and treatments.

In the winter of 20 _____-20 _____ began looking at schools for _____ for the fall of 20 _____. On _____ filed an application for _____ with _____ School, a private school in _____, _____ (Exhibit No. 40). On _____ also filed a referral with _____ (Exhibit No. 3). _____ representatives first met with _____ on _____, and subsequently again on _____ (Tr. II. at p. 268; PS Exhibit No. 3). At the conclusion of these meetings it was determined that _____ would register for kindergarten and that _____ would attempt to obtain _____'s medical records. (*Id.*) Another meeting was scheduled for _____ for _____ to receive and review _____'s medical records. (Tr. II. at p. 73; PS Exhibit No. 3). The record reflects that _____ was seen _____ by _____ (Exhibit No. 10). However, the _____ meeting was cancelled

because [redacted] was unable to obtain [redacted]'s medical records (Tr. I at p.103 and Tr. II at p. 74). The meeting was rescheduled for [redacted] ([redacted] Exhibit No. 4). [redacted] could not attend that meeting because [redacted] was in [redacted] (Tr. I at p.157; PS Exhibit No. 6).

[redacted], a special education teacher at [redacted] School, testified [redacted] advised that [redacted] "really needed the medical records" and asked [redacted] to sign a medical release so that they might help secure [redacted] records. (Tr. II. at p. 77). A home visit was scheduled for [redacted] at which time [redacted] signed releases for [redacted] and [redacted]

The medical releases were mailed to the respective doctors by [redacted]; a licensed registered nurse for [redacted]. (Tr. II. at p.p. 156, 169, 170). [redacted] provided [redacted] with the requested information on [redacted] (Tr. II. at p. 170). [redacted], however, did not respond.

[redacted] made several attempts to contact [redacted] and sent another copy of the release to [redacted] by facsimile. (Tr. II. at pp. 170, 171, 183, 184; [redacted] Exhibit No. 42). Sometime in June, [redacted] received a single page letter from [redacted] dated [redacted]. (Tr. II. at p. 172; [redacted] Exhibit No. 32). The letter states [redacted]'s diagnosis and provides that:

[redacted] is subject to episodes of adrenal insufficiency that can be characterized with acute malaise, drop in heart rate, and blood pressure and collapse. Thus, [redacted] should be in a school environment that ensures that [redacted] can be promptly evaluated and treated should such episodes occur. Treatment involves administration of glucocorticoid (cortisol) by injections followed by an emergency visit to include IV fluids if indicated. ([redacted] Ex No. 32).

No medical records or other information were provided to [redacted] by [redacted] (Tr. II. at p. 174) until [redacted] finally responded to the subpoena issued in this proceeding on the second day of the hearing.

On [redacted] an eligibility committee met to determine whether [redacted] was a child with a disability and in need of special education services ([redacted] Exhibit No.11). The committee

determined that [redacted] was eligible for special education services as a student with visual impairment and other health impairment. ([redacted] Exhibit No. 12). Also on [redacted], [redacted] notified [redacted] that [redacted]'s application for admission was accepted ([redacted] Exhibit No. 46). On [redacted], [redacted] signed an Enrollment Contract with [redacted] School for the [redacted] academic year and made the required deposit ([redacted] Exhibit No. 47). An IEP team met of [redacted] and developed an IEP that provided occupational therapy, vision therapy and speech language therapy in a non-categorical program offered at [redacted] School ([redacted] Exhibit No. 17). [redacted] did not agree with the proposed IEP and gave [redacted] Notice of Appeal stating "I would prefer to send my child, to the [redacted] School based on the extent of [redacted] developmental delay and intensive educational needs as well as [redacted] medically-fragile and . . . [?] the full time availability of Registered Nurse." ([redacted] Exhibit No. 5). By letter dated [redacted], [redacted] advised [redacted] that they needed more specific information from [redacted]'s physician(s) concerning symptoms that might precede a medical crisis and detailed written instructions regarding emergency procedures so that an individual child treatment plan could be formulated. ([redacted] Exhibit No. 13). On [redacted], [redacted] enrolled at [redacted] School. At [redacted]'s request, [redacted] reconvened the IEP team to discuss available options to address [redacted] concerns and resolve the matter. ([redacted] Ex No. 14). On [redacted], [redacted] an amended IEP was proposed ([redacted] Exhibit No. 18). At the time, [redacted] requested [redacted] sign a medical release for [redacted] took the form with [redacted] but never returned it. [redacted] did not agree with the amended IEP and by letter of the same date requested a due process hearing ([redacted] Exhibit No. 15). On [redacted], [redacted] School developed a written healthcare plan for [redacted] ([redacted]).

Exhibit No. 48).

ANALYSIS

In *Cedar Rapids Community School District v. Garret F.*, 56 U.S. 66 (1999) the United States Supreme Court ruled that in appropriate circumstances local school districts are required to provide a registered nurse to constantly monitor a handicapped child as a "related service" in order to ensure integration into the public schools. Pursuant to 8 VAC 20-80-10 "[r]elated services" are defined as:

transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education and includes speech-language pathology and audiology services; interpreting and transliterating; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation and psychological counseling; orientation and mobility services; medical services for diagnostic or evaluation purposes; school health services; social work services in schools; and parent counseling and training.

does not challenge [redacted]'s need for health services, but maintains that they have not been provided adequate information to determine what services are necessary. However, 8 VAC 20-80-54 provides:

Each local educational agency shall conduct a full, individual and initial evaluation in accordance with subsections D and E of this section before initial provision of special education and related services to a child with a disability.

Subsection D provides that the local educational agency (LEA) shall "[r]eview existing evaluation data on the child, including: [e]valuations and information provided by the parent or parents of the child . . ." The subsection further provides that the LEA shall "[o]n the basis of that review and input from the child's parent or parents, identify what additional data, if any, are needed to determine: . . . [w]hether the child needs special education and *related services* . . .

[Emphasis added]. Finally, subsection D provides that “[t]he local educational agency shall administer tests and other evaluation materials as may be needed to produce data identified in this subsection.” 8 VAC 20-80-54 provides that “[t]he local educational agency shall establish policies and procedures to ensure that . . . [t]he evaluation is sufficiently comprehensive to identify *all of the child's* special education and *related services needs* . . .” [Emphasis added].

Accordingly it is incumbent upon [redacted] to obtain the necessary data to provide [redacted] with the related services [redacted] needs to receive an educational benefit from the proposed IEP. Moreover, [redacted], a registered nurse and [redacted]’s care giver, provided [redacted] with information concerning [redacted]’s conditions, symptoms, and treatments sufficient to develop at least a tentative health care plan to ensure that [redacted] was not at risk when [redacted] enrolled at [redacted]

[redacted] School. -The proposed IEP made no provision for health services for a child with an acknowledge life threatening condition.

Nevertheless, [redacted] had ample opportunity to provide [redacted] with [redacted]’s medical records, both from [redacted] local pediatrician and [redacted]’s endocrinologist. In fact, [redacted] was seen by [redacted] on [redacted], just one week prior to the cancellation of the [redacted] meeting with [redacted] to review the requested records. In *In re S.M. v. Weast*, 240 F. Supp. 2d 426 (D. Md. 2003) the Court opined that before parents “can fairly argue that the best the school authorities had to offer was or is not good enough, the critical pre-requisite is that the parents must have cooperated with the school authorities in good faith to try to develop the IEP. Good faith cooperation includes reasonable and timely cooperation with the school authorities,” *Id.* at _____. As in *S.M. v. Weast*, although [redacted] is not to be faulted for making arrangements for to attend [redacted] School, [redacted] was less than forthcoming and did not facilitate the

production of _____'s medical information and records which were readily available to _____ and _____ local pediatrician. Moreover, pursuant to 8 VAC 20-80-66 B. 4., reimbursement for a unilateral private placement may be reduced or denied "[u]pon a judicial finding of unreasonableness with respect to actions taken by the parent or parents."

CONCLUSION

After careful consideration of all the evidence and arguments of counsel, I conclude that _____ could have, and should have, provided for related health services in _____'s proposed IEP and that actions taken by _____ to assist _____ in obtaining _____'s medical records were unreasonable.

Accordingly, _____ is directed to reconvene the IEP team, refer the matter to its Medically Fragile Committee, and develop a medical care plan that will deliver the related services required to enable _____ to obtain an educational benefit in _____ proposed placement. _____'s request for reimbursement is granted as to 50% of _____'s tuition at _____ School until such time as _____ offers an IEP that provides _____ with a free appropriate public education. _____ is responsible for submitting an implementation plan to the parties, the hearing officer and the Virginia Department of Education within 45 day from the date of this decision. Based on the above, I find that neither party prevailed in this proceeding.

Finally, 8 VAC 20-80-76 O. provides that "[a] decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal court."

Signature, Hearing Officer

Date

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES



STATEMENT OF CLARIFICATION

Public Schools
School Division _____
Name of Parent(s) _____

Division Superintendent _____
Name of Child _____

Esq.
Counsel Representing LEA _____
Esq.
Counsel Representing Parent/Child _____

Hearing Officer _____
Party Initiating Hearing _____

Pursuant to 8 VAC 20-80-76 Q.2.b.(2) of the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, the Virginia Department of Education has instructed me to issue a statement of clarification concerning the decision rendered in this matter. Specifically, the Department has asked that in the event that _____ does not agree with the IEP developed by _____ in response to the decision, "does _____ pay 50% of _____'s tuition until the IEP is offered, or must _____ continue to pay the tuition until the matter is resolved?" The Department correctly notes that if _____ offers an IEP it believes is sufficient to provide FAPE and _____ disagrees, the parties will have to go to mediation or another due process hearing to resolve the matter. My decision requires _____ to pay 50% of _____ tuition *until* _____ offers an IEP that provides _____ FAPE. Webster's defines "until" as "up to the time of a specified occurrence." Accordingly, _____ is responsible for 50% of _____ tuition up to the time it offers FAPE. Whether or not any future IEP is sufficient in this regard can only be determined after it has been developed and proposed. If a conflict develops on this point and the parties cannot resolve the matter short of due process, it will be up to the Hearing Officer appointed in the matter to determine whether or not the proposed IEP provides FAPE. If it is determined that it does provide FAPE, _____ reimbursement obligation ceased when the IEP was offered. If, however, the proposed IEP does not provide _____ FAPE, it will be up to the Hearing Officer appointed in the matter to determine the issues raised in that case, including any request for additional tuition reimbursement and the denial or reduction of the same, based on the evidence presented.

Signature, Hearing Officer

Date

cc: Parent(s)
School Division
✓ State Education Agency