

20-030
COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION
DUE PROCESS HEARING

In Re:

Case No. 20-030

Represented by Kandise Lucas, Advocate

Public Schools
Represented by Wesley D. Allen, Esq.

DECISION

This matter came to be heard upon the Request For A Due Process Hearing (complaint) filed by _____'s parents, _____ and _____ (Parents), pursuant to the Individuals with Disabilities Education Act, 20 USC § 1400 et seq. (IDEA) and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81. As the moving party the Parents assume the burden of proof in this matter. Schaffer v. Weast, 546 US 49 (2005). The standard of proof is upon a preponderance of the evidence. 8 VAC 20-81.O.13.

Issues Presented

The complaint alleges _____ (hereafter Student) was denied a free appropriate public education (FAPE) under IDEA by _____ Public Schools (PS). More specifically, the complaint alleges FAPE was denied because: 1) Student was not provided services in the least restrictive environment (LRE); 2) PS failed to identify and address Student's dyslexia; 3) PS denied the parents meaningful participation in the Individual Education Program (IEP) process; 4) PS predetermined the IEP; 5) PS engaged in intimidation and racially-based discrimination; 6) PS failed to implement Student's IEP; 7) PS failed to secure comprehensive information prior to making eligibility decisions; 8) PS failed to report possible disability indicators to deny services; 9) PS denied Extended School Year (ESY) services by proposing such services late in the school year; 10) PS failed to develop a proper IEP for Student.

Findings of Fact

Student is a _____ year old student at the _____ School (_____), part of the _____ PS system. Student is in _____ grade. Student has attended _____ since the 2017-18 school year when _____ was in _____ grade. Student previously attended _____

School which is also in the PS system. Student has progressed steadily from grade to grade in the PS system.

Student has been evaluated both psychologically and educationally by qualified experts. Student has a diagnosis of attention deficit hyperactive disorder (ADHD) and dyslexia. In 2015, Student was found eligible for special education services under IDEA in the category of “Other Health Impairment” (OHI). In 2018, PS conducted an eligibility review for Student and found continued to be eligible for special education services under IDEA in the categories of OHI and “Specific Learning Disability” (SLD). Dyslexia is not a specific category of disability under IDEA. Dyslexia is a disability which falls under the category of SLD. Student has deficits in executive functioning. Student has reading deficits in decoding and encoding skills. Student has reading strengths in comprehension skills. Student participates in athletics and is social with peers.

The Parents have requested multiple evaluations for Student including audiology, speech-language pathology, occupational therapy and assistive technology. The Parents have provided tutoring and private evaluations for Student. The Student’s mother is a with knowledge of special education. The Parents want Student to graduate high school with an Advanced Studies Diploma. An Advanced Studies Diploma requires credits in a foreign language. Student is taking Spanish in ninth grade. Student received a C grade in Spanish in the first quarter. Student’s grade had dropped to a non-passing grade as of the time of the hearing but was not a final grade.

Student’s current IEP is from November 17, 2017. This remains Student’s IEP as a “stay put” IEP because no agreement has been reached between the Parents and PS in regard to subsequent proposed IEPs. PS and the Parents have held fifteen IEP meetings in approximately two years. PS has proposed an increase in services which includes increased hours of service in a special education setting. The Parents have requested additional supports in Student’s mainstream classrooms. PS has issued numerous prior written notices (PWNs) in regard to the disagreement over services for Student. Some PWNs cover multi-session meetings. PS had a security officer present in the hallway during one of the IEP meetings. Parents’ Advocate, Ms. Lucas, attended this IEP meeting. The Parent’s advocate identified herself as a “black woman” in documentation of the incident and physically appears to be a person of mixed race. IEP meetings have been contentious, at times, including raised voices, allegations of misconduct and clashes over records. The Parents have made numerous requests for additional and specific personnel at IEP meetings.

PS and the Parents have had disputes about Student’s school records and testing. Some of Student’s school records from Student’s elementary school were “lost” for approximately two years and subsequently located in a locked cabinet. The Parents have frequently requested to review test data and protocols from evaluations for Student. Student’s mother found errors in some of Student’s evaluations, including scoring errors in a QRI, reading evaluation test. PS proposed ESY services for Student for the summer of 2018. Student’s mother requested specific details of the program Student would be involved in. Student’s mother indicated she wanted the “Just Words” program. PS ESY course programming is provided on a case by case basis with the

decision made by the teacher. Emails were exchanged in June of 2018, continuing to discuss the ESY program details. The Parents did not consent to ESY services for Student and he did not attend the program.

Student's current IEP, dated 11/17/2017, provides five hours per week in a special education setting to address "Learning Disability." PS and the Student's Parents agreed the special education setting was the LRE for providing these services. Student participates in a "team taught" English class in the special education setting, a "self contained class." Student participates in a general education setting for other classes, including "honors" classes, with accommodations. Student's accommodations include extended time, frequent breaks, graphic organizers and extra help with notes and directions.

Application of Law

The standard for providing FAPE is that a child found eligible under IDEA must be provided with an educational program which provides some educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 176 (1982). The standard of "some educational benefit" has been further defined as requiring a school system to offer an IEP which is reasonably calculated to enable a child to make educational progress in light of the child's individual circumstances. Endrew F. v. Douglas Co. School District, 137 S.Ct. 988 (2017).

Least Restrictive Environment

PS is obligated to consider the least restrictive environment for educating Student in developing IEP. 8VAC20-81-130. Student's current IEP places in one class which is in a self contained special education classroom for five hours per week. The majority of educational program is in a mainstream setting. Student's deficits in reading require English class be in the special education setting. PS and the Parents agreed on this when the IEP was created. No evidence was presented which demonstrated Student was negatively impacted by being in the self contained class. PS has followed the IEP and provided these services to Student as required by the current IEP and in accord with the regulations.

PS has proposed additional hours of services in a special education setting to address Student's reading deficits. The Parents have refused to agree to these additional services. PS maintains that it is necessary to increase the level of services for Student so that can keep up with the growing demands of higher levels of education as progresses through the school grades and that would not be "available" for the core work of the class. It is typical for students with dyslexia to struggle more as the work gets harder and Student's mother admits this was the

case with Student, even causing anxiety. The Parents' position on this issue is illogical and contradictory. They claim that PS has failed to recognize and denied services for Student's dyslexia yet they refuse to allow PS to provide the services which would directly address Student's special needs in the area of reading deficits. The Parents' demand that Student receive services exclusively in a mainstream setting is in conflict with their earlier recognition of need to receive services in a special education setting. As Student has reached higher level grades this need has not diminished. Student's reading deficits are an ongoing disability.

The Parents have failed to meet their burden of proof that the services offered by PS are in an overly restrictive environment. The Parents' only evidence that Student's special education needs could be met with accommodations in a mainstream classroom was their opinion. This is mere speculation on their part and in conflict with the evidence which showed Student needs specialized instruction in a self contained classroom to address reading deficits. It is found that PS offered FAPE in the LRE.

Student's Dyslexia

The Parents argue that PS did not identify and address Student's dyslexia. They point to the facts that dyslexia was not specified in IEP and was not initially made a category of disability in the eligibility decision. The law and the evidence taken as a whole does not support their contention despite these facts. Student's current IEP, dated 11/17/2017, specifically addresses Student's reading deficits providing special education services for "Learning Disability" and accommodations to help overcome deficits in mainstream classes. PS clearly recognized Student has reading deficits reflective of dyslexia and is addressing them through these services. The evidence also clearly demonstrates that PS continues to be aware of Student's dyslexia and has proposed additional services which it believes are both appropriate and necessary for Student to address dyslexia in accord with the standard set forth in Endrew.

Student has been eligible for services under IDEA since 2015. Student has had an IEP in place at all times relevant to this proceeding. Once Student was found eligible under any category was entitled to an IEP. "The services and placement needed by each child with a disability to receive a free appropriate public education shall be based on the child's unique needs and not on the child's disability." 8VAC20-81-100.A.1.b. The services Student received were not dependent on the category was found eligible under. The subsequent addition of the category of SLD to eligibility in 2018 or lack thereof previously is irrelevant to the services which PS was obligated to provide. As noted above there was an agreed IEP in place addressing Student's needs. The Parents have not met their burden of proof in regard to their claim PS did not recognize or address Student's dyslexia.

Parent's participation in the IEP Process

The Parents argue that they were denied meaningful participation in the IEP process. Their evidence contained material which claimed their positions were not fully detailed in Present Level of Performance (PLOP) pages, agendas limited their time to speak and limited subject areas, they were not allowed to fully express themselves in IEP meetings and full documentation was not considered at IEP meetings.

This Hearing Officer finds the claim that the Parents were denied meaningful participation in IEP meetings to be completely without merit. The evidence shows the Parents have had extraordinary participation in the IEP process. PS has held a significant number of IEP meetings to allow the Parents to participate in the IEP process. The multiple changes to the IEP documents show consistent consideration of the requests and concerns of the Parents. The addition of personnel to the IEP team demonstrates PS attempts to address the concerns of the Parents. PS conducted evaluations in multiple disciplines to address the concerns of the Parents. PS received and considered many written documents in the IEP process and responded to many emails from the Parents. PS issued PWNs when disagreements occurred reflecting consideration of the issues even when consensus was not reached. The school system is not obligated to agree with every request or position taken by a parent. 8VAC20-81-110.F.6. Participation in the process is not the equivalent of reaching an agreement or having Parents demands met in the process. The Parents have had a high level of participation in the process.

Predetermined IEP

The Parents contend that the IEP for Student was predetermined prior to the IEP meetings. The evidence presented on this issue was that there had been meetings by school staff prior to the IEP meeting and a draft IEP was produced. The Parent's evidence fails to establish predetermination of the IEP. It is standard procedure for school staff to meet prior to IEP meetings and prepare draft IEPs for discussion at the meetings. To not do so would reflect a lack of preparation. An assessment of the child and needs is expected in the IEP process and coordination between teachers, administrators and specialists is essential for producing an appropriate program for the child. The school system is expected to develop and bring a proposal to the IEP process, particularly in this case as there were multiple meetings and revisions of the IEP. The mere occurrence of staff meetings prior to an IEP meeting does not prove predetermination. It is found that the Parents evidence is insufficient to prove this claim.

PS intimidation and discrimination

The Parents allege PS acted to intimidate and racially discriminate against them by having a security guard present in the hallway during an IEP meeting. The Parents' advocate, Ms. Lucas, was present at an IEP meeting where a security guard was present in the hallway outside

of the meeting. Ms. Lucas believes the security guard was present to intimidate her because of her racial status. PS presented evidence that the school personnel felt intimidated by Ms. Lucas and that prior IEP meetings had been disrupted by Ms. Lucas making allegations against school staff. It is the obligation of PS to ensure the safety of all people at school system facilities. The security guard was present to ensure the safety of all participants. PS has stated a legitimate non-discriminatory reason for having security present. While Ms. Lucas may have been offended by the presence of the security officer, Ms. Lucas has stated, in the documentation, that she was not intimidated and her actions reveal that she has not been deterred or prevented from representing her clients or advocating her position. This Hearing Officer finds there is insufficient evidence to establish this claim.

Failure to implement IEP

The Parents allege that PS has failed to implement Student's IEP. This claim is without merit. Student's IEP is more than two years old. It requires a very low level of services be provided. The evidence presented demonstrated that Student has met the majority of the goals in the IEP to a level of mastery. PS has proposed numerous IEPs with higher goals and more services but these are not required because the Parents have refused to agree to these IEPs. Student's records show that is being provided with the required services, getting educational benefit from the IEP and advancing in the school system. The evidence fails to prove this claim.

Information for eligibility

The Parents argue that PS did not secure comprehensive information prior to making eligibility decisions. The Parents presented evidence that there were additional records and evaluations which could have been reviewed prior to the relevant eligibility meetings. This argument is superfluous. Student has been eligible for an IEP at all times relevant to this action. At no time relevant to this action has Student been denied eligibility. Student has had an IEP in place at all times relevant to this action. The category of eligibility does not effect the service requirements that PS is obligated to provide to Student. Student has not been denied FAPE in any way because PS did not consider every piece of information in determining eligibility. PS had sufficient information to find Student eligible and did so. The claim is unsupported by the evidence.

PS failed to report possible disability indicators to deny services

The Parents argue that PS has failed to provide them with complete records and perform adequate testing to deny Student services. This claim is contrary to the evidence. Student has been evaluated extensively both by parents and by PS. PS has acknowledged disability and

proposed services to address deficits. It is clear the Parents are not satisfied with the PS proposals, however, parents do not have the authority to command the school system; they may only give their input. Tice v. Botetourt Co. School Board, 908 F.2d 1200 (CA4 VA 1990); County School Bd. of Henrico v. RT, 433 F.Supp 2d 657 (ED Va 2006); 8VAC20-81-110F.6. The evidence clearly shows that PS has shared extensive information with the Parents and made many proposals of services for Student. There is no evidence that PS intentionally withheld information in effort to deny Student services. The Parents have pointed to errors in testing and record keeping by PS but these errors appear to be mistakes rather than intentional acts. As it stands currently PS is offering more services than the Parents are willing to accept. The Parents and PS disagree about placement and the methodology of services for Student but the school system is entitled to deference in that regard. Id. The Parents' evidence is insufficient to prove this claim.

ESY services

The Parents argue that PS denied Student ESY services by proposing the services too late in the school year. The Parents' position is based upon their claim that they were unable to evaluate the program Student would be administered in the ESY program in a timely manner. It is not unusual for an ESY program to be proposed late in a school year because the purpose of the program is to insure that students with disabilities do not regress during a summer break. Assessment of the child's status in this regard is often not done until the end of the school year because the need of the child for ESY cannot always be assessed until progress for the year is near completion.

The Parents presented evidence that they were still seeking clarification of the program late into June of 2018. The ESY services had been offered by early June 2018, allowing plenty of time to accept the services. The Parents, however, would not agree to the proposal without further information. Even when additional information was provided to them they were not satisfied and refused to accept the services. The evidence clearly demonstrates that PS did not deny services to Student but rather that the Parents refused to accept the services that were proposed when PS did not guarantee the specific program the Parents wanted. As noted above a parent cannot dictate to the school system specific programs it must use. The evidence that PS continued to offer ESY and clarify its position on the program throughout June 2018, shows that the services were available and offered to Student for at least a month at the end of the school year. Ultimately, the Parents rejected the offer. The claim that PS denied ESY services to Student is not proven by the evidence.

PS failed to develop a proper IEP for Student

The Parents claim that PS has failed to develop a proper IEP for Student. The Parents argue that Student can be educated in a mainstream class with proper support services and that PS has failed to provide these services to through IEP. The Parents produced evidence of testing errors in evaluating Student and incomplete records for assessing performance. They also produced evidence that grade in Spanish is in decline. Student's mother gave her opinion that Student could be educated in the mainstream class and that might be harmed by being in a self contained class with students that were below educational capabilities.

PS offered the opinions of several expert witnesses who work directly with Student that needed the additional special education services being offered through the IEP developed for . PS evidence explained that it was necessary to place Student in a self contained classroom to provide the services which would address reading deficits because would not be "available" to do the core work of classes while trying to address reading deficits in the mainstream setting. The PS experts consistently opined that the IEP proposed for Student was appropriate in light of individual needs and circumstances.

Student still struggles with SLD and executive functioning. The IEP PS has proposed for Student directly addresses these deficits. The IEP offers a large percentage of mainstream classes and opportunities for Student to interact with non-disabled peers. It also provides specialized instruction in areas of greatest need to allow to progress through school as the work gets more difficult at higher grade levels. The school personnel believe it is appropriate for and they are entitled to deference in establishing educational programing. This hearing officer is unwilling to second guess their judgement.

While the current IEP for Student appears inadequate this is not the fault of PS as the Parents have refused the multitude of new and revised offers made by PS. The Parents will not even agree to a partial change to Student's IEP, forcing to receive fewer services than are recommended by PS experts. The Parents have given their input to PS and made numerous demands which PS simply does not agree with. Despite the low level of services called for under the current IEP, Student continues to progress in the school system and is deriving educational benefit.

The Parents' evidence is insufficient to prove that PS has failed to develop a proper IEP for Student. The only expert called by the Parents is Student's mother, herself. Student's mother is a highly biased witness. She may firmly believe in her position but is clearly in a hostile relationship with PS which taints her judgement and credibility. Her opinion that Student does not need specialized instruction in a self contained classroom is contrary to the majority of the evidence including her own agreement with the current IEP. Student's mother's opinion that Student might be harmed by exposure to more severely disabled students is pure speculation and contrary to the evidence which shows is not suffering any ill effect from current self contained class with disabled students. While the evidence does show that PS has not maintained Student's records with perfection there is no significant indication that it was done with any malicious or rendered the educators' assessment of Student invalid. Student has been evaluated

extensively and level of performance and needs appear to be very well documented despite the errors uncovered by Student's mother. Student's struggle with Spanish class is not a strong indicator of any inadequacy with the IEP as students with SLD often struggle with a second language. The Parents' ambition that Student graduate with an Advanced Studies Diploma is the cause of this predicament for Student and it is just speculation that will fail. The Parents have failed to meet their burden to prove that PS has failed to develop a proper IEP for Student.

Conclusion

For the above stated reasons it is found that the Complainants, Parents, have failed to meet their burden of proof to establish that Public Schools denied Student a free appropriate public education. It is further found that PS is the prevailing party.

ORDER

IT IS HEREBY ORDERED that the above styled matter is dismissed.

Right of Appeal Notice

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.

Date Frank G. Aschmann, Hearing Officer