

Stefan's parents

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

STATE LEVEL ADMINISTRATIVE REVIEW

City of Newport News Public Schools School District	Mr. & Mrs. Brian Jaynes Parents
Stefan Jaynes, Child	Peter W. D. Wright, Esquire, Parent/Child Counsel
Leonard A. Wallin, II, Esquire School Board Counsel	City of Newport News Public Schools, Party Initiating Appeal
Richard Earle Smith, Esquire Reviewing Officer	

Statement of Appeal Proceedings

By letter of July 13, 1999, Newport News Public Schools (NNPS) appealed the June 11, 1999 decision of the Local Hearing Officer, Howard E. Copeland (LHO) and Darrel Tiller Mason, Esquire was appointed as the Appeal Hearing Officer (APO). Thereafter, Mrs. Mason recused herself and by letter July 19, 1999, the undersigned was appointed by the Virginia Department of Education as the replacement AHO. The record in this case was delivered to the undersigned on August 20, 1999, the date required for decision. NNPS moved for an extension of time for the rendering of the decision herein and on August 25, 1999, an Order of Extension was entered extending the date for a decision to on or before September 15, 1999. By the delay there appears to be no prejudice to the rights of the child or his parents as the decision relates solely to the retrospective issue of reimbursement and not to the child's current or future academic placement.

FINDINGS OF FACT

1. Stefan Jaynes was born November 24, 1990 to Brian and Julianna Jaynes and has continuously resided with his parents in the City of Newport News, Virginia.

2. According to Dr. J. Matthew Frank, a pediatric neurologist, Stefan developed normal language skills in his first two years of life. (Parent's Ex. 2, Tr. Vol. I, p. 60).

3. In February, 1993, the said Dr. Frank advised the parents that Stefan was autistic and was experiencing abnormal brain waves. At this time Stefan was progressively losing his ability to speak and losing his language skills. Dr. Frank recommended early intervention by a psychologist. (Tr. Vol. I, pp. 60-62). Dr. Frank further recommended that the PACES program be investigated.

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4. The parents contacted the PACES program and were told that they would need a letter from Dr. Frank concerning Stefan's condition before he could be admitted. PACES directed the parents to Watkin's Elementary School (NNPS) because a referral from Watkin's would be necessary for participation in PACES.

5. Mrs. Jaynes made contact with Watkin's on October 8, 1993.

6. Melonie E. Melton, a speech language pathologist who had experience working with autistic children, evaluated Stefan on October 25, 1993, revised December 16, 1993. She recommended speech therapy at two sessions per week to address areas of communication development. The report was received by NNPS on January 12, 1994. (Parent's Ex. 8).

7. On November 1, 1993, Mrs. Melton developed a "Speech/Language Plan of Care" which was signed by Mrs. Jaynes on that date. The Plan provided for "A multisensory approach stressing preverbal and verbal skills...within functional play activities". (Parent's Ex.9).

8. On November, 18, 1993, Stefan was again seen by Dr. Frank who reported that "Stefan is progressing well". He noted that the child was in the process of being evaluated for the PEEP program. (PEEP is the NNPS acronym for "Program for Education Exceptional Preschoolers").

9. Mrs. Jaynes signed on NNPS "Permission to Evaluate" form on December 15, 1993. When signed by a parent, permission was provided for NNPS to evaluate whether Stefan was eligible for special education. (SB Ex. 1).

10. A NNPS Sociocultural Assessment was conducted on December 15, 1993. The recommendation was that the NNPS Eligibility Committee make a determination as to the child's most appropriate educational placement to meet his needs. (Parent's Ex. 13).

11. A developmental Report was prepared on December 15, 1993, by Joan H. Spratley, Watkin's Preschool Developmental Specialist. (Parent's Ex. 14).

12. A psychological evaluation was performed by Mary Swenson, a Nationally Certified School Psychologist. It was her opinion that Stefan has very significant developmental delays and should be declared eligible for preschool special education. (Parent's Ex. 15).

13. On February 8, 1994, the parents were sent a form requesting their attendance at an Eligibility Committee meeting scheduled for February 18, 1994. This form advised that their child was determined to be eligible for special ed. services, an IEP will be developed at the meeting. The form further

advised that the meeting date could be changed if desired by the parents and requested that they telephone to arrange for a mutually convenient time.

14. The parents did not attend the dual meeting on February 18, 1994.

15. Stefan was found eligible for preschool special education services and an IEP was developed for him on February 18, 1994. (Parent's Ex. 24). The developed IEP failed to include a date when services were to begin, but simply stated that they would begin on 4/ /94.

16. The February 18, 1994 IEP was not signed by a parent until March 31, 1994.

17. Despite the development of the IEP in February, 1994, and signed by a parent on March 31, 1994, Stefan was not admitted into the preschool special ed class until about two weeks prior to the end of the school year. The basis for the delay was the contention by NNPS that it did not have Stefan's birth certificate on record as required by State law for matriculation.

18. Mrs. Jaynes filed an affidavit respecting Stefan's birth with NNPS on May 11, 1994.

19. Dr. Frank, on July 11, 1994, advised regarding the need for occupational therapy. (Parent's Ex. 31). These services were never provided by NNPS.

20. The parents requested extended year services for Stefan (for the summer of 1994), but the request was denied.

21. In the fall of 1994, Stefan entered Mrs. Paster's self contained special education class under his February 18, 1994 IEP. The class consisted of children with a variety of disabilities. Stefan was the sole autistic child in the class.

22. On October 10, 1994, a new IEP was developed. Mrs. Jaynes participated in the meeting and signed the IEP. Based on testimony, Mrs. Jaynes requested that Stefan be placed in the PACES program and, although the word "PACES" appears on the LRE Justification Form in the IEP, that program was rejected in favor of the self contained PEEP with NNPS.

23. Feeling that their child was not progressing in the self contained PEEP program, the parents withdrew Stefan from school in January, 1995, in order to commence an at home intensive program.

24. On March 29, 1995, Dr. Frank wrote to Dr. Stiff concerning a follow-up visit with Stefan. He noted in the letter that the child was improving as a result of the intensive program of 4½ hours per day, 32 hours per week of training. (Parent's Ex.44).

25. The parents sought a due process hearing which was bifurcated to allow for evidence respecting reimbursement for the expense of education Stefan outside of NNPS.

QUESTIONS PRESENTED

The school board contends that no reimbursement is warranted because (i) the statute of limitations had run prior to the parent's request for a due process hearing and (ii) the parents removed their child from school before the instruction under his developed IEP could be fully implemented.

The LHO found that the statute of limitation's was tolled because "the parents, without benefit of legal advice, were not provided the notice of their due process rights as required by IDEA,"with regret, I must disagree with the LHO on this finding. The record is clear that although the parents deny having received a copy of Parental Rights in Special Education (SB Ex.2&3), Mrs. Jaynes signed all of the developed IEP's indicating that she had received a copy of her parental rights. While it may be conjecture as to whether she understood the nature of those rights, the best evidence is that she did receive a copy of them on each occasion. See Manning v. Fairfax County School Board, 42 F.3d.149.

The application of the Virginia two-year statute of limitations (§ 8.01-248) does not totally relieve the School Board in toto because the bar relates solely to expenses incurred by the parents prior to the initiation of their request for a due process hearing (January 14, 1997). With application of the two-year statute of limitations, claims from January 14, 1997 and back are barred, but claims from January 14, 1997 through the date of the due process hearing are a valid consideration.

The central issues are whether the child failed to receive a free appropriate public education from NNPS, and whether he received appropriate education after he was withdrawn from the public school by his parents.

DISCUSSION OF LAW

In Board of Education of the Hendrick Hudson Central School District Bd. of Ed. v. Rowley, 458 U.S. 176 (1982), the Court established a two-prong test to determine whether there has been compliance under IDEA: First, has there been compliance with the procedures set forth in the Act? Second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? The Court stated further that the services provided to handicapped children generates no requirement to maximize each child's potential.

While, in Rowley (Id.) the Court stated that it is not necessary under IDEA to maximize a child's potential, it need

be recognised that the Act does not intend that a school system may discharge its duty by providing a program producing minimal academic advancement. Hall v. Vance 744 F. 2d 629, 4th Cir. 1985.

In review of the entire record in the instant case, it appears obvious that those school personnel comprising the IEP Committee had predetermined that Stefan be placed in a self contained classroom and receive the PEEP program. This, in spite of the fact that they had before them recommendations from medical experts that Stefan required an intensive program of one on one instruction to develop his ability to communicate due to his loss of abilities owing to juvenile autism. The program in which he was installed, Mrs. Paster's class, even by her own testimony, was little more than a nursery school. There were a number of children in the class—all with disparate handicaps and none, other than Stefan, who was autistic. It is fundamental and essential for IEP team members to be aware of a child's condition at the time when decisions are made, and to be aware of the strategies needed to provide the best opportunity for that child to receive educational benefit. Here there was a woeful disregard of Stefan's needs and little, if any, effort to globalize his opportunity to receive "appropriate" special education.

Following his removal from NNPS, Stefan was engaged in an intensive 32 hour per week program which, from the report of Dr. Frank, of March 29, 1995, Stefan's training was having an impact on his growth and development. (Parent's Ex. 44).

Aside from some questionable time delays in the development of an IEP for this child, the IEP itself is deficient. The February 18, 1994 IEP (the so-called "draft") contained no definitive date for the commencement of services; the services stated were not commenced until late May, 1994; the IEP meeting date is written "3/31/94" when the meeting was actually held on 2/18/94; the goals and objectives are unstated; the IEP Committee made no attempt to involve the parents other than to send a form letter to them. There is no record of any further attempt to involve the parents in the meeting. 34 CFR 300.345. Based on the testimony of witnesses, the IEP was altered after the parent's signature was gained.

Under the Regulation's Governing Special Education Programs for Children with Disabilities in Virginia, the IEP services are to be implemented as soon as possible following the IEP meeting. Here, the meeting was held on February 18, 1994. The services did not commence until late May, 1994, just before the end of the school year. NNPS suggests that services could not commence because it did not have the child's birth certificate. It is simply incomprehensible that NNPS would delay notifying the parent of this deficiency for a period of nearly six weeks and thereby delay the commencement of services.

"Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case". Burlington School Committee Of The Town Of Burlington, et al v. Department of Education, et al, 471 U.S. 359 (1985). The foregoing was affirmed in Florence County School District Four, et al v. Carter, 510 U.S. 7 (1993).

In the instant case we have a series of procedural violations by NNPS and failure to provide the child with FAPE as outlined above. The LHO found in favor of the parents and awarded the sum of \$117,979.78 by way of reimbursement of the parents for the educational costs of their child.

For the reasons herein stated, I affirm the LHO decision regarding reimbursement, but owing to the bar of the statute of limitations, the amount of reimbursement is reduced to those costs incurred by the parents post January 14, 1997. Based on the exhibits of expenses supplied by parent's counsel, the recovery amount is reduced by \$61,888.94 which sum represents claimed expenses prior to the institution of the request for a due process hearing and which are based by the two year statute of limitations. Id.

As NNPS chose not to offer any argument about or objection to the parent's expense exhibits, any objection that they may have is deemed to have been waived.

DECISION

The decision of the LHO in awarding the parents costs for educating their son, Stefan, is upheld, but the sum of the reimbursement is reduced to \$56,090.84 representing those expenses incurred post January 14, 1997.

Parent's counsel has offered an exhibit on attorney fees. No action is taken on that exhibit at this level of the due process procedure.

DATE: 9/14/99

ENTER: 

Richard Earle Smith
Appeal Hearing Officer