



**Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of [Student]
v.
[District]

DHA Case No. DPI-18-0023
DPI Case No. LEA-18-0019

DECISION

The PARTIES to this proceeding are:

[Student], by

[Attorney]

[District], by

Attorney Andrew Phillips
von Briesen & Roper, S.C.
411 E. Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202

PROCEDURAL HISTORY

On September 5, 2018, the Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Improvement Act (IDEA) from [Attorney] on behalf of [Parent] (the Parent) and her child, [Student] (the Student), against the [District] (the District). DPI referred the matter to this Division for hearing.

A prehearing telephone conference was held on September 24, 2018. The due process hearing was held on October 18 and 22, 2018. Both parties filed post hearing briefs on November 12, 2018 and simultaneous reply briefs were filed on November 19, 2018. The record closed on November 19, 2018 and the decision is due December 3, 2018.

ISSUES

The issues for hearing, as discussed by the parties and established during the prehearing telephone conference on Monday, September 24, 2018, are as follows:

1. Whether the District denied the Student a FAPE during the 2017-2018 school year by failing to implement the Student's IEP in the following ways:
 - a. By not allowing the Student to participate in field trips or community experiences;

- b. By failing to have properly licensed and trained staff, including an LPN in the Student's classroom;
 - c. By failing to provide OT, PT and speech/language services to the Student;
 - d. By failing to follow the Student's health plan and/or address his medical needs.
2. Whether the District denied the Student FAPE pursuant to any procedural violations, including specifically by failing to communicate with the parent.

FINDINGS OF FACT

1. The Student is 10 years old and a student of the [District] (the District). has attended the District since 2013 when he participated in the District's 4k program.
2. The Student is diagnosed with [XXXXXX] disease, a neurological condition similar to muscular dystrophy and cerebral palsy that results in developmental delays, decreased muscle tone, and physical impairments. In the Student's case he cannot walk, is wheelchair dependent, is incontinent and is fed a continuous liquid diet through a g-tube that must be monitored by caregivers and school staff attending to the Student. (Tr. 8-10)
3. During the 2017-2018 school year, the Student was enrolled in fourth grade at the District. (Tr.: 197)
4. The Student is eligible for special education services at the District under the categories of Orthopedic Impairment and Speech/Language impairment. (Tr. 198)
5. During the 2017-2018 school year, the Student's IEP was amended five times. (Ex. 200-204).
6. The Student's IEP includes weekly services for occupational therapy (OT), physical therapy (PT) and speech/language therapy (SLT). (Ex. 200-204)
7. The Student's IEPs required that the Student have direct adult supervision during the school day and while transported. Supplementary services in the Student's IEPs require that he be repositioned throughout the day for comfort and safety. In addition, the Student's IEPs provided nursing services in the form of a nurse consultation annually to train staff on diapering, tube feeding and emergency plans for caring for the Student. The physical therapist was to provide training to staff four times per year on wheelchair positioning, transfers, positioning options when out of his wheelchair and massage training. In addition, at the beginning of the 2017-2018 school year the Student's IEP also provided that the Student receive monthly community experiences such as bowling. (Ex. 200-204)
8. The Student was absent from school on 129.5 out of 180 days of the 2017-2018 school year. In particular, the Student did not attend school from March 22, 2018 through the remainder of the 2017-2018 school year. (Ex. 214)

9. On December 7, 2017 the Student's parent filed a state IDEA Complaint and on February 2, 2018 the Wisconsin Department of Public Instruction (DPI) issued a written Decision 17-087 determining, in part, that on three occasions in October 2017 the Student's feeding machine was disconnected despite the Student requiring continuous feeding; that the District failed to provide community experiences between September 5 through November 13, 2017 as part of the Student's special education services pursuant to his IEP; and that the Student's IEP failed to sufficiently describe how communication between school and home would be effectuated. The DPI required that the District reconvene an IEP meeting to determine appropriate compensatory community experiences for the Student and to clarify what information would be communicated home. (Ex. 210)
10. On March 2, 2018 the Student's IEP team met to address the DPI February 2, 2018 Decision. The Student's IEP was amended to include use of a notebook to communicate information regarding the Student's elimination, spitting up, g-tube care, therapy activity session and description of intolerance for activities. In addition, the IEP determined that the Student would be provided with a monthly bowling trip from March through May 2018 and adaptive swim lessons at the local YMCA to compensate the Student for missing community experiences from September to November 2017; and the District agreed to reconvene the IEP to discuss adding Extended School Year (ESY) services be provided to the Student over the summer of 2018. (Ex. 203)
11. On March 7, 2018 the Student's parent filed another state IDEA complaint and on April 20, 2018 the DPI issued IDEA Decision 18-025, which determined that the District improperly changed the Student's placement when the Student's classroom was changed at the suggestion of the school principal and by the Parent's agreement without reconvening the IEP team. DPI also determined that on one occasion, a substitute teacher covering the Student's classroom was not properly licensed but that the Student's EA was properly licensed. (Ex. 212)
12. The District scheduled community activities for the Student between March and May 2018. However, the Student did not avail himself of these activities because the Parent chose to keep the Student home from school. (Tr.: 207-209)
13. The District provided occupational, physical therapy and speech/language services to the Student as required under the IEP. If any services were missed it was because the Student was absent from school.

DISCUSSION

The IDEA requires that all children with disabilities are offered a free, appropriate public education (FAPE) that meets their individual needs. 20 USC § 1400 (d); 34 CFR § 300.1. The U.S. Supreme Court has set forth a two-prong test to determine if a child has received FAPE: (1) whether there has been compliance with the IDEA's procedural requirements; and

(2) whether the IEP is reasonably calculated to provide educational benefits. *Board of Educ. v. Rowley*, 458 U.S. 176, 206-207 (1982). The federal regulations implementing the IDEA mandate that, in a due process proceeding involving a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; or (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefit. 34 CFR § 300.513 (a)(2). The FAPE determination aside, a hearing officer may order an LEA to comply with the procedural safeguard provisions of the IDEA. 34 CFR § 300.513 (a)(3).

Burden of Proof

The U.S. Supreme Court has ruled that the burden of proof in an administrative hearing challenging an IEP is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the complainants in this matter, the burden of proof is on the Parent of the Student. *Sch. Dist. Of Wisconsin Dells v. Z.S.*, 184 F.Supp.2d 860, 884 (W.D. Wis. 2001), *aff'd* 295 F.3d 671 (7th Cir. 2002). The burden of proof is a preponderance of the evidence. Wis. Stat. §111.80(5)(b).

Failure to Implement IEP Provisions

The Parent alleges that the District failed to provide the Student FAPE during the 2017-2018 school year by failing to implement the Student's IEP. The IDEA has not been interpreted by the courts to require perfect implementation of IEP provisions. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007); *Melissa S. v. Sch. Dist. of Pittsburg*, 183 F. App'x 184, 187 (3rd Cir. 2006). Rather, courts have held that the IDEA is violated if there is evidence that a school district failed to implement substantial provisions of an IEP or "an essential element of the IEP that was necessary for the child to receive an educational benefit." *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n. 3 (8th Cir. 2003); *see also Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348-349 (5th Cir. 2000).

The Parent testified at the hearing that the Student was denied opportunities to participate in field trips or community experiences. The DPI investigated the allegations and determined that the Student was in fact denied the community experiences that were listed as part of the Student's IEP at the beginning of the 2017-2018 school year. Accordingly, the District reconvened an IEP meeting in March and determined that the Student would be provided compensatory services in the form of monthly bowling and adaptive swim classes at the YMCA. However, the Parent subsequently ceased sending the Student to school and therefore, did not avail himself of these community experiences. Although the District's failure to provide the community experiences amounted to a failure to implement the IEP, the Parent has not established that the lack of community experiences were necessary for the student to receive educational benefit or that the lack of community experiences resulted in a denial of FAPE under the law. Moreover, the District remedied the alleged violation prior to the filing of this Due Process hearing complaint by offering compensatory services.

The Parent also testified that she believed that the District failed to have properly licensed and trained staff. The preponderance of evidence establishes that the District's staff were

properly licensed, except on one day when the Student had a substitute teacher. The DPI reached a similar conclusion after its own investigation in IDEA Decision 17-087. The Parent has not established that the Student did not receive educational benefit on the one day that the unlicensed substitute teacher was covering the Student's classroom. Rather, the evidence establishes that the Student's EA, who is properly licensed, continued to provide services to the Student on that day.

In addition, the District provided credible testimony and evidence to establish that training by both a nurse and physical therapist occurred as required under the Student's IEP. The Parent testified that she was not aware of the training and did not believe that training was done because she had to show staff how to position the Student in ways that she knew to be most effective in order to burp him. The Parent acknowledged at the hearing, however, that she did not have personal knowledge of the staff training that occurred and therefore did not know if and when it occurred. (Tr. 21, 38, 91-92) Just because she was not made aware of when and what training occurred or by whom, does not mean that it did not occur.

The Parent testified that the Student was coming home with wet undergarments, vomiting and with left over liquid food. The fact that the Student came home with wet undergarments did not establish that the District was not training staff or that the staff were not implementing the Student's IEP. There was no evidence presented that the Student was wet prior to leaving the school. The District presented testimony and evidence of the procedures for when the Student was changed, including examples of logs showing how the school staff kept track of how often the Student was changed. Similarly, the Parent testified that she believed that the staff were not positioning the Student properly, particularly to burp him, which the Parent believed resulted in the Student vomiting when he got home. Yet, the Parent also alleged in her complaint and post hearing briefing that the Student was denied nourishment as a result of insufficient feeding at school. The Parent's testimony was not only often inconsistent but also largely based upon speculation without any other corroborating evidentiary support. Again, the Parent has not established by a preponderance of evidence that unlicensed or untrained staff resulted in a loss of educational benefit or a denial of FAPE to the Student.

Similarly, the Parent has failed to set forth any evidence that the Student was not provided OT, PT or Speech/Language therapies. On the contrary, the preponderance of evidence presented by the District established that the Student was provided the therapies as required by his IEP. However, due to the Student's many absences from school, he often missed his scheduled weekly therapies. Moreover, based upon the Parent's testimony at the hearing, her assertion that therapy was not provided was based upon her lack of knowledge of whether therapies were provided due to her limited access to the school and because she did not feel that the District staff were keeping her adequately informed. However, merely because the Parent was not present to observe all therapy and/or did not have first hand knowledge of the therapy and/or was not informed when the therapy occurred, does not mean it did not occur.

Finally, the Parent alleges that the District failed to have an LPN in the Student's classroom. However, nothing in the Student's IEP or the law requires that the District assign a one-to-one nurse to the Student or have a nurse in the classroom with the Student at all times. The Student's IEP provides for a nurse to consult with and train staff. The District presented credible testimony

that the Student's IEP was complied with in this regard and that a school nurse was on site when the Student was in attendance should the need for nursing or emergency services arise.

Not only has the Parent failed to meet her burden of proof, but the Parent's alleged violations are largely unsubstantiated and refuted by a preponderance of evidence. The Parent has failed to present evidence that the District failed to implement substantial provisions of the Student's IEP or "an essential element of the IEP that was necessary for the child to receive an educational benefit". Although the lack of community experiences described in the Student's IEP amounts to a failure to implement the IEP, as stated earlier, that omission was corrected by the District prior to the filing of this due process hearing request. The Parent has not only failed to establish by a preponderance of evidence that the District failed to implement substantial portions of the Student's IEP, but has also failed to establish that the Student was denied meaningful educational benefit or a denial of FAPE as a result of the alleged failures.

Procedural Violation

As stated above, procedural violations result in a denial of FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; or (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefit. 34 CFR § 300.513 (a)(2). The Parent has not met the burden to establish a procedural violation that resulted in a denial of FAPE under the law. Moreover, neither of the post hearing briefs filed on behalf of the Parent and Student even mention any procedural violation related to a failure to communicate let alone set forth any evidence or legal argument in support of a finding of a denial of FAPE related to any alleged failure to communicate.

At hearing, the persistent theme of the Parent's testimony was that she did not believe that District staff were taking required and appropriate actions to address the Student's needs because the District did not communicate each action taken by staff. Nothing in the law requires that the District communicate every action taken with respect to the Student. Regardless, the preponderance of evidence established that the District documented the cares provided to the Student even when not communicated with the Parent. The District took steps to improve the method and content of communication during the 2017-2018 school year. Although the frequency and content of the communication may not have been to the Parent's satisfaction, the Parent has not established by a preponderance of evidence that the District's communication was insufficient under the law. Moreover, the Parent's post hearing briefing does not explain how the alleged procedural violation, if any, amounted to a denial of FAPE. Therefore, I do not find sufficient evidence to support a procedural violation that impeded the Student's right to FAPE or that impeded the Parent's opportunity to participate in the decision making process regarding the provision of FAPE nor caused a deprivation in educational benefits to the Student.

CONCLUSIONS OF LAW

1. The School District did not deny the Student a free, appropriate public education during the 2017-2018 school year by failing to implement the Student's IEP.

2. The School District did not commit procedural violations that amount to a denial of FAPE.

ORDER

It is hereby ordered that the due process hearing request in this matter is dismissed.

Dated at Madison, Wisconsin on December 3, 2018.

STATE OF WISCONSIN
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By: _____

Kristin P. Fredrick
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

APPEAL TO COURT: Within 45 days after the decision of the administrative law judge has been issued, either party may appeal the decision to the circuit court for the county in which the child resides under §115.80(7), Wis. Stats., or to federal district court pursuant to U.S.C. §1415 and 34 C.F.R. §300.512.

A copy of the appeal should also be sent to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor, Madison, WI 53705-5400.

The Division will prepare and file the record with the court only upon receipt of a copy of the appeal. It is the responsibility of the appealing party to send a copy of the appeal to the Division of Hearings and Appeals. The record will be filed with the court within 30 days of the date the Division of Hearings and Appeals receives the appeal.