

PRELIMINARY MATTERS

Subsequent to the Hearing, both parties submitted proposed findings of fact and conclusions of law. Both have been reviewed and considered in offering this Decision. To the extent that any witness testimony is not in conformity with the findings of fact contained herein, such testimony is not found to be credible.

PROCEDURAL HISTORY

The request for Hearing in this matter was filed on November 13, 2008. The Petitioner waived resolution session on November 18, 2008. Petitioner requested an extension of the timeline based upon the unavailability of Petitioner's counsel until late February 2009. The request was not objected to and was therefore granted. A Prehearing Conference was held on December 17, 2008, the results of which are reflected in the Prehearing Conference Order issued on the same date.

ISSUES PRESENTED

During the above noted Prehearing Conference, the issues were clarified to be and are limited to the following:

1. Did LEA deny the student FAPE by failing to develop an IEP which included methodology needed to provide the student with educational benefit?
2. Is the Petitioner entitled to reimbursement for prior and continued private placement?

FINDINGS OF FACT

1. [REDACTED] is a five year old boy, born on January 19, 2004, diagnosed with autism spectrum disorder, also described in the records as Pervasive Development Disorder, Not Otherwise Specified (PDD-NOS). Due Process Exhibit R-14

2. Since the age of two, [REDACTED] has been enrolled at the [REDACTED] Ex. R-23, R-22, R-18, R-20. Before attending [REDACTED] was nonverbal, had deficits in social and cognitive skills.
1. [REDACTED] was approximately 2 years old when he began treatment with [REDACTED] at [REDACTED] Hospital.
 3. [REDACTED] described [REDACTED] at age 2 as nonverbal with high rates of repetitive and restrictive behaviors, having a significant learning delay, highly inattentive and difficulties staying on task. Additionally, he displayed a number of repetitive and stereotypical behaviors, of autism.
 2. [REDACTED], as [REDACTED] diagnostician, has made the recommendation that [REDACTED] receive 30-40 hours per week of Applied Behavior Analysis using Discrete Trial Instruction or Teaching (hereinafter "ABA DTI or DTT")
 4. [REDACTED] currently receives 30-40 hours per week of ABA-DTT at [REDACTED].
 5. On October 11, 2007, a team of educators from the LEA observed J.A. at [REDACTED]. Ex. R-2
 6. On November 7, 2007, the [REDACTED] sent to [REDACTED] parents a Notice of Eligibility Committee and/or Individualized Education Program Team Meeting, scheduling an IEP meeting for November 30, 2007, for J.A. Ex. R-1
 7. The parents responded that they would attend and that their attorneys, [REDACTED] and [REDACTED] would attend, as well [REDACTED] and [REDACTED] from [REDACTED] Ex. R-1

8. On November 19, 2007, LEA Principal [REDACTED] transmitted to the parents a copy of the LEA's updated procedural safeguards; present levels of educational performance as observed by the LEA at [REDACTED] on October 11, 2007; and a draft of annual goals and short term objectives for the IEP meeting on November 30, 2007. Ex. R-2
9. On November 27, 2007, the parents responded, and included specific IEP goals to be incorporated into [REDACTED] IEP; a present levels document prepared by the parent and [REDACTED], and comments and clarifications relative to the observations sent by the LEA. Ex. R-3
10. The LEA attached, verbatim, the present levels document and incorporated the goals suggested by the parent into the draft IEP to be discussed by the IEP Committee on November 30, 2007. Ex. R-5, Ex. R-6; Due Process Hearing Transcript Volume 1 pp. 218-220. (hereinafter Tr. Vol. ___p. ___)
11. The parents attended the IEP meeting on November 30, 2007, along with [REDACTED] the Executive Director of [REDACTED] and [REDACTED], [REDACTED] program coordinator. Ex. R-8.
12. [REDACTED], the LEA's school psychologist; [REDACTED], a preschool special education teacher; [REDACTED], Principal at [REDACTED] Elementary School; [REDACTED], autism teacher; [REDACTED]; autism consultant; [REDACTED], the LEA's Director of Special Education; [REDACTED], speech therapist; and [REDACTED], occupational therapist; attended the IEP meeting on behalf of the LEA. Ex. R-8.
13. The parents and the LEA were presented at the IEP meeting by counsel. Ex. R-8

14. The IEP calls for [REDACTED] placement in special education 100% of the time. Ex. R-8
15. At the IEP meeting, neither the parents nor their advocates voiced any objection to the IEP, except that the parents and their advocates questioned the SCERTS methodology to be used by the LEA. TR. Vol. I p. 220-222; 227-228; Ex. R-12
16. The IEP's initiation date was December 17, 2007. Ex. R-8
17. The LEA uses SCERTS as a methodology for students with autism.
18. The IEP calls for trained SCERTS instructor to implement portions of the IEP. Ex. R-8
19. All of the LEA's teachers were trained in SCERTS on or before December 12 and 13, 2007.
20. On December 17, 2007, having not heard from the parents regarding the IEP, Principal [REDACTED] sent the parents a prior written notice, indicated when the IEP would start and setting forth some dates of transition. Ex. R-10
21. On December 17, 2007, counsel for the parents rejected the IEP, indicating that the parents intended to keep the student at [REDACTED] because of their concerns with the methodology employed by the school system. Ex. R-11.
22. In December 18, 2007, counsel for the LEA responded confirming that the methodology remained the main issue with the parents. Ex. R-12.

23. The parents did not file for due process until November 10, 2008, nearly one year later.
Ex. R-26
24. ██████████ teaches Preschool Special Needs for the LEA. Tr. Vol. 1 p. 173.
25. ██████████ has over 25 years of experience teaching students with special needs and, throughout that time, has been involved in developing thousands of IEP's. Tr. Vol. 1 pp. 229-230.
26. ██████████ holds a bachelor's degree in special education; a bachelor's degree in elementary education; and a master's degree in special education early intervention. Tr. Vol. 1 pp. 173-174.
27. She is certified by the State of West Virginia to teach Elementary Education 1-6; Special Education K-12; and Pre-School Special Education Pre-K-K. Tr. Vol. 1 p.174; Ex. R-24.
28. ██████████ observed ██████████ at ██████████ and helped to develop his IEP. Tr. Vol. 1 pp. 214-216.
29. ██████████ was present and participated throughout the IEP meeting on November 30, 2007, for ██████████. Tr. Vol. 1 p. 220-228.
30. ██████████ was qualified as an expert in special education.
31. ██████████ testified that the IEP developed for ██████████ was designed to confer meaningful educational benefit. Tr. Vol. 1 pp. 213, 229.

32. She testified that the LEA believed that [REDACTED]'s needs could be met in a more functional environment and still confer educational benefit.
33. [REDACTED] teaches students with autism for the LEA.
34. [REDACTED] has taught students with special needs for 8 years. Prior to that, he served as an instructional aide for 15 years.
35. He hold a bachelor's degree in speech pathology; a master's degree in severe multiple disabilities; and an autism certification from Marshall University.
36. [REDACTED] is certified by the State of West Virginia to teach Special Education K-12; and Autism OK-AD[ULT]. He is considered a highly qualified teacher under No Child Left Behind.
37. [REDACTED] observed [REDACTED] at [REDACTED] and helped to develop his IEP.
38. [REDACTED] was present and participated throughout the IEP meeting on November 30, 2007, for J.A.
39. [REDACTED] was qualified as an expert in special education and autism instruction.
40. [REDACTED] testified that the IEP developed for [REDACTED] was reasonably calculated to confer meaningful educational benefit.
41. [REDACTED] testified that the IEP was "based on information supplied by [REDACTED] center; it was based on [REDACTED]'s past experience working with that age level population; and it was based on the input of people who work with students with autism."

42. [REDACTED] is an autism consultant for [REDACTED] County Schools.
43. [REDACTED] observes students with autism and works with parents and teachers to develop an educational program for them.
44. [REDACTED] provides discrete trial training to students; supervises instructional personnel in administering such programs; and monitors and modifies programs when needed.
45. [REDACTED] holds a bachelor's degree in psychology and a master's degree in child clinical psychology.
46. [REDACTED] observed [REDACTED] at [REDACTED] and helped to develop his IEP.
47. [REDACTED] was present and participated throughout the IEP meeting on November 30, 2007, for [REDACTED]
48. [REDACTED] testified that the IEP developed for [REDACTED] was designed to confer meaningful educational benefit.
49. [REDACTED] testified that the IEP was "specifically designed for [REDACTED]. It was -- it's very individualized. It targets specific functional skills that he would need to progress and be successful in life."
50. [REDACTED], who holds a Ph.D. in clinical psychology and is a professor of pediatrics at Ohio State University and Nationwide Children's Hospital, is [REDACTED] treating psychologist.

51. [REDACTED] testified that he has seen [REDACTED] at Children's Hospital once a year over the past 3 years and has received reports about [REDACTED] from [REDACTED] parents.
52. [REDACTED], who qualified as an expert in the field of pediatric psychology with a specialization in autism, recommended that [REDACTED] receive 30-40 hours of 1:1 therapy using ABA discrete trial techniques.
53. In fact, [REDACTED] testified he typically recommends ABA/DTT for children with autism up to age 8, when they are similar in performance to [REDACTED].
54. [REDACTED] testified that ABA/DTT is the only method which has peer reviewed scientifically based research which shows educational benefit for student with similar proficiencies to [REDACTED].
55. [REDACTED] has not observed [REDACTED] at [REDACTED] and he did not review the IEP.
56. [REDACTED] never observed any of the LEA's classrooms, and his only familiarity with SCERTS comes from looking at the SCERTS website on the internet.
57. [REDACTED] was qualified as an expert in school psychology, special education programming and autism.
58. [REDACTED] reviewed [REDACTED] IEP; the reports by [REDACTED]'s psychologist from Children's hospital; [REDACTED] records from birth to 3 program; his records at [REDACTED] and observed [REDACTED] at [REDACTED] for less than two hours.
59. In addition, [REDACTED] was present for [REDACTED]'s testimony.

60. Based upon his review of the records, his observations of [REDACTED], his discussions with the teachers at the LEA, and his review of the November 30, 2007, IEP, [REDACTED] testified that he believed the IEP was a good IEP, that would provide educational benefit to [REDACTED].

61. According to [REDACTED], the IEP is "well thought out, and, most importantly, is based on what he can do....It is implementable. It is in a school and it will be able to be generalized and transferable and it will be- not require the huge transition that he would have to make. If [REDACTED] continues to stay where he is, the older you get, the harder the transition is. And so I think this would provide educational benefit, and it is not- it is not ABA Lovaas- approved discrete trail training, but it provides educational benefit."

62. [REDACTED] testified that transitioning [REDACTED] from the ABA/DTT program to the SCERTS program would cause regression.

63. [REDACTED] disagrees with [REDACTED] that "the only methodology for children with autism is ABA discrete trial."

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The provision of FAPE is determined by a two prong test: First, has the LEA complied with the procedures of IDEA. Second, is the IEP reasonably calculated to provide the student with educational benefit? *Bd. of Educ. V Rowley, 102 S. Ct. 3034 (1982).*

2. The educational benefit must be more than trivial. *Carter v. Florence County School Dist. Four*, 950 F.2d 156 (4th Cir. 1991) *aff'd* 510 U.S. 7; 114 S. Ct 361 (1993).
3. A student is eligible for services under IDEA if the student has a disability and who, by reason of the disability, needs special education and related services. 20 U.S.C. 1401, 34 C.F.R. 300.8
4. The applicable statutory authority is found at 20 U.S.C. 1400, et seq. (IDEA) and its regulatory interpretations at 34 C.F.R. 300, et seq.
5. [REDACTED] is a disabled child within the meaning of 20 USC 1400, et seq. (IDEA), its implementing regulations at 34 CFR 300, et seq. and West Virginia Policy 2419.
6. IDEA provides for private placement reimbursement when the LEA fails to provide FAPE and the private placement is appropriate. 20 U.S.C. 1412; *Burlington v Dept. of Educ. Of Mass.*, 471 U.S. 359; 105 S.Ct. 1996 (1985).
7. Parents are not required to subject their children to inappropriate IEPs and educational failure in order to seek reimbursement for private placement. *Frank G. v Board of Education of Hyde Park Central School Dist.*, 459 F.3d356 (2nd Cir 2006). *cert. denied*, _____ U.S. _____, 128 S.Ct. 436 (2007)
8. LEAs must use educational programs which are based upon peer reviewed research to the extent practicable. 20 U.S.C. 1414(d)(1)(A)(IV).
9. The LEA has the burden of proof as to the appropriateness of any proposed action. *WV Policy 2419*

DISCUSSION

This matter centers on a request for reimbursement of private school tuition. The student received services from the private school from the age of two as the result of a settlement agreement between LEA and Petitioner. Upon the time of development of an IEP for IDEA covered services provided by the LEA for the period beginning January 2008, the parents were dissatisfied with the LEA proposed IEP. Parents unilaterally placed student at the same private school and sought reimbursement of tuition. In order to prevail in a claim for reimbursement, the petitioner must show that the LEA has not offered FAPE in a timely manner and that the private placement is appropriate. The LEA has the burden of proof for showing that the proposed IEP is appropriate.

First, the petitioner must show that FAPE has not been provided. In order to meet the requirement of FAPE, LEAs must develop IEPs which are reasonably calculated to provide educational benefit. *See Rowley*. The educational benefit must be more than minimal or trivial. *See Carter*. The IEP must be based upon the student's individual needs.

The student in this matter has been receiving services based upon the recommendation of his treating psychologist. The psychologist testified that [REDACTED] was far below his peers in development. Throughout his extensive research and experience, he has found the Applied Behavioral Analysis/Discrete Trial Training (ABA/DTT) method to be the only method that works with students of the same proficiency levels as [REDACTED]. Based upon his years of working with [REDACTED], the psychologist recommended 35-40 hours per week of ABA/DTT. [REDACTED] has attempted to comply with the recommendations by providing the particular methodology for the number of hours possible suggested by [REDACTED]. The psychologist made his recommendations based upon the particular needs of the individual child [REDACTED]. However, it

should be mentioned that the psychologist regularly recommends a similar program for students with similar levels of deficiency.

The instructors who work with [REDACTED] on a daily basis believe that the student needs ABA/DTT in order to receive educational benefit which is more than minimal. [REDACTED] current instructors have worked with him since he began at [REDACTED] as a two year old. These instructors, while not certified teachers, are professionals who have knowledge of the day to day progress or lack thereof under the current system of instruction.

To the contrary, the LEA's recommendations are based upon a roughly two hour observation of the student. While this Hearing Officer must give due weight to the expertise of LEA professionals, the length and quality of observation and evaluation of the student significantly diminish the weight given to LEA proposals. It is difficult to thoroughly evaluate any child in such a short timeframe. It is particularly difficult to do so when the child is autistic and results may vary dramatically from day to day. Furthermore, LEA did apparently did not request or review the data collected by [REDACTED] staff on [REDACTED] performance until after the complaint was filed.

In addition to the limited evaluation and observation, the LEA offers an IEP which relies upon the SCERTS method. Again, while courts are reluctant to substitute their judgment in place of the judgment of educational professionals, such determinations may be made in the context of determining whether a particular method in an IEP provides educational benefit. *Ed of Educ. Of Kanawha Co. v Michael M.*, 95 F. Supp 2d 600 (S.D. WVa. 2000); *MM v. Sch. Dist. Of Greenville Co.*, 303 F. 3d 523 (4th Cir 2002). In order to determine whether the LEA has offered FAPE through the IEP, we must investigate the effectiveness of the particular components of the IEP, in this case SCERTS. Congress has recognized the need for objective

determinations of the effectiveness of teaching systems by requiring the use of peer reviewed techniques. 20 U.S.C. 1414.

In this case, the Hearing Officer is not persuaded that the SCERTS method meets the requirements of scientifically based, peer reviewed research. Based upon evidence presented, SCERTS is a compilation of bits and pieces of various techniques developed to teach children with autism. The approach seeks to incorporate other techniques into a various social settings, recognizing that social interaction is generally a significant impediment to children with autism. LEA offered much testimony regarding the research behind the SCERTS program. However, in reviewing the testimony and the research offered by proponents of SCERTS, it is apparent that components of SCERTS have been researched but the program as a whole has not been fully evaluated. The SCERTS method appears to have been a recent development and as such LEA presented has no longitudinal research which shows the efficacy of using techniques in the manner which SCERTS describes. While the SCERTS program may prove to be an effective program after proper review, at this point in its infancy it cannot be considered to meet the scientific and peer reviewed requirement. By requiring a peer reviewed scientific basis, Congress has expressly relieved parents of the loss of precious time that may occur when children are subjected to experimental and unproven educational programs. Additionally, although not dispositive in the case, it is disturbing that only minimal training in the form of less than three days of seminars is offered as proof that LEA teachers are competent in the SCERTS method.

The LEA, in recommending SCERTS, has also shown no evidence that it considered the individual needs of [REDACTED]. The student has been receiving instruction under the ABA/DTT model, as recommended by [REDACTED], and has progressed according to the evaluation data collected by

the [REDACTED] staff. Petitioner asserts that changing the strategy which has produced positive results for two years would have negative impacts on the student. Interestingly enough, LEA's expert agrees with the assertion. [REDACTED] testified that there will certainly be regression and negative effects from changing methods. He goes on to reason that the change must occur at some point so [REDACTED] should undergo such regression sooner rather than later. By offering the SCERTS model and only the SCERTS model, bolstered by the opinion of [REDACTED] that [REDACTED] must change methods when he enters public school, the LEA essentially admits that it has not considered the individual needs of [REDACTED]. Instead, LEA has adopted the SCERTS model and will transition [REDACTED] from his successful program to an unproven program with no evidence that it will provide educational benefit to this individual child.

In considering the limited observation and evaluation times upon which the LEA based its recommendation to completely change the program which has been successful for [REDACTED], the LEA recommendation of a program which has not been shown to be effective through the necessary peer reviewed research and the lack of any determination by the LEA that the proposed program is individually based, the IEP offered by LEA does not provide FAPE to [REDACTED]. The LEA has failed to meet the burden as required by WV Policy 2419. In addition, the private placement is appropriate because Petitioner has demonstrated the progress made under the proposed placement.

It is worth noting that this discussion is fact intensive and may change depending upon the facts presented. It is expected that the LEA and Petitioner will cooperate in reviewing and evaluating [REDACTED] on a continuing basis. If the LEA shows in the future that it offered an individualized program which offers educational benefit to the student, the outcome may be different.

ORDER

1. LEA shall reimburse Petitioner for tuition and expenses associated with [REDACTED] attendance at [REDACTED]. This reimbursement shall cover the period of time from January 2008 until the start of the 2009-2010 school year.
2. Within forty five calendar days (45 days) of this Order, the IEP team shall meet to develop student's IEP for the 2009-2010 school year. During this meeting the team shall determine if the LEA is able to provide an individualized program which provides the student educational benefit using scientifically based teaching techniques.
3. This Due Process proceeding is hereby complete and may therefore be closed.

APPEAL RIGHTS

Any party aggrieved by this decision or any part thereof may appeal to any state or federal court of competent jurisdiction within 120 days of the date of issuance of the decision.

Entered on April 24, 2009 by

_____/s/ Patrick Lane_____

Impartial Hearing Officer