

**BEFORE THE WEST VIRGINIA DEPARTMENT OF  
EDUCATION OFFICE OF FEDERAL PROGRAMS  
DUE PROCESS HEARING OFFICER**

**DECISION  
Due Process No. 20-002**

The West Virginia Department of Education Office of Federal Programs designated the undersigned to serve as impartial hearing officer in the above-referenced matter. An evidentiary hearing was conducted on the agreed dates of September 30 and October 2, 2019, at a location agreed to by the parties and the hearing was recorded by a certified court reporter. The purpose of the hearing was to consider evidence related to Student<sup>1</sup>/Parent's due process request. Student/Parent were not represented by counsel; County Schools were represented.

**PROCEDURAL HISTORY**

On August 14, 2019, the undersigned was notified of assignment by the West Virginia Department of Education Office of Federal Programs (OFP) to this due process hearing request and contacted the parties by letter dated same. County Schools filed an Answer to the complaint August 21, 2019. A telephone scheduling conference was held August 28, 2019, in which

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<sup>1</sup> Pursuant to West Virginia Department of Education student confidentiality policies, all names of individuals and entities personally identifiable to/with Student are not used and titles or functions are substituted for names. The

Student/Parent moved that County Schools not be permitted to have an attorney because Parent was not represented by counsel; this motion was denied. Student/Parent elected to not have Student present at the hearing and to have the hearing open, later changed to closed by email. The Resolution Session was not successful; the parties then elected to go to mediation scheduled for and held on September 16, 2019. The mediation resolved one of the issues and the Parent elected to go forward with the remainder of the issues at the due process.

County Schools filed a motion alleging Complaint insufficiency on September 17, 2019; an Order was entered on that same date denying the motion and finding the issues sufficiently specific to allow the hearing to go forward. The parties were able to agree on hearing dates of September 30, and October 2, 2019, and to the hearing location. Parties filed their exhibits and witness lists on September 23, 2019<sup>2</sup>. Parent contacted the WV Department of Education and received instructions on how to request subpoenas but failed to request any from the hearing officer.

On September 30, 2019, the hearing commenced with evidence received and a record of the proceedings made. Student's Parent testified, presented no additional witnesses and introduced exhibits that were made part of the record at the hearing. County Schools presented two (2) witnesses and introduced exhibits that were made part of the record at the hearing. The transcript was delayed and not received by Parent until September 25, 2019. The parties had elected to file proposed findings and conclusions electronically on the agreed date of November 25, 2019, but because of the transcript delay, the hearing officer extended the due date to December 9, 2019, and the parties timely filed these pleadings. This decision is issued on the agreed date of January 2, 2020.

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coversheet identifies the actual names.

<sup>2</sup> Unfortunately, Student/Parent's exhibits were numbered differently for the County Schools and for the Impartial Hearing Officer and did not contain the same documents. The transcript notes which exhibits were used.

## **ISSUES**

A. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to appropriately evaluate Student before ending the provision of a one-to-one aide?

B. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to determine Student's need for extended school year services (ESY)?

C. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide Student appropriate modifications, assistance, homework packets, and services all in the least restrictive environment (LRE)?

## **MOTIONS**

All decisions rendered at the aforesaid hearings on motions filed in this action are hereby affirmed and all other motions filed in this action by either of the parties which were not previously ruled upon by the hearing examiner are hereby denied and rejected.

## **CREDIBILITY OF WITNESSES, TESTIMONY, AND EXHIBITS**

The hearing officer was and is satisfied that all records, papers and documents entered as exhibits<sup>3</sup> are now complete, authentic and valid and that they were entered with the proper

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<sup>3</sup> As noted above, because the documents introduced by Student/Parent were not consecutively numbered, had different numbers on County School copies than on Hearing Officer copies, and were not complete, the hearing officer used exhibits numbered and provided by County Schools whenever possible. The transcript reflects which

evidentiary foundations.

The hearing officer was and is satisfied that the witnesses brought on by the parties were credible and truthful except as inconsistent with this decision. Neither the demeanor of the witnesses nor the substance of any testimony suggested any inconsistency, conflict, or ulterior motive except as noted below. No evidence suggested any personal gain to be achieved by any witness as a result of testifying except as noted below.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and the exhibits admitted into evidence and matters of which the hearing officer took judicial notice during the proceedings, assessing the credibility of the witnesses, and weighing the evidence in consideration of the same, this hearing officer makes the following findings of fact and conclusions of law. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by the parties but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

Following a thorough review of the evidence, the hearing officer makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. Student is twelve (12) years old and this year attends sixth grade in a County middle school. For the preceding two (2) years, Student attended fourth and fifth grade in a County elementary school.

2. Student has received special education and related services since entry into county schools. Student is eligible under the autism category; Student has a genetic disorder and motoric and oral apraxia. TR. I at 24, 26. TR. II at 181.

3. Since Student was in kindergarten, Student has had the same aide who came with her to middle school. Parent credited the aide with much of the progress Student has made in school. TR. I at 27, TR. II at 280-303.

4. Some time prior to August 13, 2017, the description of this aide's services was changed from "1:1 aide" services to "adult supervision services." Although Parent was unsure of the date this occurred, she believes she was not notified of this change. TR. I at 27-8, 106.

5. On February 11, 2014, Parent was sent a prior written notice (PWN) that the 1:1 aide services would not be provided although there was some disagreement about the content and receipt. TR. I at 105-7.

6. County Schools billed Medicaid for the aide's personal care of Student (hygiene, etc.) but not academic assistance. Student received in the last two years few or minimal personal care services. TR. I at 30-4. TR. II at 170-2. CS Exhibit Number 4.

7. Parent requested County Schools to stop billing Medicaid for those personal care services in 2019, County Schools brought Parent the form which Parent signed, and County Schools stopped billing Medicaid. TR. II at 172-3, 223.

8. Student's primary aide testified that she works with Student nearly all day every school day except recess and some therapy sessions. TR. II at 169.

9. Student had issues at least once on the playground when the adult supervision was inadequate to prevent her from an injury. Parent filed a State Complaint on this issue and received a Letter of Findings. TR. II at 165. CS Exhibit Numbers 19, 20, 30, 49, 51.

10. Student has been evaluated for Extended School Year Services (ESY) each year and has been offered ESY services for the relevant years of this due process. TR. II at 181.

11. During the 2019 ESY provided to Student, Student worked on skills gained during the past school year to prevent losing them. She did not start the Wilson reading program Parent wanted until this school year. TR. II at 242-5.

12. Parent filed a State Complaint on the 2018 ESY offered to Student and the Office of Federal Programs in its February 8, 2019, Letter of Findings determined that County Schools provided students with appropriate ESY programming to meet students' individualized need. CS Exhibit Numbers 43, 44, 45, 46, and 52.

13. During the 2017-18 school year, all students missed at least fourteen (14) days of instruction at County Schools. Four (4) of those days were for inclement weather and were replaced by four (4) days: February 19, March 30, May 25 and May 29, 2018. Ten (10) days were for the teacher work stoppage; five (5) of those days were made up using accrued instructional time and five were made up by adding May 30, 31, June 1, June 4 and 5, 2018 to the instructional calendar. This recoupment plan was approved by the West Virginia Department of Education so that no students were short-changed.

14. Parent filed a State Complaint on this recoupment on December 11, 2018; The Office of Federal Programs in its February 8, 2019, Letter of Findings determined that County Schools did not deny special education and related services to any student, including Student, who attended school on the enumerated days. CS Exhibit Number 49.

15. Parent believed that Student missed some minutes of services required by her IEP and that the homework packets sent out to County School students during the work stoppage were not appropriately modified for Student.

16. Parent did not introduce any evidence that Student missed any minutes of IEP services, or that Student did not attend on those make-up days in the approved County School Recoupment Plan or provide appropriate Student's homework packets.

17. Although one of Student/Parent issues involved provision of services in the least restrictive environment (LRE), Parent testified that was not her intent, that she is pleased with Student's primarily general education placement. TR. I at 63-5, 71.

## **CONCLUSIONS OF LAW**

1. A due process complaint must be initiated within two (2) years of the date a parent or district knew or should have known of a disputed decision or alleged action that forms the basis for the complaint. In this due process, the appropriate date is August 13, 2017. *WV Policy 2419 (126 CSR 16) Dispute Resolution, Ch. 11, §4A.*

2. The federal burden of proof in a due process complaint consists of the burden of production and the burden of persuasion. The burden of production is the duty of a party to be the first to introduce evidence to prove a disputed fact such that if the party with the burden fails to satisfy the initial burden, the other party wins without having to present evidence on that disputed fact. The burden of persuasion is the responsibility of a party to convince the trier of fact that they have presented sufficient evidence to persuade the trier of fact to award them a win. The United States Supreme Court has determined that in a due process hearing challenging the school

system's provision of FAPE, the burden of proof is placed upon the party seeking relief which, in this matter, is the Student/Parent. Schaffer v. Weast, 546 US 49, 62 (2005).

3. The burden of proof in West Virginia is “on the party seeking relief...” *WV Policy 2419 (126 CSR 16) Dispute Resolution, Ch. 11, §4. A.*

4. When a student is suspected of needing special education and related services, WV Policy 2419 establishes the procedures and requirements for evaluating the student. The initial evaluation is expected to gather information to determine whether the student has a disability, what the educational needs of the student are including his present levels of academic achievement and his related developmental needs, the effects of the disability on educational and functional performance, whether the student needs specially designed instruction and the nature and extent of the special education needed by the student. *WV Policy 2419 Evaluation/Reevaluation, Ch. 3, §2A.*

5. No single measure or evaluation may be used as the sole criterion for determining whether a student is a student with a disability and for determining an appropriate educational program for the student. *WV Policy 2419, Evaluation/Reevaluation, Ch. 3, § 4 B.2.*

6. Special education is defined as “specially designed instruction, at no cost to the parents, to meet the unique needs of the student with an exceptionality.” *WV Policy 2419, Eligibility, Ch. 4, § 3.*

7. Specially designed instruction means “the content, methodology, or delivery of instruction is adapted, as appropriate, to address the unique needs of the student that results from the student's exceptionality and to ensure access of the student to the general curriculum so that the student can meet the educational standards that apply to all students.” *WV Policy 2419, Eligibility, Ch. 4, § 3 A.*



8. In matters alleging a procedural violation, a hearing officer may find that a student did not receive a free appropriate education only if the procedural inadequacies “...(i) impeded the child’s right to a free appropriate education; or (ii) significantly impeded Parent’s opportunity to participate in the decision making process regarding the provision of a free appropriate public education to parents’ child; or (iii) caused a deprivation of educational benefits to the student.” 20 U.S.C. §1415(F)(3)(E)(ii) and *WV Policy 2419, Ch. 11 §4. M.* However, the Fourth Circuit has recently determined that the hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child’s right to a free appropriate education; **and** (ii) significantly impeded Parent’s opportunity to participate in the decision making process regarding the provision of a free appropriate public education to parents’ child; **and** (iii) caused a deprivation of educational benefits to the student. (Emphasis added) *R.F. v. Cecil County Public Schools*, 74 IDELR 31 (4<sup>th</sup> Cir. 2019).

9. The free appropriate public education (FAPE) standard was clarified by the US Supreme Court in March of 2017 from the Rowley<sup>4</sup> standard that a student requiring special education and related services must receive some benefit from his educational services to the Endrew F. standard focusing on the student’s progress and requiring a school to provide the student with meaningful benefit, although not necessarily equivalent to those benefits provided to other students. The IEP must be reasonably calculated to enable a child to make progress appropriate in light of the individual child’s circumstances and the goals for the child must be appropriately ambitious. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1, 137 S. Ct. 988 (2017).

10. Extended school year Services (ESY) must be annually determined and documented for each student. Students who are entitled to ESY services are those who require special education and related services in excess of the regular school year to maintain critical skills as described in the current IEP. The type of services and length of services the student requires is determined on an individual basis by the IEP Team. *WV Policy 2419, Ch. 5, §2 H.*

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<sup>4</sup> Bd. Of Ed. Hendrick Hudson Sch Dist. v. Rowley, 458 U.S. 176 (1982)

## DISCUSSION

### I. Overview

As noted above, the burden of proof in this due process hearing belongs to Student/Parent and involves both the burden of production and the burden of persuasion. The Student/Parent has the obligation to provide evidence on each allegation and then demonstrating that this evidence is sufficient and outweighs any evidence offered by County Schools. The parent was aware of this legal burden and was also aware that this due process was generally limited to the two years preceding her filing of this complaint.

In reviewing the evidence, the hearing officer finds that there are some issues involving school-parent communication, trust and control. Parent is a very involved parent and enjoys researching issues. She has strong likes of County School employees (e.g. Student's aide) and strong dislikes (e. g. Supervisor of Instruction Special Education Autism) but overall believes that Student is doing much better in school. Parent reports Student has friends who watch over her at recess and the playground and that Student's aide is "great. And I think if [Student] had any other aide that she would not have done so well. Because you make sure things are followed." (TR. II at 303)

School personnel were also very pleased with Student's progress in school. Her behaviors have improved immensely, and she is now only in need of some occasional focus correction. Her aide testified that it is a "world of difference" between her kindergarten behaviors and now. Student "couldn't sit for five minutes, she would pinch kids, she would hit kids, she would pinch, hit, spit, kick, bite because she had a lot of trouble communicating. And now she's great." (TR. II at 286-7) The aide testified that Student has done better than the aide expected in transitioning to middle school and has a group of friends and can maneuver well through the school hallways to get to her class.

Nonetheless, Student's mother does not trust some employees of County Schools and is clear that she doesn't want them to have anything to do with Student. However, state and county school personnel rules control who is assigned where and to whom and personnel assignments are outside the hearing officer's jurisdiction.

## II. Student/Parent's Identified Issues

A. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to appropriately evaluate Student before ending the provision of a one-to-one aide?

As discussed above and the record reflects, Parent provided no evidence to demonstrate that Student was not appropriately evaluated before changing the provision of aide services in 2014 or that Parent did not receive the PWR in that year. Whatever happened is long before August 2017 when the statute of limitations tolled for this due process.

Parent argued that County Schools' failure to provide Student 1:1 aide services is an ongoing violation since 2014 and therefore, the statute of limitations should not apply. However, for this argument to be valid, Parent must provide proof of educational harm Student suffered during these two years and Parent failed to do that. Student's aide testified that her services to and with Student had not changed during this time period, that Student was making good academic and behavioral progress and Parent agreed noting that Student's "done well because of" the aide and Parent thanked the aide at the hearing.

Parent argued that the County Schools billed Medicaid for a 1:1 aide until February 2019 but didn't provide Student with a 1:1 aide. However, the Medicaid billing issue was not

addressed in the complaint and seems to be based on some incorrect information as to who and what is billed to Medicaid, in particular, the service plan. Medicaid may be billed for any personal care (diaper changing, hygiene, etc.) but not academic assistance. Student received in the last two years minimal personal care services at school. Parent requested County Schools to stop billing for those personal care services. County Schools brought to Parent the cease-billing form which Parent signed, and County Schools stopped billing Medicaid. There was no evidence that Medicaid required a 1:1 aide to pay for personal care services for Student at school nor evidence that the code billing referenced by the parent was limited to 1:1 aide service provision.

Parent argued that the August 2017 IEP lists both adult supervision and 1:1 aide for Student and procedurally demonstrates some confusion. Parent is correct that in different sections of that IEP, both terms are used. After Parent filed a state complaint, the WV Department of Education directed County Schools to fix this and to provide a schedule for adult supervision which they did. Parent did not appeal this Letter of Finding so this argument is moot.

Therefore, Student/Parent failed to offer sufficient evidence to prove that County Schools did not provide Student with an appropriate aide, failed to demonstrate that Student needed a 1:1 aide during the last two years and failed to show that Parent was not informed by County School PWN of the change from 1:1 to adult supervision.

B. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to determine Student's need for extended school year services (ESY)?

The evidence demonstrated that Student has had several IEPs over the two-year period at issue in this due process and certainly many before this time. It appears that each year Student was appropriately evaluated by the team for ESY services and received them.

Parent's actual issues concerning ESY as developed at the hearing were:

- 1) Whether Student's school year aide was hers also (and no other student's) at the 2019 ESY; and
- 2) Whether Student should have received the Wilson Reading program at the 2019 ESY.

Student's aide testified that she was hired to work for the 2019 ESY program. When questioned by Parent, she said she did walk other kids to transportation with Student. She thinks that was because the other students knew her and because they were friends of Student, not because "they were trying to get by with anything." (TR. II at 296) The consistent evidence reflects that in Student's ESY class there were six (6) students and four (4) adults, including teachers and aides. The aide also noted that Student is doing group work in the regular classroom setting and she works with Student and her group in the regular school year too.

As noted above, ESY for any entitled student is to maintain critical skills as described in the current IEP. Reading is certainly a critical skill; however, the Wilson Reading program had not been introduced to Student in fifth grade (2018-19) school year and was to start in the sixth grade. The IEP Team did not find it appropriate to introduce a new program in ESY and WV Policy 2419 gives the final determination on the type of services the student requires and is provided at ESY to the IEP Team.

Therefore, the Student/Parent failed to provide sufficient evidence to prove that County Schools should have offered Student the Wilson Reading program or prevented the aide from being with other students at the 2019 ESY program.

C. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide Student appropriate modifications, assistance, homework packets, and services all in the least restrictive environment (LRE)?

This issue involved the days that teachers were out on work stoppage and Parent believed Student had been shortchanged services and special education. She was not concerned about Student's usual LRE, but that Student did not receive services during that ten (10) day period in her usual LRE. This issue was resolved by a Letter of Findings dated February 8, 2019, which was not appealed by Parent.

Parent was also concerned that the homework packet sent home to Student was not appropriately modified. However, Parent did not introduce a complete homework packet as evidence, so the hearing officer is unable to determine whether it violated IDEA or WV Policy 2419.

Therefore, the Student/Parent failed to provide sufficient evidence to prove that County Schools failed to provide Student with appropriately modified homework packets, assistance or services during the teacher work stoppage.

## **DECISION**

1. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to appropriately evaluate Student before ending the provision of a one-to-one aide?

Based on the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds that Student/Parent has not met the burden

of proof showing that the County Schools violated provisions of IDEA and/or WV Policy 2419 by failing to appropriately evaluate Student before ending the provision of a one-to-one aide. The evidence is consistent that Student has not needed a 1:1 aide during this past two-year period but still needs constant adult supervision, that Student's aide has worked with her for almost eight (8) years and has helped Student grow in her behavior control and has provided the same services to her for the past two years, and the probable ending of 1:1 services was over five (5) years ago, long before the statute of limitations. Parent has regularly attempted at IEP meetings to reinstitute 1:1 aide language in the Student's IEP but the IEP team based on Student's current evaluations does not believe Student needs more than adult supervision.

2. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to determine Student's need for extended school year services (ESY)?

Based on the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds that Student/Parent has not met the burden of proof showing that the County Schools violated IDEA and/or WV Policy 2419 by failing to determine Student's need for extended school year services (ESY). Student has regularly been offered ESY services, has attended ESY and has done well. Not using the Wilson Reading program in 2019 ESY before it was introduced in regular school was the decision of the IEP Team and consistent with *Policy 2419*.

3. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide Student appropriate modifications, assistance, homework packets, and services all in the least restrictive environment (LRE)?

Based on the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds that Student/Parent has not met the burden of proof showing that the County Schools violated provisions of IDEA and /or WV Policy 2419 by failing to provide Student appropriate modifications, assistance, homework packets, and services all in the least restrictive environment (LRE). This matter was primarily resolved by WV Department of Education Office of Federal Programs Letter of Findings dated February 2019 and not appealed by Parent.

### **DIRECTIVES FOR IMPLEMENTATION**

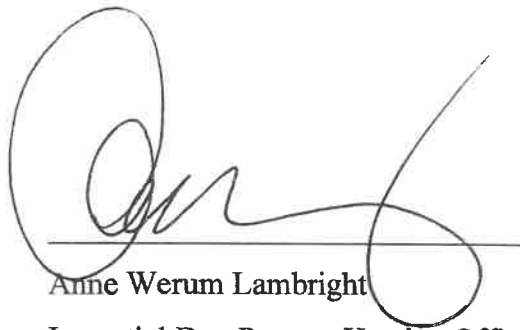
As the Student/Parent was unable to demonstrate by sufficient evidence that County Schools violated IDEA and/or WV Policy 2419, there are no directives for implementation.



## APPEAL RIGHTS

Any party aggrieved by the findings and decisions made in the hearing has the right to bring a civil action with respect to the due process complaint in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) days of the issuance of the due process hearing officer's written decision.

DATE: January 2, 2020

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by 'W', 'L', and 'O'. The signature is written over a horizontal line.

Anne Werum Lambright

Impartial Due Process Hearing Officer