



# EDUCATION LAW NOTES

## Federal and Virginia Developments in School Law

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### ***HOW SOON MUST AN IEP TEAM CONVENE TO CONSIDER NEW STUDENT DATA?***

In *Fairfax County School Board vs. A.G., et al*, the United States District Court for the Eastern District of Virginia reversed a hearing officer's ruling on an issue not raised in a special education due process complaint. That issue concededly is of more interest to school lawyers than to principals, but the underlying matter about which the hearing officer ruled impacts school leaders: when must an IEP team convene to consider new student data? Fairfax County Public Schools ("FCPS") appealed the hearing officer's decision that FCPS denied a free appropriate public education ("FAPE") to a high school student with ADHD when it failed to timely reconvene his IEP team to consider an independent evaluator's report.

In his early years, A.G. spent time in both public and private schools. In October 2019, his parents retained legal counsel to assist during A.G.'s eligibility/IEP processes. FCPS determined that A.G. was eligible as a student with disabilities on March 5, 2020, and later under additional disability categories. It convened his IEP team to address those needs. Dissatisfied with the proposed, revised IEP – specifically because the IEP proposed A.G.'s placement at FCPS with additional accommodations and supports rather than a private day school – A.G.'s parents requested and FCPS paid for an independent educational evaluation ("IEE") in August 2020. The independent evaluator completed her report on September 28, 2020. A.G.'s IEP reevaluation committee reconvened on October 29, 2020, to consider it. The committee determined that FCPS should conduct a follow-up psychological

evaluation to consider additional areas of special education eligibility. The school psychologist issued her report on January 5, 2021. A.G.'s eligibility team added eligibility categories on January 19, 2021. His IEP team reconvened and modified his proposed IEP on February 24, 2021.

In the interim, on January 5, 2021, A.G.'s parents through legal counsel filed a due process request. They made five different allegations to support their claim that FCPS denied A.G. a FAPE. A.G.'s parents specifically alleged that FCPS violated the Individuals with Disabilities Education Act ("IDEA") because it did not timely hold an initial IEP meeting within thirty days of the determination that A.G. was eligible for special education and related services (within 30 days of March 5, 2020 – the date of A.G.'s initial eligibility). The due process request included no similar claim with respect to any later failure to timely reconvene the IEP team. Importantly, it contained no claim that FCPS improperly failed to reconvene A.G.'s IEP team by the date of the due process filing or that FCPS assumed any duty to reconvene A.G.'s IEP team by any specific date after receiving the IEE.

***[court] reversed a hearing officer's ruling on an issue not raised in a special education due process complaint***

During a 4-day due process hearing, A.G.'s parents and FCPS collectively called sixteen witnesses. The hearing officer found in favor of FCPS on ALL issues raised by the parents and identified in his pre-hearing order. However, he ruled in favor of A.G.'s parents on one point, finding that "within a reasonable time after receipt of [the independent evaluator's] IEE evaluation report, at least by the end of FCPS 2020-2021 winter break, FCPS had a duty to

reconvene A.G.'s IEP team to review the IEE report and to revise A.G.'s IEP to provide an appropriate location for services" and that FCPS' failure to do so denied A.G. FAPE. He ordered FCPS to reimburse A.G.'s parents for the tuition they paid to a private school from the end of the 2020-2021 winter break through the date of the decision and to fund A.G.'s placement at the private school for the rest of the 2020-2021 school year.

The federal District Court found that the hearing officer reached an issue not raised by either party when he found that FCPS denied A.G. a FAPE by failing to reconvene his IEP team within a specified period of time after receiving the IEE report. The Court held that the hearing officer erred in doing so and vacated that portion of his decision. It relied on several other federal court decisions and the IDEA's express language for the proposition that "the subject matter of a due process hearing is limited to those issues that were raised in the due process complaint by the party requesting the hearing." Stated differently "where an issue was not raised in the due process complaint, was not identified as an issue during the pre-hearing conference, nor was it mentioned in the pre-hearing order, the issue could not be raised *sua sponte* by the hearing officer following the due process hearing in the hearing officer's determination."

FCPS argued that the hearing officer should have stopped when he determined that A.G.'s parents failed to prove that the IEPs developed in May and August of 2020, proposing A.G.'s placement in a public day school, were inappropriate. FCPS argued further that at that point the hearing officer had resolved all issues before him. However, he continued his analysis to reach what he acknowledged was a "decidedly separate question," finding that on the date of his decision the public day school could no longer be considered reasonably calculated to enable A.G. to make progress appropriate in light of his circumstances. The hearing officer relied on the independent evaluator's testimony, which was not available to the IEP team when it crafted A.G.'s

IEP and which was not the focus of her report previously available to the team.

The Court found that A.G.'s parents did not present to the hearing officer a "failure to reconvene" theory despite having the opportunity and capability to do so. They cited to Virginia Administrative Regulation 8VAC20-81-210(F)(6): "The special education hearing officer has the discretionary authority to permit either party to raise issues at the hearing that were not raised in the notice by the party. . .in light of particular facts and circumstances of the case." But the Court held that regulation "conflicts with the federal statute and regulations applicable to the IDEA." It further noted that the Virginia regulation permits new issues raised by *a party* during the hearing; here, it was the hearing officer who raised the "failure to reconvene" issue.

***school principals should encourage special educators to reconvene IEP teams promptly after receiving new student data***

The Court determined that the hearing officer's substantive decision lacked legal and factual support. The IDEA requires FCPS to review a child's IEP periodically, but no less frequently than annually. "There is a statutory mandate to revisit the IEP annually, but there is no requirement that the District's Committee reconvene whenever additional information comes to its attention." The hearing officer's legal mistake was compounded because the record clearly reflected that FCPS timely responded to the IEE evaluator's report when it conducted a reevaluation meeting less than a month after receiving the IEE, prompting the additional psychological testing FCPS completed, an updated eligibility, and a modified IEP proposal. "The Hearing Officer was aware of this response by FCPS but provided no explanation for why he found it insufficient and untimely."

Nonetheless, school principals should encourage special educators to reconvene IEP teams promptly after receiving new student data, particularly when eligibility is at issue and/or a student is making little progress under existing educational programming. As always, consultation with special education legal counsel is advisable.