

EXECUTIVE SUMMARY

ARBITRATION APPEAL; PINKERTON/CHESTER
SB-FY-12-03-014

Hearing Officer's Report and Recommendation

A. Action Needed:

To consider the Hearing Officer's Report and Recommendation in the above captioned matter. To either adopt the Hearing Officer's Recommendation or take some subsequent action.

B. Rationale for Action:

Issue:

A request for a hearing by the State Board was received on March 12, 2012. Pinkerton Academy filed the appeal of Commissioner Barry's arbitration decision regarding a Special Education fiscal matter.

Jurisdiction:

Jurisdiction lies with the State Board of Education pursuant to Ed 206.

Dates of hearing process:

A pre-hearing conference was scheduled for April 3, 2012.

Discussion:

This matter is a contract dispute between the Chester School District and Pinkerton Academy and specifically revolves around the billing for paraprofessional support pursuant to a long-term tuition contract under RSA 194:22 regarding services for high school students. The State Board approved the contract agreement on May 15, 2000. The tuition contract included a dispute resolution clause that required the parties to bring any dispute to the Commissioner of Education who would sit as an arbitrator. The parties further cited the state arbitration statute, RSA 542, and noted that the Commissioner's decision would be binding on the parties, "subject to appeal to the State Board of Education pursuant to RSA 542."

Position of Chester:

Some Chester students have IEPs that called for shared paraprofessional support. They were instead provided one-on-one paraprofessional support by Pinkerton. The decision to provide one-on-one paraprofessional support was

made unilaterally by Pinkerton without Chester's approval. The decision was not made due to student's needs but rather it was due to scheduling issues.

Position of Pinkerton:

In part, certain of the students enrolled in classes where they were the only students who required paraprofessional support. Thus, it was not possible to provide a shared paraprofessional, and Pinkerton was faced with the following options: 1. Not providing the student with any paraprofessional support, despite the fact that the IEP called for some level of paraprofessional support; 2. Prohibiting the student from enrolling in the course on the basis that there were no other students to share a paraprofessional; or 3. Providing the student with a 1:1 paraprofessional. Pinkerton opted for the third choice, which was the only choice, in their estimation, that was consistent with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and state law."

Commissioner's Conclusion:

The Commissioner found that Pinkerton Academy, in providing a 1:1 aide instead of the shared profession as agreed upon by the IEP Team, and without consulting with Chester School District prior to enacting such unilateral changes, violated §300.324(4) and (6) which require any changes to a child's IEP be made by either the entire IEP Team at an IEP Team meeting. The Arbitrator entered an award consistent with the above finding.

Commissioner's Order:

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the conclusion, the Commissioner ordered that:

1. Pinkerton Academy remit payment in the amount of \$4,044.68 to the Chester School District. Chester will waive its interest charges against Pinkerton's overcharge.
2. Such payment will be made within 15 days of the arbitration order.
3. Pinkerton Academy shall not receive payment in the amount of \$25,758.76 nor interest.
4. Pinkerton shall not recover attorney's fees from Chester School District.

Hearing Officer Recommendation:

Pinkerton Academy seeks a correction or modification of the arbitrator's award. Pursuant to the parties' agreement to follow RSA 54, the State Board can grant Pinkerton's request only if the Commissioner's award is based on a plain mistake. Under the plain mistake standard, the Hearing Officer and the State Board aren't determining if they would have made the same findings, or come to the same conclusion as the Commissioner. Rather, the task is to only review the decision to see if a plain mistake occurred. As related by the Hearing

Officer, in *John A. Cookson v. New Hampshire Ball Bearings, Inc.*, 147 N.H. 352, 357 (2001), the New Hampshire Supreme Court noted that plain mistake under RSA 542:8 means:

an error that "is apparent on the face of the record and which would have been corrected had it been called to the arbitrator's attention." It must be shown that the arbitrator manifestly fell into such error concerning the facts or law, and that the error prevented his free and fair exercise of judgment on the subject. When undertaking a "plain mistake" analysis, we afford great deference to the arbitrator's decision. We examine the face of the record to determine if there is validity to the claim of "plain mistake," and defer to the arbitrator's decision if the record reveals evidence supporting it.

The Hearing Officer recommends that the State Board of Education find that the Commissioner's arbitration decision does **not** rise to the level of plain mistake under RSA 542 and uphold the Commissioner's decision.

C. Effects of this Action:

If the State Board accepts the Hearing Officer's Report and adopts the Recommendation, the Commissioner's decision will be upheld.

D. Recommendation:

The State Board accepts the Hearing Officer's Report and adopt the Recommendation.

E. Possible Motion:

I move that the State Board accept the Hearing Officer's Report and adopt the Hearing Officer's Recommendation.

OR

I move that the State Board accept the Hearing Officer's Report and reject the Hearing Officer's Recommendation.

OR

I move that the State Board reject the Hearing Officer's Report and Recommendation and remand the matter back to the Hearing Officer for further consideration.

IN THE MATTER OF THE ARBITRATION)
BETWEEN) **ARBITRATOR'S**
CHESTER SAU 82) **CONCLUSION**
AND) **AND**
PINKERTON ACADEMY) **ORDER**

HEARING: January 26, 2012

HEARING CLOSED: January 26, 2012

ARBITRATOR:

Virginia M. Barry, Ph.D.

Commissioner of Education

101 Pleasant Street

Concord, NH 03301

REPRESENTING CHESTER SAU 82:

James Gaylord, Superintendent of Schools

Jana Ruiz, Director, Special Education

Gordon Graham, Esquire

REPRESENTING PINKERTON ACADEMY:

Mary Anderson, Headmaster

Dean Eggert, Esquire

Richard Sharp, Director, Special Education

Linda Couture, Inclusion Facilitator, Pinkerton Academy

APPEARING AS WITNESSES FOR CHESTER SAU 82:

None

APPEARING AS WITNESSES FOR PINKERTON ACADEMY:

None

BACKGROUND

Arbitration was referred before the Commissioner of Education in accordance with paragraph **19. Contract Dispute** of the March 4, 2000 Agreement between Chester School District and Pinkerton Academy which was signed by the parties and approved by the State Board of Education on May 15, 2000. Prior to the arbitration hearing the parties agreed that the decision of the Commissioner of Education in such Arbitration shall be binding upon the parties, subject to appeal to the State Board of Education pursuant to RSA 542. The parties further agreed that they would not subpoena the Commissioner of Education to testify in any court proceedings connected with the Arbitration or other activities related to the New Hampshire State Department of Education.

Prior to the arbitration hearing the parties submitted statements of the issues as well as exhibits.

At the hearing the parties had full opportunity to make opening statements, examine and cross examine witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made a tape recording of the hearing. No witnesses appeared to testify.

STATEMENT OF THE ISSUE

The dispute is about Pinkerton Academy's billing for paraprofessional services provided pursuant to Individualized Education Programs.

Background

Under the provisions of RSA 186:C:7, the Chester School District is responsible for the development for an individualized education program for each of its resident children with a disability. In paragraph 3 of the Agreement between Chester School District and Pinkerton Academy, entered into on March 4, 2000, it is Pinkerton's responsibility to offer programs comparable to those offered by other public high schools of a like size in New Hampshire for educationally disabled and exceptional children. Pursuant to the parties' agreement, Pinkerton has accepted Chester pupils with individualized education programs. The Chester student's IEPs have been developed by the Chester School District in cooperation with Pinkerton special education staff. This dispute concerns Pinkerton's billing for paraprofessional services provided pursuant to those individualized education programs.

Shared Paraprofessional versus One-On-One Paraprofessional Support

Some Chester students have IEPs that called for shared paraprofessional support. They were instead provided one-on-one paraprofessional support by Pinkerton. The decision made by Pinkerton to provide one-on-one assistance was not made due to students' needs but rather it was due to scheduling issues. Chester was then billed for the additional cost of one-on-one paraprofessional support. Chester did not consent to nor did it authorize Pinkerton to provide additional services beyond the services called for in the students' IEPs. Chester asserts it was not consulted or notified of the changes nor were the parents of the students whose paraprofessional support was switched to one-on-one were ever notified or consulted.

STATEMENT OF FACTS

POSITION OF CHESTER

As stated above, some Chester students have IEPs that called for shared paraprofessional support. They were instead provided one-on-one paraprofessional support by Pinkerton. The decision to provide one-on-one paraprofessional support was made unilaterally by Pinkerton

without Chester's approval. The decision was not made due to student's needs but rather it was due to scheduling issues.

POSITION OF PINKERTON ACADEMY

In part, certain of the students enrolled in classes where they were the only students who required paraprofessional support. Thus, it was not possible to provide a shared paraprofessional, and Pinkerton was faced with the following options: 1. Not providing the student with any paraprofessional support, despite the fact that the IEP called for some level of paraprofessional support; 2. Prohibiting the student from enrolling in the course on the basis that there were no other students to share a paraprofessional; or 3. Providing the student with a 1:1 paraprofessional. Pinkerton opted for the third choice, which was the only choice, in their estimation, that was consistent with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and state law."

ANALYSIS AND CONCLUSION

Arbitrator's Jurisdiction

Prior to any discussion as to the merits of the grievance, it is incumbent upon the arbitrator to state the authority under which arbitration was held as an Arbitrator cannot create arbitral jurisdiction where it does not exist. In this case, as stated under Background, Arbitration was referred before the Commissioner of Education in accordance with paragraph **19. Contract Dispute** of the March 4, 2000 Agreement between Chester School District and Pinkerton Academy which was signed by the parties and approved by the State Board of Education on May 15, 2000. Prior to the arbitration hearing the parties agreed that the decision of the Commissioner of Education in such Arbitration shall be binding upon the parties, subject to appeal to the State Board of Education pursuant to RSA 542. The parties further agreed that they would not subpoena the Commissioner of Education to testify in any court proceedings connected with the Arbitration or other activities related to the New Hampshire State Department of Education.

Chester Proposed Order:

1. Order Pinkerton Academy to remit payment in the amount of \$4,044.68 to the Chester School District. Chester will waive its interest charges against Pinkerton's overcharge; and,
2. Grant such other and further relief as is deemed just and equitable.

Pinkerton proposed order:

1. Order that Chester School District remit payment in the amount of \$25,758.76, plus interest accrued in accord with the terms of the tuition agreement, to Pinkerton Academy, within 15 days of the arbitration order;
2. To the extent that the arbitrator finds that Pinkerton is enforcing a clear contractual and statutory obligation, Order that Pinkerton may recover its reasonable attorney's fees from Chester School District;
3. Grant such other and further relief as is deemed just and equitable.

LEGAL BASIS FOR ARBITRATOR'S CONCLUSION AND ORDER

The 2004 Individuals with Disabilities Education Act, under §300.324(4) (i) and (ii) states:

(4) Agreement.

(i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.

(ii) If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.

Additionally, the 2004 Individuals with Disabilities Education Act, under §300.324(6) states:

(6) Amendments. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

CONCLUSION

The arbitrator finds that Pinkerton Academy, in providing a 1:1 aide instead of the shared profession as agreed upon by the IEP Team, and without consulting with Chester School District prior to enacting such unilateral changes, violated §300.324(4) and (6) which require any changes to a child's IEP be made by either the entire IEP Team at an IEP Team meeting.

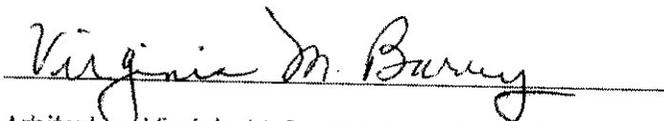
The Arbitrator will enter an award consistent with the above finding.

ORDER OF ARBITRATOR

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the conclusion, it is ordered that:

1. Pinkerton Academy remit payment in the amount of \$4,044.68 to the Chester School District. Chester will waive its interest charges against Pinkerton's overcharge.
2. Such payment will be made within 15 days of the arbitration order.
3. Pinkerton Academy shall not receive payment in the amount of \$25,758.76 nor interest.
4. Pinkerton shall not recover attorney's fees from Chester School District.

Respectfully submitted on February 24, 2012 by



Arbitrator: Virginia M. Barry, Ph.D., Commissioner of Education