07-060 & 061

CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

Public Schools
School Division

Name of Parents

Name of Child

Aug 10, 2007 ; July 18, 2007
Date of Decision

John F. Cafferky, Esq.
Counsel Representing LEA

Parents
Counsel Representing Parent/Child

Parents
Party Initiating Hearing

School Division
Prevailing Party

Hearing Officer's Determination of Issue(s):

1) Whether School was required to provide educational services after Parents moved from
2) Whether School supplied FAPE up to May 1 when Parents moved from

Hearing Officer's Orders and Outcome of Hearing:

1) Sched not required to provide any educational services after Parents moved from
2) Settled and dismissed as to Issue #2.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

William E. Rollow
Printed Name of Hearing Officer

William E Rollow
Signature

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EDUCATION

Parents,

v.

PUBLIC SCHOOLS

School,

IN RE:

Student

and

IN RE:

Student

FINAL ORDER

WHEREAS, by decision herein dated 18 July, 2007, rendered after a full evidentiary hearing and briefing, Parents' requests for relief for alleged violations of IDEA by School occurring on and after May were dismissed with prejudice, and

WHEREAS Parents and School have amicably resolved Parents' claims for relief based upon alleged violations of IDEA by School occurring prior to May , it is this 10th day August 2007 ORDERED:

(1) That so much of Parents Due Process complaints as relate to alleged violation of IDEA occurring prior to May are hereby dismissed with prejudice, as settled.

(2) That nothing in this Order shall be deemed to amend, modify, or abridge in any way the Decision filed herein dated 18 July, 2007; nor shall the Order extend the time allowed for filing an appeal from that Decision as set forth in the Decision.

(3) That there being no further pending matters in this case, the record herein is closed.

WILLIAM E. ROLLOW
Hearing Officer

cc.

Public Schools
John F. Cafferky, Esq.
Reginal Frazier
Virginia Department of Education

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EDUCATION

Parents,	)	
	)	IN RE:
v.	)	
	)	Student
PUBLIC SCHOOLS	)	and
	)	
School.	)	IN RE:
	)	
	)	Student
	)	

DECISION

(Upon Jurisdictional Entitlement for Educational Services)

(a)

Procedural History

The instant case consists of two companion cases consolidated for trial. The governing facts in these two cases are virtually identical. Accordingly, the term "Student", unless otherwise noted, will refer to both and Public Schools will be referred to as " PS".

Parents allege that their two sons, , age , and , age ("Student") each have been denied a free appropriate public education (FAPE) by PS. It is uncontested that and each are learning disabled and that each is entitled to special education services from

PS. The specific educational disabilities, including autism, are, according to Parents' Notice of Appeal (i.e, Due Process Complaint) remarkably similar.

For each boy, Parents allege that PS failed to implement the respective IEP's; that the boys made insufficient progress on their respective IEP goals because of PS's failures; that both boys were denied FAPE; and that there were serious procedural failures by PS which likewise denied each boy FAPE; and that accordingly Parents, on March 8, 2007 were required to and did remove each boy from PS, placing each in a private day school. Parents seek reimbursement for the private placement, for transportation costs, and for other intensive assessments and remediation, and for future private tuition costs.

Parents Notice of Appeal was filed for each boy on June 1, 2007. The Undersigned was appointed to hear the cause of on June 6, 2007. On June 6, 2007 PS by letter of that date, challenged the sufficiency of the Notice of Appeal (i.e, Due Process Complaint) for each boy. Numerous Pretrial conferences occurred between the parties and undersigned on June 6 and June 7, 2007. PS, with Parents' consent and agreement, requested that the Due Process Complaint of be consolidated for hearing with that of . The Supreme Court of Virginia consolidated both cases, naming the undersigned a Hearing Officer for both and .

After fully considering PS's Motion to challenge the sufficiency of the respective complaints, the undersigned by order dated June 7, 2007, denied that Motion as to each boy. PS, however, was expressly permitted by said Order

to challenge, by way of Summary Judgment or other similar procedure, whether PS had any duty to educate or provide any prospective relief for the boys after May – this because of PS's contention that the family, including and , had moved from to Bolling AFB (located in the District of Columbia) on May . By letter dated June 6, 2007, PS formally requested that judgment be entered in its favor denying Parents' request for any relief to be performed or occurring after May . This request was supported by various Affidavits. Parents, by letter, opposed PS's Motion.

By order dated June 28, 2007 Parents were permitted to file Amended Notices of Appeal for each boy. By agreement between the parties, PS's earlier filed Motion for Summary Judgment and Parents' opposition were deemed to and will apply to the Amended Notices, effective June 28, 2007.

Because of the gravity of PS' Motion, and the need for full evaluation of the facts, a hearing thereon was earlier set for June 28, 2007. (See Pretrial Order) Testimony was then taken and the appropriate Exhibits accepted into evidence by consent. This decision follows:

(b)

Summary of Testimony

Neither nor his wife, testified herein. They relied upon documents submitted by them.

PS called four witnesses: (i) Mrs. , Assistant Principal, Elementary School, ; (ii) Ms. , Coordinator of Student Registration for the Schools, (iii) ; and (iv) .

(i)

Ms.

Ms. reaffirmed her affidavit (Tr. 65) which was accepted in evidence (Tr. 65). Ms. testified that she had been the coordinator of student registration for over 3 years (Tr. 22-23) and was in charge of determining who was a resident for purposes of schooling in Public School system (Tr. 23, 24-5); that she had ruled on literally "hundreds and hundreds" of requests for free public schooling in the county by military families, including a number of requests relating to the schooling of children whose parents had left the county for housing at Bolling AFB, Washington, D.C. (Tr. 25). Both her testimony (Tr. 24 – 51) and her Affidavit (PS Ex. 4) were clear: PS will not provide free schooling for children of military parents who, for personal reasons, requested and obtained housing at Bolling AFB (Tr. 28).

Ms. added that it was the uniform and well established interpretation of Section 2202.3 II (B) and (E) of the Policy statement adopted by the School Board (i.e., its regulations) that a military family who moved to Bolling AFB for personal reasons, as distinguished from the need to perform their duties there - i.e., military necessity – did not fall within

authorization for PS for schooling contained in that Section (See e.g. Tr. 29 – 30, 33, 41, 48, 50).

Ms testified further that the documentation submitted by Parents here did not constitute the type of orders called for by Section 2202.3 (E) (Tr. 26 – 27); and that accordingly, Student was not entitled to schooling in after his parents moved to Bolling AFB (Tr. 48, 90). She added that her ruling with regard to and was uniform and consistent with prior rulings (Tr. 28-29).

(ii)

Mrs.

Mrs. affirmed her earlier affidavit (Tr. 65) which was received in evidence. Mrs. , the Assistant Principal at Elementary School (the assigned PS for Student), testified that early in the morning of April Mrs. had requested a meeting with her and Principal, which was held at on that same morning (Tr. 61 – 62). At this meeting Mrs. told Mrs. and Mr. , the Principal of that the family was planning to move to housing on Bolling AFB (Washington, D.C.) (Tr. 62); and that ". . . was at Bolling as we spoke trying to get things going . . ." Mrs. testified further that the primary reason for the move was to enable Mrs. to be nearer to Walter Reed Medical Center for medical treatment she would be undergoing there (Tr.

62) (See also Affidavit of Mrs. , Ex. 2, Paragraphs 4, 5). And, also to ease 's commute to work (Tr. 62).

Mrs. told Mrs. that the family was not sure of the exact date of the move other than it would be as soon as possible (Tr. 63). Mrs. subsequently learned from that the family would move to Bolling AFB on May (Tr. 64).

Upon cross-examination Mrs. consistently reaffirmed that the family was moving to Bolling AFB for personal reasons - primarily to enable Mrs. to be closer to Walter Reed for treatment of her medical condition (Tr. 70 - 73).

(iii)

Ms. s (an employee of PS) testimony related to clarifying that Ex. N was an e-mail from Ms. to which merely stated that PS would need to see 's orders to relocate in order to determine Student's residency (Tr. 86 - 88).

(iv)

Mrs. is the PS Director of School Counseling and Student Registration Services (Tr. 101). She testified, in essence, that Subsection II H of the School Board's Policy Statement Section 2202.3 merely allowed a student whose parents moved from within 60 days prior to the end of the

school year (here June 17, 2007), to continue on at the specific public school wherein he or she was then attending (here) until the end of that school year (Tr. 102 – 105). And that it did not enable a child who was attending a private school to continue on at the private school until the end of the school year at the County's expense (Tr. 109).

(c)

Facts

The salient facts for purposes of this Motion are not in dispute.

Student is part of a military family that regularly moves from one assignment to another every one to three or so years. His father, , is a career officer in the United States Air Force.

While at 's prior assignment, namely Air Force Base (AFB) in , Student who had been earlier diagnosed as autistic, was receiving extensive special education services from the , School district, adjacent to AFB. In the late spring of 2006, was selected as a "Legislative Fellow" – an extremely prestigious honor – and posted to serve at Senator 's office in the Capitol, effective as of September 2006. After completing his tour with Senator 's office, will serve in a related legislative position working ". . . with Pentagon personnel and as a liaison to members of Congress" (Ex. G). In early June, prior to his departure from AFB to the Washington, D.C. area, was

notified by his commanding general, that he had been approved for promotion to Lt. Colonel.

In June 2006, and his family relocated from AFB, to in order to begin his new assignment. He rented a house at , , , Virginia where his family took up residence. On July 17, Student, along with his siblings, enrolled in the Public School system. Appropriate IEP's were prepared for the two brothers, signed August and consented to by Parents (Tr. 91 – 2).

Student was assigned to the Elementary School (Tr. 65). Student continued at until March , when his Parents removed him and enrolled him in a private school, namely School – this because, according to Parents, PS had failed to properly implement his IEP's, combined with total lack of any educational progress. Parents, as per their respective Notices of Appeal for each boy, also alleged that there had been numerous major procedural violations also constituting a denial of FAPE. (These issues have yet to be litigated and are included here solely for historical narrative purposes).

On May and his family moved from to governmental housing located on Bolling Air Force Base ("BAFB"), District of Columbia (Tr. 64 – 5). According to the uncontested testimony of PS's witnesses, Mrs. – the primary purpose of this move was to enable Mrs. to be closer to Walter Reed Medical Center also located in the

District of Columbia where she is undergoing treatment for a recently diagnosed medical condition (Tr. 62). And, to a lesser extent, to ease 's commute (Tr. 62) to the Capitol and/or Pentagon. Mrs. said nothing to PS about the move being a "required" one (Tr. 62).

(d)

Issue

The threshold issue presented here is whether PS is required to provide educational services for and on and after May such being the date when the family (including and) moved to the District of Columbia.

It is agreed by the parties that there is no issue as to Students entitlement to educational services from PS from the date of their enrollment on July 17, up to May . All issues relating to this period will be heard subsequent to the resolution of the threshold issue of residence/jurisdiction presented here.

(e)

Discussion

IDEA was enacted to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") which contains special educational accommodations and related services designed to meet their unique needs. See: 20 U.S.C. 1400 (d)(1)(A).

FAPE consists of:

> ". . . educational instruction specially designed to meet the unique needs of the handicapped child . . . supported by such services as are necessary to permit the child to benefit from the instruction." Board of Education v. Rowley, 458 U.S. 176, et 207 (1982).

A school, in order to supply an "appropriate" education, is not required to provide the best possible education. MM Ex. Rel. DM v. School District of Greenville County, 303 F 3rd 523, at 527 (4th Cir. 2002), Rowley, supra. It is sufficient if some meaningful benefit is conferred. MM, supra at 526-7. However, the benefit supplied must be something more than a "trivial" or minimal advancement. Hall ex. Rel Hall v. Vance County Bd of Educ., 774 F. 2d 629, 636 (4 Cir. 1985).

FAPE is implemented through an Individualized Education Plan ("IEP"). In this regard, an IEP is sufficient if it is ". . . reasonably calculated to enable the child to receive educational benefits." Rowley, supra, at 207. However:

> . . . where the public school district is unable to provide FAPE in the public schools, the IDEA requires that the school districts shall assume the cost of educating the child in a private school that meets the child's educational and social needs. Section "20 U.S.C. 1412 (a)(10)(B)" County School Board of Henrico Cy v. R. I., C.A. No. 3: 04 cv 923 (filed May 26, 2006).

IDEA further mandates that FAPE be supplied in the least restrictive environment. See: e.g., School Board of Prince William Cy v. Malone, 762 F 2d 1210 (4 Cir. 1985); RT, supra. Notwithstanding the plethora of statutory and

regulatory provisions of IDEA concerning what physical disabilities are covered by IDEA and how they are to be addressed, little is said about the residence requirements, if any, for a child seeking the provision of educational services under IDEA.

Section 1412 of IDEA at subsection (a) (1) (A) states merely:

> "(A) In general, A free appropriate education is available to all children with disabilities residing in the State between the ages of 3 and 21 inclusive . . ."

Section 300.101 of 34 CFR repeats verbatim the above statutory language.

The United States District Court for the District of Columbia in Pestronk v. District of Columbia, 150 F. Supp - 2d 147 (D.D.C. 2001) expressly held that IDEA, per se does not authorize or require a foreign state to provide special education services to a learning disabled child residing in another (there contiguous) state. The court in Pestronk held:

> "As previously stated, the District's special education program is funded pursuant to IDEA. Congress requires states to ensure that "all [special needs] children residing in the state . . . who are in need of special education and related services are identified, located and evaluation . . ." 20 U.S.C. Section 1412(2)(C). The express statutory language of the IDEA demonstrates that Congress did not intend for one state to bear the cost of specialized education for special needs children residing in another state. . . Congress certainly did not intend such an absurd result." (at p. 149) (underscoring supplied).

No similar ruling exists in the Fourth Circuit or Virginia. Most courts, however, resolve the determination of residence with regard to IDEA by leaving

that determination up to the application of applicable State law. See e.g. Catlin v. Sobol, 93 F. 3rd 1112 (2nd Cir. 1996); Manchester School District v. Crisman, 306 F 3rd 1 (1st Cir. 2002). Thus, in Hester v. District of Columbia 433 F.Supp 2d 71 (U.S.D., D.C. 2006) the Court ruled:

> "The IDEA does not define the term resident. There seems to be no disagreement, however, that residence determinations under IDEA should be made according to state law. J.S. v. Shoreline Sch. Dist., 220 F. Supp 2nd 1175, 1191-2 (W.D. Wash. 2002), Linda W. v. Indiana Dept. of Educ., 927 F.Supp 303, 307 (N.D. Ind. 1996) aff'd at 200 F.3rd 504 (7 Cir. 1999); ..."
> (at 433 F.Supp 19, fn 9).

The seminal case involving state residency requirements with regard to the education of children is Martinez v. Bynum, 461 U.S. 321 (1983). In Bynum, petitioners there challenged the constitutionality of a Texas statute establishing resident requirements for children seeking a public education in Texas. There the U.S. Supreme Court opined:

> "We have specifically approved bona fide residence requirements in the field of public education (at p. 326).
>
> * * *
>
> ". . . a State has a legitimate interest in protecting and preserving . . . the right of its own bona fide residents to attend [its colleges and universities] on a preferential tuition basis. . . This "legitimate interest" permits a state to establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state but who have come to the state solely for educational purposes, cannot take advantage of the in-state rates" (at p. 328)

The Supreme Court in Martinez after specifically holding that a bona fide residence requirement imposed by a state as a pre-condition to attendance in its public schools on a non-fee (i.e., free) basis was constitutional (See Martinez at pp. 327-9, 331 fn 11) went on to quote from Milliken v. Bradley, 418 U.S. 717 (1974) as follows:

> "No single tradition in public education is more deeply rooted than local control over the operations of its schools." (Martinez at p. 329)

The Court in Martinez then added:

> "The provision of primary and secondary education is one of the most important functions of local government. Absent residence requirements, there can be little doubt that proper planning and operation of the schools would suffer significantly." (Martinez at p. 329). (underscoring supplied)

Residence, at common law is defined as physical presence plus an intention to remain for at least some period, albeit indefinite. See e.g. Martinez, Catlin and Hester, supra. And, under common law, a child's residence is presumed to be that of his parents (Catlin, supra, at p. 1115.) The respective states are free, however, to establish their own definition of residence for educational purposes, which may enlarge upon the more strict common law standards. Martinez, supra. Accordingly, we turn to applicable Virginia law:

VAC Section 22.1-215 requires the appropriate Virginia school district here , to provide a free appropriate public education to those learning

disabled children who reside in its district. VAC Section 22.1-5 requires a school district to provide a free education to persons who meet the residency qualifications set forth in VAC Section 22.1-3 which provides:

> "The public schools in each division shall be free to each person of school age who resides within the school division. Every person of school age shall be deemed to reside in a school division:
>
> 1. When the person is living with a natural parent, or a parent by legal adoption;
>
> 2. When the person is living with an individual who is defined as a parent in Section 22.1-1, not solely for school purposes, pursuant to a Special Power of Attorney executed under Title 10, United States Code, Section 1044b, by the custodial parent while such custodial parent is deployed outside the United States as a member of the Virginia National Guard or as a member of the United States Armed Forces;
>
> 3. When the parents of such person are dead and the person is living with a person in loco parentis who actually resides within the school division;
>
> 4. When the parents of such person are unable to care for the person and the person is living, not solely for school purposes, with another person who resides in the school division and is either r(i) the court appointed guardian, or has legal custody, of the person; or (ii) acting in loco parentis pursuant to placement of the person for adoption by a person or entity authorized to do so under Section 63.2-1200;
>
> 5. When the person is living in the school division not solely for school purposes, as an emancipated minor; or

6. When the person living in the school division is a homeless child or youth, as set forth in this subdivision, who lacks a fixed, regular and adequate nighttime residence. Such persons shall include (i) children and youths, including unaccompanied youths who are not in the physical custody of their parents, who (a) are sharing the housing of other persons due to loss of housing, economic hardship or other causes; are living in motels, hotels, trailer parks or camping grounds due to lack of alternative adequate accommodations or in emergency, congregate, temporary, or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement; (b) are living in an institution that provides a temporary residence for the mentally ill or individuals intended to be institutionalized; (c) have a primary nighttime residence that is a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings; or (d) are living in parked cards, parks, public spaces, abandoned building, substandard housing, bus or train stations, or similar settings; and (ii) migratory children, as defined in the Elementary and Secondary Education Act of 1965, as amended, who are deemed homeless as they are living in circumstances set forth in clause (i) of this subdivision.

Student does not fall within the category of children set forth in VAC Section 22.1-5:1 after May since his parents left Virginia on that date. Further, Student does not fit into any of the remaining categories in Section 22.1-3 for any time period. (It is conceded in this case that Student was a resident of

Virginia prior to May ; and thus, it is clear that Student was entitled to FAPE up to May).

Virginia, however, in 1999 amended VAC Section 22.1-5 (See H-2673 approved March 24, 1999) to confer upon School Districts in Virginia the following, additional authority (among others not relevant here):

> ". . . The following persons may, in the discretion of the school board of a school division and pursuant to regulations adopted by the school board be admitted into the public schools of the division and, may, in the discretion of the school board, be charged tuition: (VAC Section 22.1-5) (underscoring supplied)
>
> * * *
>
> "Persons of school age who as domiciled residents of the Commonwealth who were enrolled in a public school within the school division, are required as a result of military or federal orders issued to their parents to relocate or reside on federal property in another State or the District of Columbia, if the School district subsequently enrolling such persons is contiguous to such state or the District of Columbia." (VAC Section 22.1-5)"

The School Board for , in turn, adopted over 5 years ago (Tr. 44, 46) the following Policy Statements (i.e., regulation), namely Policy 2202.3. It provides, part:

"This policy supersedes Policy 2202.2

I. PURPOSE

To establish the eligibility requirements for enrollment in Public Schools (PS).

II. NONTUITION PAYING STUDENT

A person of school age (i.e., a person who will have reached his or her fifth birthday on or before September 30, of the school year and who has not reached 20 years of age on or before August 1 of the school year) is eligible for admission on a non-tuition basis if residing in . A person of school age shall be deemed to reside in when such person meets one of the following criteria:

A. Is living with a natural parent or parent by legal adoption who actually resides in .

* * *

E. is a resident of federal property in the District of Columbia who was enrolled as a domiciled resident of in PS but whose parents were subsequently required, as a result of military or federal orders, to relocate and reside on federal property in the District of Columbia.

* * *

The burden of establishing and/or providing proof of the student's residence is the responsibility of the parent or guardian. Bona fide residence is one's actual residence maintained in good faith and does not include superficial residence established of the purpose of free school attendance. If it is determined that a student has fraudulently enrolled in PS, the student shall be withdrawn and the parent or guardian shall be liable for tuition for the entire time of fraudulent enrollment.

PS strenuously argues that 's School Board's Policy statement 2202.3 II E pertains only to a situation where the parents, in order to

perform their military duties were required, by military or federal orders, to relocate to the District of Columbia or another contiguous state. Thus, a voluntary move made for personal reasons is not, according tc PS, covered by Policy Statement 2202.3 II E.

Neither nor Mrs. testified herein. We are thus left to decide this case on the basis of the testimony (and affidavits) of the PS's witnesses and the documents submitted by as well as the answers given upon cross examination.

The unrebutted testimony of Mrs. , Assistant Principal at Elementary School, is that Mrs. told her at a meeting held on April 25, 2007 at that was in the process of requesting housing on Bolling AFB in order to allow Mrs. to be closer to Walter Reed Medical Center for treatment of a recently diagnosed medical condition (Tr. 61; Paragraph 2 of Ex. 2 to the Declaration of). At that time Mrs. had no specific date for the move, but said that was, "at that very moment" working with the housing office at Boling AFB on this request (Tr. 61-2), Declaration supra. Mrs. subsequently learned from that the move would be on May . (Tr. 64; Declaration, supra)

The testimony of Ms , the Coordinator of Student Registration, PS is critical to the disposition of this case. Her testimony at trial is succinctly restated in her affidavit (admitted into evidence, Tr. 94) attached as Exhibit 4 to PS letter/motion for summary judgment. It reads, in part:

5. In the course of making these decisions [as to residency for educational purposes], I have received numerous military orders presented by Parents and guardians seeking to meet the residency requirements stated in Section II (B) and (E) of the current version of Policy 2202.3 to be able to enroll their children in our schools.

6. As of the date of the execution of this Declaration [June 16, 2007] I have not provided a military order for the parents of and that meets the standard documentation requirement employed by Public Schools.

7. For purposes of Policy 2202.3, a military order to reside on a military base encompasses only those situations in which the military members is required to live on the base. It does not include situations in which a military member and/or the military member's family have voluntarily chosen to live in base housing. In my experience, having reviewed numerous military orders, I have rarely seen orders that require military members to move onto a base."

And, as before noted this has been a uniformly followed policy by PS in the past (Tr. 28 – 29).

Ms. 's testimony was in no way impeached by 's skillful cross-examination. And Ms. 's testimony was further corroborated by the testimony of Mrs. .

contends on the other hand, that Student is covered by the School Board's Policy set forth at 2202.3 II (E) this because he relocated at Bolling AFB pursuant to military orders (Tr. 112). He relies primarily upon various documents submitted by him relating to his move. A close analysis of these documents reveals that: they relate either to: (1) shipment of household items

(Ex. J); or (2) authorization to change basic quarters allowance and assignment of quarters (Ex. K) and an "assignment of military housing family housing (Ex. H). While the term Order, sometimes appears, it is used in the context of authorization - not a directive. Ex. G does contain a statement in a letter from Captain , USAF to the effect that 's move to Bolling AFB was "pursuant to orders." Conspicuously absent, however, are copies of any orders assigning to his new duties as a Legislative Fellow - which presumably caused him to come to the Washington, D.C. area (namely) in the summer of 2006. And, missing also are copies of any orders which specifically require him to perform any duties at Bolling AFB. The record herein reveals only that his duties are to be first performed at Senator 's office at the Capitol, and later at the Pentagon (Ex. G).

The undersigned will take judicial notice of the fact that an Air Force officer cannot receive governmental base housing without specific authorization. It is also apparent that the Air Force clearly regards such authorization as an "order". See e.g. Exs. G, H and N; See also: Air Force Form 899 and Air Force Instruction 32-6001 (Tr. 71). However, it is equally obvious that orders authorizing base housing and shipment of household items to that base are not the type of orders requiring relocation which PS considers necessary to invoke the provisions Policy statement Section 2202.3 II E (Tr. 47 - 50).

Section 2202.3 II E is not clear on its face as to which interpretation should govern. We are thus presented herein with the threshold dispositive issue of

whose construction of Section 2202.3 II E controls? – the School's or the Air Forces' (Tr. 114).

It is a well accepted doctrine of law, applicable here, that where an agency (i.e., the School Board) is given the discretion and authority to enact regulations (here Policy 2202.3 II E) its interpretation and construction of that Policy is controlling unless it s interpretation and construction is plainly contradictory to the language of the regulation or is arbitrary and/or capricious – Bernard v. Robbins 519 U.S. 452 (1997) at p. 461; Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) Thos. Jefferson University v. Shalala, 512 U.S. 504 (1994), Humanoid Group v. Rogan, 375 F3d 301 (4th Cir 2004); Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F. 3d. 425, at 439 (4th Cir. 2003). Metro Machine v. U.S. Small Business Adm., 308 F. Supp 2d 614 (D.C.E.D. Va 2004).

An obvious construction of Section 2202.3 is to limit its application to allowing children who were formerly residents of to continue on in a public school when their parents were required (as distinguished from authorized) by military orders to relocate to a military base in a contiguous state or the District of Columbia in order to perform their duties there. There is no language in Section 2202.3 II E to suggest that this construction must be enlarged to include all relocations – including voluntary ones made wholly apart from military necessity. And, it makes common sense for a School Board to try to utilize public school monies to first serve the children of its residents before it undertakes to educate non-resident children. Accordingly,

under Bernard, and the cases cited earlier, PS's interpretation of Policy 2202.3 II (E) must be adopted. In short, I believe, as does PS, that a sharp distinction exists between a relocation made for reasons of personal convenience and one made for reasons of military necessity.

There is, however, an even more compelling reason to support the PS's interpretation of Section 2202.3 II E. As pointed out in Martinez, supra nothing is more deeply ingrained in our culture and legal tradition than local control over local public schools. Here, the residents of support the local public schools by way of their property taxes. Non-residents provide no fiscal help. The selection of teachers (qualified by the State) is left to the School Board; and many policies of the local public school are primarily set by the local School Board. If an outside entity is given the option to construe applicable and otherwise legal local school regulations in defiance of the School Board's construction, the fundamental authority of that School Board is severely undercut. To borrow from Pestronk, supra:

> "Congress certainly did not intent such an absurd result" (at p. 148)

Nor can such a result be permitted under the teaching of Martinez.

To sum it up, IDEA limits its reach to residents of the respective states. 20 U.S.C. 1412 (a)(1)(A). It leaves to the state to determine who is a resident of that state. Martinez, supra. Virginia under VAC Section 22.1-215 requires Public Schools to provide FAPE to learning disabled children residing

therein. VAC Section 22.1-3 governs as to who is a resident – and it does not include Student here. However, Virginia authorized the School Board in its discretion, to allow certain classes of non-resident students to obtain a free education in its public schools. The School Board allowed certain limited exceptions (See: Section 2202-3 II of the School Board Policy Statement). However, under the uniform past and clearly reasonable interpretation of Section 2202.3 II E of that Policy by PS, Student does not fall within its reach. And, for the reasons set forth earlier herein, that construction controls.

One final point remains: Parents contend that 2202.3 II H of the School Board's Policy Statement requires PS to pay for Students' private educational costs through the end of the school year. Subsection H provides

> "H [when the students] becomes a resident in another jurisdiction within 60 calendar days of the end of the school year, but requests to continue attending his or her previously assigned school on a non-tuition basis until completion of the school year, subject to the condition that transportation will not be provided by the school system."

This language merely permits a student who requests to continue on at his previously assigned school – here Elementary School – to continue at that school until the end of the school year. In our case, no request to continue was made on behalf of Student. Indeed, he was attending another school – a private school – at that time. Student could have returned to He

simply chose not to. Such clearly does not obligate PS to pay for any private educational costs occurring on or after May when Student ceased to be a resident of (See testimony of Ms. Tr. 101 – 105, 108 -9).

In passing it might be noted that did, in fact return to , without cost, for various periods over a two week period before the end of the 2007 school year (Tr. 60); and the 's other two children did, without cost, attend PS schools for the entire school year which ended June 18, 2007 (Tr. 60-61). Thus, to the extent Section 2202.3 II H applies, it was followed by PS.

(f)

CONCLUSION

PS is entitled to a judgment dismissing so much of Parents' Notice of Appeal (Due Process Complaint) as requests relief for the period beginning on and after May .

FINDINGS OF FACT

1. Student is a member of a military family, namely that of , USAF.
2. Student is a minor child conceded to have various learning disabilities, including autism.
3. and his family moved to at some time prior to July 17, 2006 and established the family's residence there including Student's.

4. Student was enrolled in the Public School system (PS) on July 17, 2006.

5. Elementary (part of PS) prepared an IEP for Student, which Parents signed and consented to, on August 7, 2007.

6. Student was assigned to where he received educational services, including inclusion in that schools autistic remedial program until March 7, 2006.

7. On March 7, 2007 Parents unilaterally removed Student from and placed him in a private school, namely, School.

8. On May , and his family moved from to Bolling Air Force Base, located in the District of Columbia.

9. This move was made at the request of in order to facilitate the medical treatment of his wife at Walter Reed Medical Center, located in the District of Columbia, for a recently diagnosed health problem, and to a lesser extent to shorten his commute to the U.S. Senate and/or Pentagon (his place of work).

10. On June 1, 2007 PS received a Notice of Appeal ("Due Process Complaint") for Student alleging various denials of FAPE and seeking various relief and accommodations for the period beginning March 7, 2007 and continuing thereafter, including inter

alia reimbursement of the costs of private schooling and transportation.

11. Complaint was amended effective June 28, 2007.

12. On June 6, 2007 PS challenged the Due Process Complaint insofar as it requested relief, including reimbursement for private schooling costs, for any part of the period occurring on or after May .1/

a. By joint agreement between the parties, PS challenge to the initial Complaint was deemed to have been filed to challenge the Amended Complaint.

CONCLUSIONS OF LAW

1. Student for educational purposes, including IDEA was a resident of from July 17, 2006 up to May .

2. Student was entitled to FAPE from PS from the date of his enrollment in PS on July 17, 2006 up to May . See. IDEA Section 1412 (a) (1)(A)

3. PS is not required under IDEA to provide special education services for non-resident students who are educationally disabled. 20 U.S.C. 1412 (a) (1) (A).

1/ PS initially sought to dismiss the Complaint because it did not set forth the requisites by IDEA. This Motion was denied. PS was permitted to convert its position to a motion for summary judgment - here in issue.

4. Virginia law governs this case insofar as the determination of residence for educational purposes is concerned. Martinez v. Bynum, supra.

   a. Student failed to establish his residence in for the period on and after May .

5. Except in certain cases not relevant here Virginia law does not authorize or require a local school district to educate a non-resident student.

6. Virginia has authorized the various school districts in their discretion, to provide a free public school education to certain limited classes of non-resident children. VAC 22.1-5

   a. Section 2202.3 II E of the School Board's Policy Statement, relied upon Parents in this cause, does not under PS's construction, include Student.

   b. PS's construction is reasonable, does not conflict with the regulatory language, and therefore, controls. Kentuckians for the Commonwealth v. Rivenburgh, supra.

7. Parents, under IDEA, have the burden of proof. Schaffer v. Weast, 546 U.S. 508 (2005); Policy Section 2202.3 likewise places the burden of proof on the Parents.

   a. Parents failed to prove their case here.

8. Student, as a mater of law, is not entitled to any educational services from PS (other than 2202.3 II H) including those required by IDEA, for the period beginning or after May , such being the date on which he ceased being a resident of . Bernard v. Robbins, supra.

9. Parents, as a matter of law, are not entitled to any reimbursement of the costs of private schooling, or any other costs related thereto, for the period beginning on or after May .

10. Nothing in the decision shall be deemed to limit, deny or prejudice in any way Parents' right to assert claims for relief under IDEA or otherwise, from the District of Columbia; wherein Parents and their family, including Student, now live.

11. Nothing in this decision shall be deemed to deny, limit or prejudice or any way Parents' right to seek relief of any kind from PS for the period from July 17, 2006 to May .

    a. All such issues are reserved for future trial, set for August 13, 14 and 15, 2007.

Accordingly, it is this 18th day of July:

ORDERED: So much of Parents' Amended Notice of Appeal as seeks relief of any kind from PS, legal, equitable or otherwise, for the period beginning on or after May is hereby dismissed with prejudice.

William E. Rollow
Hearing Officer

RIGHT OF APPEAL

This decision is final and binding unless either party appeals in a federal District court within ninety (90) calendar days of the date of this decision, or in a state circuit court within one (1) year of the date of this decision.

cc: Parents
LEA
SEA
John F. Cafferky, Esquire