

SEP 18 2007

Dispute Resolution & Administrative Services

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 Parent(s)

Name of Child

September 14, 2007
Date of Decision or Dismissal

G. Rodney Young, Esq.
Counsel Representing LEA

Pre se
Counsel Representing Parent/Child

School Division
Party Initiating Hearing

Parents
Prevailing Party

Hearing Officer's Determination of Issues(s):

Whether school division's proposed IEP to place child at segregated day facility for severely disabled students would violate the Least Restrictive Environment provision of the IDEA.

Hearing Officer's Orders and Outcome of Hearing:

Placement of child at segregated facility would be inappropriate under the IDEA.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. 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.

Peter B. Vaden
Printed Name of Hearing Officer


Signature

SEP 18 2007

Dispute Resolution & Administrative Services

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: } Findings of Fact
Due Process Hearing } and
} Decision

Parents:

, Pro se
, Pro se

Counsel for
Public Schools

G. Rodney Young, II, Esq.
Timberlake, Smith, Thomas and Moses
PO Box 108
Staunton, Virginia 24402-0108

This matter came to be heard upon the request of Public Schools (“
”) for an Impartial Due Process hearing under the Individuals with Disabilities Education
Act (the “IDEA”)¹, 20 U.S.C. §1400 et seq., and the Regulations Governing Special Education
Programs for Children with Disabilities in Virginia (“Virginia Regulations”).
seeks approval of its proposed 2007-08 Individualized Education Program (“IEP”) for
, who is in the fourth grade at ’s School
 (“ ”), has been identified as eligible for special education services on the bases of Multiple
Disabilities and a Visual Impairment. ’s proposed IEP would move

¹ The Individuals with Disabilities Education Act was amended and reauthorized by the Individuals with Disabilities Education Improvement Act of 2004, Public Law 108-446, most parts of which took effect on July 1, 2005.

from [redacted] to [redacted] Center (“ [redacted] ”), a regional special education center in [redacted], Virginia where [redacted] would be educated with other severely disabled children. The parents, Ms. [redacted] and Mr. [redacted], contend that [redacted]’s placement at [redacted] would be inappropriate because she would no longer be educated with her non-disabled peers and because [redacted] is some ten miles further away from [redacted]’s home than [redacted]. The requirements of notice to the parents, have been satisfied.

The due process hearing was held before the undersigned hearing officer on September 5-6, 2007 at [redacted]’s School Board Annex in [redacted], Virginia. The hearing was opened to the public and transcribed by a court reporter. The school system was represented by Assistant Superintendent [redacted] and by counsel. The parents, Ms. [redacted] and Mr. [redacted], appeared in person at the hearing and [redacted] was present for the first day. Both parties made opening and closing statements. The parents submitted post-hearing written argument.

BURDEN OF PROOF

In this case, [redacted]’s IEP Team recommended changing [redacted]’s placement for the 2007-08 school year from [redacted] Elementary School to [redacted]. The Virginia Regulations require parental consent before any revision may be made to a child’s IEP services. *See* 8 VAC 20-80-70.E. When [redacted]’s parents refused their consent to place [redacted] at [redacted], [redacted] requested this due process hearing. The burden of proof in a due process hearing challenging an IEP is upon the party seeking relief. *See Schaffer ex rel. Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) (burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief). Although [redacted] is not challenging an IEP in this hearing, it is the party seeking relief. I find therefore that the burden of proof should

be upon _____ to establish the appropriateness of placing _____ at _____.

FINDINGS OF FACT

I make the following findings of fact based upon the preponderance of the evidence adduced at the hearing:

_____ was born on April 1, 1998. Soon after birth, _____ was found to have chromosome abnormalities. _____ has been diagnosed with Cerebral Palsy, Turner's Syndrome, and Lennox Gastaut Syndrome. _____ also has reduced vision with optic nerve atrophy, congenital nystagmus and a sensory strabismus. In a 2004 report, _____'s neurologist, _____, M.D., stated that _____ had significant encephalopathy characterized by global development delay, a history of seizures, and severe feeding problems. Neurologist _____, M.D. examined _____ on January 10, 2007. He reported that _____ was receiving the drug Depakote for seizures. On the day of the examination, _____ did not track and follow objects, did not reach for objects and was overall hypotonic (floppy). _____ is non-verbal, is unable to ambulate and is fed via a gastric feeding tube. On a 2004 educational evaluation, _____'s cognitive growth was ranked at the age equivalent level of 11 months.

Prior to pre-school, _____ was enrolled in _____'s Parent Infant Education Program ("PIE") program. She received pre-school special education services at _____'s _____ Elementary School under the classifications Developmentally Delayed and Visually Impaired. _____ has attended _____ Elementary School since starting kindergarten. _____ is the elementary school closest to _____'s home and is the school that she would attend if she did not have a disability.

's most recent triennial special education eligibility evaluation was completed in December 2004. She was found eligible for continued services under the classifications Multiple Disabilities/Vision Impaired. is physically, cognitively and visually disabled. At school uses a custom wheel chair to enable staff to transport her on school grounds and a gait trainer walker device to assist her to sit up and to have some self-mobilization. Two staff members are needed to move in and out of the devices. To address 's lack of verbal communication, the school uses programmable "Big Mac" switches intended to enable to communicate purposeful choices by hitting the correct switch pad device.

's IEP academic goals and objectives are limited. The measurable goals for in 's proposed IEP for fourth grade placement at include,

- Given a personal daily schedule with words and pictures cues presented in a left to right and top to bottom format, will identify the next event in her day by pointing to it in 4 of 5 trials for 4 consecutive opportunities given;
- Given observation of the exchange of money for items, will participate in the exchange of coins for a desired object with minimal assistance in 4 of 5 consecutive opportunities given;
- Given daily weather observations, will identify the weather in terms of sunny, cloudy, rainy or snowy and graph her observations using a pictograph; and
- Given opportunities to interact with staff and/or peers, will use simple/personal hand signals to request desired items or activities in 4 of 5 consecutive opportunities to interact.

These goals are identical to the measurable goals established in 's March 15, 2007 IEP to which the parents consented.

Under her IEPs at , has been scheduled for a shortened school day from approximately 8:00 a.m. to 1:00 p.m. daily. Her school day has been divided between time in the

special education resource room for academic instruction and time in the regular classroom to provide socialization opportunities with non-disabled peers. also has been provided occupational therapy, physical therapy, speech and language therapy and vision therapy in the resource room.

's IEPs provided for extensive opportunities to mainstream with non-disabled students. The benefit to from mainstreaming has varied over time. In first grade (2004-05), attended the literacy block in the regular education classroom. The other students would read to , work on her color goals and generally interacted with to a great degree. would also attend Specials classes (Music, Art, Physical Education, Computer and Library) with her non-disabled peers.

Under her second grade IEP for 2005-06, was again scheduled to be in the general education setting for a considerable part of her school day. According to 's special education staff, 's alertness and ability to attend to her surroundings began to decline in the fall of 2005. was hospitalized for serious illnesses and missed at least three to four weeks of school in late 2005 and early 2006. When returned to , she exhibited more frequent seizure-like activity. Apparently as a result, she tended to be less alert, more prone to fall asleep and less engaged with her non-disabled peers.

principal testified that 's falling asleep necessitated removing her from the regular classroom. This was because the staff transported to the classroom in her wheelchair. When fell asleep in the wheelchair her airway would be partially impeded. 's mother had given instructions that was to be moved to her car seat when this occurred. The car seat was kept in the resource room As a result of her

tendency to fall asleep, was taken out of the regular classroom more often and was less able to interact with the regular education students. Because of her somnolence had increased need for staff attention. This prompted to assign a dedicated staff person to work only with for the 2006-07 school year.

Another reason for 's spending less time in the regular classroom was her increased seizure-like activity. Special education teacher testified that would be taken out of the regular classroom when these events occurred, so that the other children would not be scared by what was happening.

At the beginning of her third grade year (2006-07), showed improvement. Ms. testified that was feeling strong and was more alert than she had been at the end of second grade. But, after the first grading period, 's performance declined. Ms. observed that had more frequent and more intense seizure-like activity followed by long periods of sleep.² According to Ms. and other witnesses, during this period, usually did not respond at all to the presence of the other children. As a result, had very little meaningful interaction with non-disabled students for the rest of the year.

During her speech therapy sessions, apparently showed improvement over the 2006-07 school year. , a speech and language pathologist who was formerly employed by , worked directly with for the last four school years. Mr. observed that over the past school year, showed a marked improvement in attending to her therapy compared to the 2005-06 school year. Also, during several sessions with in

² It is noted that the timing of the decline in 's performance is coincident with the October 4, 2006 change in her seizure medication from Topamax to Depakote. See Exhibit H-1.

the summer of 2007, Mr. observed that was far more alert and made greater effort.

 's mother, Ms. came in for those sessions and assisted Mr. .

 's IEPs reflect inconsistency in her academic progress at . The IEP Team reported steady progress in some IEP goals in kindergarten, very little progress in first grade, and mastery of IEP some goals in second grade. According to the March 2007 IEP, in third grade (2006-07), was making progress toward her goals when she was alert enough to attend, but that since the second grading period, was more frequently unable to work on goals due to illness, discomfort or sleepiness.

The IEPs establish that at least until the second grading period of her 2006-07 third grade year, with the exception of a post-hospitalization period in 2006, derived educational benefit from her interaction at with her non-disabled peers. Her April 2004 IEP reports that in kindergarten, " seems to really enjoy spending time with her regular education peers. . . . spends her time socializing with her peers by giggling or extending an arm for interaction." The following March, 's IEP team reported that " participates in her general education Literacy Block and Specials. During Literacy Block, peers read to . She also works on her IEP goals for choosing between two objects and releasing objects on request." 's March 2006 IEP reported that " participates in the general education circle time, literacy block and specials. During the circle time, she is with her peers for calendar and other morning activities. Her classmates enjoy having her present during this time." In March 2007 's IEP team reported that, began the 2006-2007 school year very strong. She was able to work on her goals on an almost daily basis. She attended her 3rd grade Literacy Block [in the regular education class] and was read to by peers.

She also participated in modified activities during first grade Specials classes, and socialized with peers in the cafeteria.”

_____ (“ ”)
_____ is stand-alone satellite facility of _____ Educational Programs (“ EP”). EP is a regional program for children with special needs that serves the school systems of _____, _____, and _____. _____ houses a school that serves children with severe disabilities as well as a program for preschoolers, most of whom have special needs.

_____’s severe disabilities program is set up to serve up to 24 students from aged 2 years to 22 years. At the present time, _____ has an enrollment of 13 severely disabled students. The students are assigned by age to one of three classrooms. Each classroom is staffed by a special education teacher with an endorsement in severe disabilities and by one aide. A floating aide assists in all three classrooms. _____ has a clinic staffed by a full-time registered nurse with expertise in attending to the medical needs of children with severe disabilities. _____ is equipped with a large variety of different adaptive equipment for its severely disabled students. It has a specially designed playground and a multi-purpose room. _____’s students have the services of visiting contract therapists who can provide occupational, physical and speech therapy at the facility throughout the day. _____ offers its students swimming therapy at an off site pool at least biweekly and takes the students on community outings twice a week. Students from a private middle school visit _____ monthly. Otherwise, _____’s severe disability students have no class time or other contact with non-disabled peers.

_____ would have to pay a substantial tuition fee to place _____ at _____ which

would cost the school system more than its current program to educate at .

DECISION

The core of this dispute involves whether 's proposal to place at would violate the Least Restrictive Environment ("LRE") provision of the IDEA. is a segregated facility serving only some 13 students with severe disabilities. I find that keeping at would be a less restrictive environment, even if she spends most of her school day in the self-contained classroom. However, "mainstreaming," that is, educating disabled children with their non-disabled peers, is only a strong preference in the IDEA. It is not always required. The LRE provision in IDEA requires that,

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.A. § 1412(a)(5)(A). *See, also*, 8 VAC 20-80-64.

In determining whether the LRE mandate in the IDEA has been violated by a school district, U.S. Circuit Courts of Appeals have developed variations of an LRE test that weigh several different factors. The Fourth Circuit applies the test from *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.1983), which states that "[i]n a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting." *See DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir.1989). "If they can, the placement in the segregated school would be inappropriate under the Act." *Roncker*, 700 F.2d at 1063. Further, the Fourth Circuit

held in *DeVries* that “mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting.” *Hartmann by Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir.1997)³. See also, *Board of Educ. of Montgomery County v. Hunter ex rel. Hunter*, 84 F.Supp.2d 702, 706 (D.Md. 2000) (Mainstreaming is not appropriate when no educational benefit can be derived thereby.)

Under *DeVries*, to overcome the IDEA’s preference for mainstreaming, must show (a) that services for _____ at _____ would be superior and those services could not be feasibly provided at _____; or if not, (b) that _____ receives no benefit from mainstreaming at _____; or that any marginal benefit she receives would be significantly outweighed by benefits which could only be obtained at _____; or that _____ is a disruptive force in the regular classroom setting at _____. For the following reasons, I find that _____ has not met this burden.

A. Services at _____

The evidence fails to establish that services which could be provided to _____ at _____ are superior to services that could feasibly be furnished at _____. There was no persuasive evidence that _____ would be superior to _____ in addressing _____’s somnolence and seizure-like activities which has had such a negative effect on her educational progress in the last school

³ Unlike the non-mainstream programs at issue in *Devries* and *Hartmann*, at _____ disabled students have no in-school contact with non-disabled peers.

year. 's special education teachers teach only severely disabled children and presumably have considerable experience in this field. But 's witnesses testified that 's special education staff are likewise adequately trained to teach .⁴ Moreover, at , would be placed in a classroom with 3-7 other severely disabled children staffed by one teacher and one assistant. At , is assisted one-on-one by a dedicated special education aide is assigned to her. Both and have experienced registered nurses on their staffs. has superior equipment and play/therapy facilities but there was no evidence that 's needs for such equipment and facilities are not met at . 's occupational therapist testified that scheduling therapy for could be more flexible at because therapists are often at with its larger disabled student population. Assuming that is true, that is not sufficient reason to remove a child from a mainstream setting. In sum, with regard to the specific needs of , I find that does not offer services which could not be feasibly provided to at .

B. Benefit to from mainstreaming at

The most difficult issue in this case is whether continues to receive any educational benefit from mainstreaming at . The evidence establishes clearly that until the second marking period of the 2006-07 school year, with gaps in the spring of 2006, did receive benefit. But 's witnesses testified that for most of the last school year, was asleep or not alert at school and arousing her was difficult or impossible. I found

⁴ Pupil Personnel Director testified that she had seen a lack of confidence, in 's staff's ability to implement the last IEP. ("Whether it was for medical reasons or educational reasons, I don't know, but I know that they felt very inadequate in serving 's needs this past year.") This comment may indicate a need for staff changes or additional training.

the following testimony by Pupil Personnel Director

to be most helpful on this

issue:

Q. Now, you testified on direct examination that you feel that _____ could do a better job in terms of educating _____, but you feel that _____ could be educated at _____. What do you mean by that? Can you explain that?

A. Yes. What I meant by that was that I do believe that _____ could get an appropriate education at _____ but not the inclusion model at this point in time.

Q. So how do you believe that she could get an appropriate education at _____?

A. It would be a much more self-contained model than what we had designed in the IEP for last year. And to put _____ in a self-contained program at _____ means isolation to me. _____ needs and deserves and must belong wherever she is educated, whatever that means, and from day to day, you just don't know with _____ because one day she can be alert and many days she cannot be. But when she's alert, I do believe that we can provide her with more opportunities for inclusion, but that didn't happen last year.

Q. When you say if she were to get an appropriate education at _____, it would have to be a more self-contained model, would that more self-contained model also have inclusion aspects?

A. That's what we would strive for. We just weren't able to achieve that to any degree this past school year, for the majority of this past school year.

Q. In your opinion, would _____ benefit from inclusion?

A. When she's awake, she would benefit greatly from inclusion. She very -- you can tell a physical enjoyment when she is around other children, other peers, when she's awake and alert.

_____ has a master's degree in severe and profound disabilities and has been the director of

_____ 's special education programs for the last nine years. Her balanced and thoughtful

testimony establishes two points: First, _____ can receive a free appropriate public education

(“FAPE”) (See, e.g., 8 VAC 20-80-10.) at _____, albeit in a model that focuses more on self-contained learning and less on inclusion. Second, there are times when _____ is awake and alert at school, and on those occasions she benefits from mainstreaming.⁵ I find from Ms.

_____’s testimony and from the preponderance of the other evidence at the hearing that _____ can continue to receive benefit from mainstreaming and inclusion at _____ even if that requires an IEP for a more self-contained classroom model than in years past.

I do not ignore the opinion of special education teacher _____ that _____ is no longer an appropriate placement for _____ because at _____, _____ has to be educated for the majority of the day as the only child in the Resource Room. However, as between spending the majority of the school day in the resource room at a mainstream school and being placed in a segregated facility with no non-disabled peers, the IDEA evinces a preference for the mainstream school.

C. Benefits of mainstreaming at _____ not significantly outweighed at _____

I have already found in this decision that the evidence failed to establish that the segregated setting at _____ would provide superior benefits to _____ that could not be provided at _____. The testimony of several _____ witnesses was notable for the apparent opinions that _____ would benefit more from placement with handicapped peers than

⁵ Unfortunately neither party presented medical or other professional evidence to attempt to explain _____’s somnolence during the last school year or possible solutions. Ms. _____ reported that at home in the afternoons _____ is alert and attentive and that she is responsive when she is out in public. _____ was alert and responsive in a 2007 meeting with _____’s pediatrician and school staff. According to speech pathologist _____, _____ has shown marked improvement in her attentiveness over the past year, including at four speech therapy sessions this past summer. This raises the question of whether a school schedule change would be helpful. In 2007, _____ proposed changing _____’s school schedule to later in the day, but the parents did not consent.

from mainstreaming.⁶ Whatever the merit to this opinion, it is contrary to the IDEA's LRE requirement: "The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate." *Roncker, supra*, 700 F.2d at 1063.

3. is not a disruptive force at .

The record does not support a finding that has been "disruptive force" at . Counsel for stipulated at the hearing that was not herself disruptive in the regular classroom. The measures used by special education assistants to arouse her from somnolence, speaking in her ear, squeezing her shoulder blade and the like were mostly non-disruptive. More aggressive measures used by 's teachers or aides, such as clapping hands, jingling keys, calling 's name loudly or ringing a bell device, were generally used outside of the regular classroom if their use were likely to disrupt the other students.

CONCLUSION

Elementary School is a less restrictive environment for than . Center. I find that the services available to at Center

⁶ See testimony of (My opinion is that is no longer the appropriate placement for . I feel that it's more restrictive to her than a placement at the Center. She spends the majority of her time alone); testimony of (If at Elementary School and , any severely disabled children that are educated that would necessitate a self-contained classroom would attend . I feel or the IEP team felt that is a least restrictive -- would provide more opportunities for peer interaction than what we could provide at . It was more restrictive to be at than to be placed at); testimony of (would probably have more of an opportunity to belong not with normal peers but with peers with handicaps. She would probably feel like she belongs more than she did this past year at .)

can feasibly be provided to her in the mainstream setting at Elementary School and that can receive an educational benefit from attending school with her non-disabled peers.

Therefore 's placement at would be inappropriate under the IDEA and the Virginia Regulations.

ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. Public Schools shall develop an Individualized Education Program for 's 2007-08 school year that is based at Elementary School and that, to the maximum extent appropriate, educates with her non-disabled peers;
2. Public Schools shall develop an implementation plan within 45 calendar days of the date of this decision which must state how and when this decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing, the hearing officer and the Virginia Department of Education.
3. The parents are the prevailing party in this due process hearing.

Right of Appeal Notice

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



Peter B. Vaden, Hearing Officer
600 Peter Jefferson Pkwy, Ste 220
Charlottesville, Virginia 22911-8835
Telephone: 434-923-4044
Telecopier: 434-923-4045

Date of Decision: September 14, 2007