

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

DECISION

Public Schools
School Division

Name of Parents

Division Superintendent

Name of Child

John F. Cafferky, Esquire
Counsel Representing LEA

Counsel Representing Parent/Child

James M. Mansfield, Esquire
Hearing Officer

Public Schools
Party Initiating Hearing

PROCEEDINGS

By Notice of Appeal dated January 10, 2008, on behalf of Public Schools (PS), assistant principal of School, requested a due process hearing to determine whether a proposed change in placement for is appropriate and should be ordered over the parent's objection.

This hearing officer was appointed and a Due Process Hearing was initially scheduled for February 12, 2008, with a pre-hearing telephone conference to be convened January 29, 2008. The pre-hearing conference was convened as scheduled. Participating in the conference were the parents, and, their advocate , and on behalf of PS John F. Cafferky, Esquire and, Coordinator Monitoring and Compliance. The parties advised that they desired to mediate and had scheduled a session for February 4, 2008. Accordingly, a second pre-hearing conference was scheduled for February 5, 2008, to determine if mediation had been successful and, if not, whether the Due Process Hearing needed to be rescheduled.

On February 5, 2008, the second pre-hearing conference was convened. Participating in the

conference were Ms. [redacted] and Ms. [redacted] for the student, and Mr. Cafferky, [redacted] and [redacted] on behalf of PS. The parties advised that they had attempted mediation on February 4, 2008, but were unable to resolve the issues presented. The Due Process Hearing was then rescheduled to March 4, 5, and 6, 2008, with a decision due on or before March 20, 2008.

On February 26, 2008, PS timely submitted its exhibits and list of witnesses. No exhibits or witness list were submitted on the parents' behalf. On March 3, 2008, in response to an inquiry as to the parents' intentions in participating in the proceedings, Ms. [redacted] contacted the hearing officer's office and advised that due to family matters neither she nor Mr. [redacted] would be participating in the Due Process Hearing. Ms. [redacted] also indicated she did not want the hearing officer to entertain a request for a continuance.

The Due Process Hearing convened as scheduled March 4, 2008. PS was present with counsel together with its representatives and witnesses. Neither Mr. nor Ms. [redacted] appeared. PS presented an opening statement, testimony of its witnesses, and introduced PS Exhibits Nos. 1 through 66. Whereupon the hearing was concluded.

FINDINGS OF FACT

[redacted] is a thirteen-year-old student who is eligible for special education as a student with disabilities. He is currently attending [redacted] School which is a regular middle school with special education programs (Tr. 21-22). [redacted] is in a self-contained special education classroom with four other students, one teacher, and an instructional assistant (Tr. 71-72). His areas of disability are mental retardation and hearing impairment (PS Exhibit 6: Tr. 33). He had previously been educated in self-contained special education programs at [redacted] School (Tr. 96).

In the fall of 2006, [redacted] was a fifth grader at [redacted] although he was age appropriate for sixth grade (Tr. 98). [redacted]'s level of functioning was pre-academic with "below age the

expectations in the area of self-help, pre-academic skills, and expressive and receptive language” (Tr. 34). Also, the testimony reflected he was demonstrating puberty, with acting out and noncompliant behaviors (Tr. 98). Additionally, [redacted] is large for his age and it “was a challenge to handle [him] with one adult” (*Id.*). His negative behavior escalated to the point there was concern for the safety of other children as well as staff (Tr. 100). Prior to enrolling in

[redacted] School in September 2007, efforts were made to facilitate [redacted]’s transition from [redacted] (Tr. 32). His existing IEP ([redacted] PS Exhibit No. 11) had a transitional addendum dated May 2007 ([redacted] PS Exhibit No. 13) and [redacted]’s parents attended an orientation in April 2007 (Tr. 32).

However, the transition to [redacted] School did not go well. [redacted], [redacted]’s classroom teacher, testified he requires one-on-one attention and instruction, in part because of behavioral and safety issues (Tr. 73). Despite implementing behavioral plans and strategies (Tr. 85) she testified:

He will drop to the floor. He will roll around on the floor. He will lie under his desk, lie under tables. He’ll wander the room and destroy property. He has thrown things. He gestures at students and staff. He might make a fist and kind of shake it in a threatening way. He has punched staff, hit staff, spit, kicked. He has tried biting. He soils himself on a regular basis. And up until recently has often refused to change his clothes. He has thrown soiled clothing at people. He has thrown his shoes. He takes off his socks. Gnaws on different materials, licks things (Tr. 78).

See also [redacted] PS Exhibit Nos. 33-37 and 39. As a result of these behaviors, it was the opinion of [redacted]’s teachers that he was not receiving an educational benefit despite his capacity to function at a higher academic level (Tr. 37; 74).

[redacted] PS attempted to address [redacted]’s behavioral issues by another addendum to his IEP adding a Functional Behavior Assessment and Behavior Intervention Plan in September 2007 ([redacted] PS Exhibit No. 16). In response to [redacted]’s escalating behavior and his non-responsiveness to intervention, [redacted] PS developed a third addendum which provided for an abbreviated school day

until another IEP meeting could be convened (Tr. 45). They also revised [redacted]'s behavior plan (Tr. 47). Subsequently, an IEP meeting was convened and produced the proposed December 14, 2007 IEP which provides for public day school placement at the [redacted] (Tr. 47-50; PS Exhibit No. 19).

[redacted] is a self-contained special education school with seventy-seven students ages five to twenty-one (Tr. 114; 133). The school has two different programs: one for multiply disabled students, most of whom are medically fragile and cognitively in the three to nine-month range; and the other is a Transition Program designed for students who are having behavior difficulties that could not otherwise be managed in self-contained special education classes in general education buildings (*Id.*). The goal of the Transition Program is to reduce negative behavior to acceptable levels so students can transition back into a less restrictive educational placement with non-disabled peers (Tr. 114-115). [redacted], principal of the

[redacted] who participated in developing [redacted]'s December 14, 2007 proposed IEP, testified extensively regarding the staffing, services, schedules, and programs available at the

[redacted] (Tr. 112-158). Mr. [redacted] concluded that [redacted] would benefit academically in the Transition Program and that it was otherwise an appropriate placement for him (Tr. 151).

[redacted] the Special Education Department Chair at [redacted] School testified similarly (Tr. 50), as did Ms. [redacted] (Tr. 89).

CONCLUSIONS OF LAW

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Here, PS has requested a Due Process Hearing to order a proposed change of placement to a self-contained Transition Program at the [redacted] with which the parents do not agree. Accordingly, the burden of proof is on PS to show that [redacted]'s present placement is not reasonably calculated to provide

him with an educational benefit and that the proposed placement at the _____ is. See *Hudson Dist. Bd. Of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). The testimony of PS's special education providers, all of whom had involvement with _____ and are well qualified in their fields, gave testimony that was credible, consistent, and uncontroverted. The inescapable conclusion is that _____ is not receiving an educational benefit at

School; that in his present placement he cannot meaningfully interact with peers, whether regular or special education students; and that the Transition Program at the _____ does offer him a free appropriate public education reasonably calculated to provide an educational benefit in the least restrictive environment, despite the fact that it is a self-contained special education program. See *DeVries v. Spillane*, 882 F.2d 876 (4th Cir. 1989) holding an autistic student's education could not adequately be accommodated at a local public high school, even with supplemental aids and services, and that his placement at a county vocational center was an appropriate placement in the least restrictive environment so he could receive an educational benefit.

DECISION

After careful consideration of all the pleadings, correspondence, exhibits, and testimony, and for the reasons stated herein, I conclude that _____ Public Schools has met its burden of proof and _____'s placement should be in the Transition Program at the _____ PS is the prevailing party in this matter.

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


Signature, Hearing Officer


Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Hearing Officer's Decision was delivered *via* facsimile and mailed first-class, postage prepaid, this 20th day of March 2008.

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And mailed first-class, postage prepaid, this 20th day of March 2008 to:

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James M. Mansfield