

OCT 11 2006

Dispute Resolution & Administrative Services

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

CASE CLOSURE REPORT

<u>Public Schools (LEA)</u>	
_____ School Division	_____ Name of Parent(s)
_____ Division Superintendent	_____ Name of Child
_____ Counsel Representing Local Education Agency (LEA)	_____ Counsel//Advocate Representing Parent/Child
<u>Ternon Galloway Lee</u> _____ Hearing Officer	<u>LEA</u> _____ Party Initiating Hearing

Hearing Officer's Determination of Issue

On the issue of whether the LEA's proposed placement is appropriate, the hearing officer found the IEP's proposed placement at the TRAEP alternative school is the most appropriate placement for _____ and calculated to provide educational benefit in the least restrictive environment.

The hearing officer also found all requirements of notice to the parent or parents were satisfied; that _____ is a child with a disability and in need of special education and related services; and the local educational agency has provided for a free appropriate public education; however, the parent has not allowed _____ to attend TRAEP, the educational placement calculated to provide educational benefit to _____ in the least restrictive environment.

Hearing Officer's Orders and Outcome of Case

By order entered August 28, 2006, the Hearing Officer found the LEA's proposed alternative placement for the child is appropriate.

This certifies to the best of my knowledge I have completed this matter in accordance with applicable law.

Jennin Hallway
Signature, Hearing Officer

October 3, 2006
Date

Cc: _____, Counsel for LEA
(parent)
_____, Director of Special Education for _____ Public
Schools
Virginia Dept. of Education (original)

VIRGINIA STATE EDUCATIONAL AGENCY

Re: _____, by and through his parent(s),
v. _____ Public Schools (LEA)

Child & Parent(s):

Attorney for Parent(s):

Local Educational Agency (LEA): _____ Public
Schools

Public Schools Attorney: _____ Esq.

Superintendent of LEA:

Administrative Hearing Officer: _____ Ternon Galloway Lee, Esquire

DECISION

I. PROCEDURAL HISTORY¹

By request for due process hearing dated June 12, 2006, the Public Schools (hereinafter "LEA") requested a due process hearing asserting the alternative educational setting proposed by the LEA is appropriate. The hearing officer (hereinafter "HO") held an initial pre-hearing conference on June 27, 2006, wherein the issue was determined to be the following:

1. Is the interim alternative educational placement designated/proposed by the LEA appropriate?
2. Was the child denied a free appropriate public education (FAPE)?
3. Were the requirements of notice to the parent(s) satisfied?

¹ Throughout the decision the following abbreviations will be used:

Exhibit	Exh.
Transcript	Tr.
Joint Exhibit	Exh. J

4. Does the child have a disability?
5. Is the child in need of special education related services?

Regarding the issue pertaining to the educational setting, the hearing officer has determined an accurate stating of the issue is "Whether the LEA's proposed alternative setting is appropriate."

During the initial pre-hearing conference, the HO also scheduled the due process hearing for July 31, 2006, and August 2, 2006, if a second day was needed for the hearing. Based on discussions during the pre-hearing conference, the HO issued a scheduling order dated June 30, 2006.

The parties held an unsuccessful resolution session as the parent timely rescinded her consent to the resolution reached during the session. Exh. J. 36. The matter proceeded to a hearing held and concluded on July 31, 2006. The HO's decision is set forth below.

The IDEA 2004 was signed into law on December 3, 2004. With the exception of some elements of the definition of "highly qualified teacher," which took effect on December 3, 2004, the provisions of IDEA 2004 became effective July 1, 2005 (the "Effective Date"). Concerning this administrative due process proceeding, where the events occur before the Effective Date, IDEA 1997 and the implementing regulations apply. Concerning events occurring on or after the Effective Date, the IDEA 2004 applies. In this event, any federal and state special education regulation not impacted by the Act remains in effect until newly revised federal and/or state special education

regulations are implemented. Newly implemented federal regulations become effective October 13, 2006.

II. ISSUES

1. Is the alternative educational placement designated/proposed by the LEA appropriate?
2. Was the child denied a free appropriate public education (FAPE)?
3. Were the requirements of notice to the parent(s) satisfied?
4. Does the child have a disability?
5. Is the child in need of special education related services?

III. STATEMENT OF FACTS

1. The LEA found _____ (hereinafter “ _____ ”) eligible for special education and related services May 27, 2004, under the disability category of other health impaired due to his diagnosis of attention deficit disorder. Tr. 14, 28, Exh J-1. _____, born August _____, is now seventeen years of age and classified as a 9th grader. Exh. J-31. (showing date of birth as _____). His disability causes him to, among other things, fail to read social cues effectively and exhibit behaviors that do not meet social expectations of the setting. Exh. J-19.

2. _____'s placement as of January 25, 2006, was _____ High School (hereinafter “ HS”). On January 25, 2006, _____ struck a cafeteria worker at HS. _____ was suspended for ten (10) days. Once his suspension ended, the parent kept _____ out of school. Exh. LEA 32. _____'s behavior was determined to be a manifestation of his disability. Exh. J-19.

3. The school cafeteria worker struck by _____ filed criminal charges against him and reportedly he was found guilty of the offense by the _____ Juvenile

and Domestic Relations Court. Tr. 45.

4. The applicable Schools Student Handbook including Standard of Student Conduct (hereinafter "student handbook") provides in pertinent part that Students who have been charged, found guilty or not innocent of an offense listed in the Code of Virginia, 1950 as amended, Section 22.1-277.2:1 may be assigned to an alternative education program regardless of where the crime occurred. Exh. J-38.

reportedly was charged with such an offense. Tr. 64-65. , the LEA's director of student services and Superintendent designee recommended be placed at Tidewater Regional Alternative Educational Program (hereinafter "TRAEP"). Exh. J-20.

5. The individual educational program (hereinafter "IEP") team held meetings on February 15, 24, 2006, to decide what placement would be appropriate for . Exhs. 21, 22, 23, Tr. 29 - 32.

6. On February 15, 24, 2006, the IEP committee/team decided 's should be placed at TRAEP. Tr. 29, 51, Exhs. J-21,23.

7. The parent disagreed with the recommended placement. Tr. 29, Exh. J-24.

8. When the IEP team deliberated about alternative placements for , it considered various placement options. Tr. 30- 32, Exh. J-23.

9. The LEA gave the parent an opportunity to provide suggestions for alternative placements for during the IEP meeting(s), but the parent declined to do so. Tr. 32, Exhs. J-21,23, 24.

10. The parent and attended the February 15, 2006 IEP meeting but

declined to sign the form indicating their presence. Exh. J-21. The parent and attended the February 24, 2006 IEP meeting also; however, when the committee made the decision to place [redacted] in TRAEP, the parent disagreed, stated she would not allow her child to attend TRAEP and left the meeting with [redacted] before it adjourned. Exh. J-24.

11. Features of TRAEP are it has a much smaller student body than High School and a more structured environment. Its student teacher ratio is about one teacher for every six students. In addition to serving non-special education students it also serves special education students also. Students do not change classes at TRAEP which minimizes chances of a student being in an unassigned area. TRAEP also addresses students' behavior issues without necessarily disciplining a student for having behavior problems and serves students who have usually been charged with certain offenses, such as, but not limited to assault and battery. The staff at TRAEP has more expertise in handling students with behavior problems such as those of [redacted]. Tr.47-48, 52, 54, 70.

12. A significant problem of [redacted]'s is timely arriving for class and staying in class and out of unassigned areas. He generally wants to leave out of class and is often found in places in the school where he is not authorized to be. Tr. 51, Exhs. J-9,10,13, 15, 16, 17,18,19.

13. During the 2005-2006 school year, [redacted] received disciplinary referrals for disrespect, walking away from class; wandering off to unauthorized area; tardiness and failure to follow staff's directions; assault and battery on staff worker. Exhs. J-15 - 18.

14. During the 2004-2005 school year, [redacted] received disciplinary referrals for attendance problem and being in unauthorized area, and not following directions of [redacted].

staff. Exhs. J 5-6.

15. During the 2003-2004 school year, attended the Alternative School with Middle School being his home school. At the time, he was not receiving special education and related services. While attending that school, he was placed on administrative homebound due to behavior problems. He also received failing grades and had a number of referrals for misconduct while attending the alternative school. Exh. J -1, Tr. 67-68.

16. The Alternative School has a teacher student ratio of about 1 to 10, the student body is no more than 30 students, and the students do change classes in a small area. Tr. 67-68.

17. At HS, special education teacher (hereinafter “ ”) taught English and Algebra in an inclusion class during the first semester of the 2005-2006 school year. Tr. 73-74. would often be tardy to class. He would often put his head down and when instructed by the teacher to pick it up, he would not. Also, at times, he would leave class without permission. He did not do well academically in the class. Tr. 74 - 75.

18. As a result of a resolution meeting held May 16, 2006, pertaining to a complaint the parent filed with the Virginia Department of Education, the LEA agreed to provide homebound instruction in English 9 to . The IEP on May 24, 2006, was amended to reflect the agreement. The amendment does not replace the IEP changing 's placement to TRAEP. Exh. J-31, Tr. 76.

19. 's IEP dated May 3, 2005, created a behavior intervention plan

(hereinafter "BIP") appropriate to the secondary high school program. Exh. J-11.

's behaviors identified to address on the BIP were ineffective communication with adults; ineffective expressions to adults/authority; defensiveness when redirected; expressions of respect to adults/authority; and being in unauthorized locations. Exhs. J-11,24.

20. 's IEP amended on September 23, 2005, provided the following accommodations:

- i. Extended time for testing
- ii. up to 5 minute breaks per 40 minutes of instruction (not to include leaving the room)
- iii. Preferential seating near the instructional presentation and away from distraction
- iv. Small group or individual assistance by classroom teacher or other staff in the classroom
- v. use of calculator for arithmetic table for problem solving and calculations.

The IEP's summary of deliberations noted that concerns about 's organizational skills, completion of classroom assignments, and tendency to be outside of an assigned area would be addressed through regular instruction, after school tutoring, and through mentoring and tutoring. Exh. J-14.

21. has not attended school since January 25, 2006, and has been administratively withdrawn due to excessive unexcused absences. Exh. J-25

IV. APPLICABLE LAW AND ANALYSIS

To determine if the alternative educational placement is appropriate, the hearing officer will consider several factors, to include the least restrictive environment (hereinafter LRE"), the needs of the child, any behavior intervention plan and its

implementation, and who determined the alternative placement.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, must be educated with children who are not disabled. Special classes, separate schooling or other removal of children with disabilities from the regular educational environment should only occur when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactory. 34 CFR Section 300.550.

As of September 23, 2005, _____'s applicable IEP placed him at a regular high school, _____ HS, and provided for English 9 and Science in inclusion and general education classes; consult once a month by the case load teacher, tutoring (recoupment)² for 1 hour 3 times a week at _____ Schools, and mentoring (recoupment) which supplanted counseling for 1 hour a week at _____ Schools. Exh. J - 14. Accommodations to be provided pursuant to the IEP were extended time for testing, preferential seating near the instructional presentation, utilization of small group size or individual assistance, use of a calculator for problem solving and calculations. Exh. J-14.

_____ was also shadowed and escorted from one place to the other when given permission to leave a classroom. Tr. 21.

The evidence shows that the LEA implemented the educational services and accommodations outlined in the IEP. For example, _____'s case manager and special education teacher, Mr. _____ provided consult and mentoring and tutoring to

² Recoupment services are counseling and tutoring services the LEA agreed to provide as part of a corrective action plan from the Virginia Department of Education Tr. 25

consistent with the IEP. Additionally, provided one on one assistance in completing assignments and social skills instruction. also conferred with general education teachers and regularly interceded on 's behalf with teachers and administrators. also shadowed or escorted when he was permitted to leave the classroom after class was in session. Exh. J-24.

Despite the above-referenced provisions of educational services and accommodations, continued to perform poorly in the regular educational setting at HS, both academically and behaviorally. Exh. J-24, Tr. 73-75. As of spring, 2006, was 16 years of age, in the ninth grade and had only earned 2 credits toward graduation. Exhs. J-14, 31 (IEPs dated 9/23/05, 5/24/06 and indicating in 9th grade and 16 years of age with a birth date of August).

Moreover, 's behavior history from the beginning of the 2005-2006 school year included on September 9, 2005, leaving/skipping class ; on October 14, 2005, repeatedly kicking ball at people during game in class and when instructed to sit down because of the kicking, he left class without permission ; on November 17, 2005, not returning to class after leaving to blow his nose ; on November 17, 2005, walking out of another class without permission; on January 17, 2006, while being provided preferential seating in class pursuant to his IEP, opening the first aid kit unnecessarily and when moved and instructed not to talk, ignoring directives of teacher; and on January 25, 2006, striking a school cafeteria worker.

Because of 's latter conduct on January 25, 2006, he received 10 days of out of school suspension. Exhs. 18, 19. Upon holding a manifestation review meeting

within 10 school days of [redacted]'s conduct, the committee determined [redacted]'s behavior was a manifestation of his disability. Tr. 28, Exh. J-19.

Subsequent to the manifestation review, the IEP team met on February 15, 2006, and February 24, 2006, to determine what placement was appropriate for [redacted]. The parent was a member of the team and both she and the child attended part if not all of the meetings.

The IEP team then deliberated numerous options. The committee considered continued placement in a regular high school setting such as HS or High School, the LEA's only other regular high school. The committee also considered placement at Alternative School. The committee determined

Alternative School was not an appropriate setting because [redacted] had previously been enrolled at that school but he had not been successful. Exh. J-2., Tr. 67. The committee considered private day school, homebound instruction, and residential placement. These placements were all deemed too restrictive to meet [redacted]'s educational needs. Exh. J-24.

The committee considered and recommenced TRAEP as the appropriate placement for [redacted]. Tr. 30- 32. The placement has a small student teacher ratio of approximately 6 to 1; the educational environment is more structured; and the opportunity for [redacted] to be in an unauthorized areas is greatly diminished because students do not change classes. Moreover, staff at TRAEP has an increased and relevant expertise in handling the types of students placed there who as in [redacted]'s case have been charged or convicted of a crime. [redacted] would also be able to work on his behavior

problems without necessarily being penalized for his behavior. For example, excessive absences alone would not necessarily cause a student to lose a course credit as is the case in the regular high school setting. Tr. 80.

Not only did the IEP committee consider numerous placement options, but it also provided the parent several opportunities to suggest an alternative placement for [redacted]. The parent declined to make any suggestions. Exh. J-24.

The parent asserts that if [redacted] attends TRAEP, he will pick up bad habits. The parent offers no convincing evidence or argument to support her claim. Tr. 83.

Further, the parent argues in essence that a change in placement is not appropriate because the LEA did not implement all provision of the child's IEP/BIP. She states that the child was not shadowed/escorted at all times. [redacted] was to be escorted when he was given permission to leave the class not when he simply walked out on his own. The evidence establishes, [redacted] was appropriately escorted or shadowed. Exh. J-24.

The hearing officer also finds the BIP was implemented. On May 3, 2005, the IEP team met and conducted a functional behavioral assessment of [redacted]. The committee identified as behaviors of concern the following:

1. ineffective communication with adults;
2. expressing himself ineffectively to adults in authority;
3. using respect when expressing himself to adults in authority
4. becoming defensive when redirected, and
5. failing to remain in authorized locations. Exh. J-11. 19.

The IEP determined that [redacted] engaged in the undesirable behaviors to play and amuse, interact socially, express opposition to being singled out, lack of self-regulation. The IEP team then developed a BIP appropriate for the secondary educational setting to address

's behavior problems. Strategies to be implemented included privately conferring with , redirecting , reinforcing/teaching appropriate behaviors, providing positive consequences such as praise for appropriate behavior and negative consequences for inappropriate behaviors.. Exh. J-11. Mr. , among other things, mentored , worked with one on one and interceded on 's behalf. The Hearing officer therefore finds the BIP was appropriate and implemented.

Despite the appropriateness and implementation of the 's IEP and BIP, 's behavior infractions continued as previously discussed herein. The hearing officer also notes that even prior to the 2005-2006 school year, 's implemented IEP with behavior strategies and escort provision did not preclude him from receiving numerous behavior infractions for similar type behaviors to include being in unassigned areas of the school building, walking out of class without permission, and not reporting to class. Exh. J-5, 6,8, 9,10

plans to attend college. Exh. J-12. Yet, as of the conclusion of the 2005-2006 school year, has only advanced to the 9th grade and has only earned 2 credits toward graduation. Exh. J-32.. The IEP team appropriately concluded that needs a structured educational environment with a small teacher to student ratio, the diminished ability to wander around the school building when the student should be in class and receiving vital instruction, and a placement that would allow him to receive instruction in credit bearing courses without the likely loss of credit due to excessive unexcused absences. The hearing officer concurs.

V. DECISION AND ORDER

The LEA's proposed placement at the TRAEP alternative school which was determined by the IEP team is the most appropriate placement for _____ and calculated to provide educational benefit in the least restrictive environment.

The hearing officer has reviewed and considered all evidence of record whether specifically mentioned in the decision or not.

The hearing officer also finds all requirements of notice to the parent or parents were satisfied; that _____ is a child with a disability and in need of special education and related services; and the local educational agency has provided for a free appropriate public education; however, the parent has not allowed _____ to attend TRAEP, the educational placement calculated to provide educational benefit to _____ in the least restrictive environment.

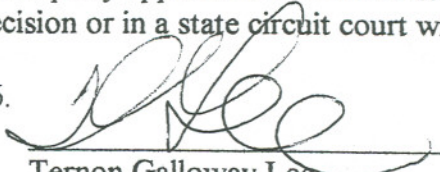
VI. PREVAILING PARTY

On the issue of whether the alternative placement is appropriate the LEA prevails. On all other issues neither party prevailed as they were issues not raised by the parties as they are standing issues the hearing officer is mandated to decide pursuant to applicable law.

VII. APPEAL INFORMATION

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

Entered into this 28th day of August, 2006.


Ternon Galloway Lee
Hearing Officer

cc: _____, Esq., Counsel for LEA
(parent)
_____, Dir. of Special Education for LEA
Virginia Dept. of Education