06-029

# 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.)*

School System
School Division

Name of Parents

Name of Child

March 31, 2006
Date of Decision or Dismissal

John F. Cafferky, Esq.
Counsel Representing LEA

Avocate Dr. David Rostetter
Counsel Representing Parent/Child

Parents
Party Initiating Hearing

Public Schools
Prevailing Party

Hearing Officer's Determination of Issue(s):

All issues raised were dismissed
is providing FAPE

There is a Health Care Plan in process
Presently is not enrolled in except for a voluntary ISP

Hearing Officer's Orders and Outcome of Hearing:

Orders implementing the Decision are in the Decision.
They cannot be enforced unless or until returns to

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.

Charles G. Aschmann, Jr.
Printed Name of Hearing Officer

Charles G Aschmann
Signature

VIRGINIA

SPECIAL EDUCATION DUE PROCESS HEARING



v. )
Public Schools ) In re:

Decision

This matter arises from a request for a Due Process Hearing by the They seek relief for the following issues:

1. Services required in IEP's that were not provided resulting in harm to and a claim of compensatory educational services.

2. Lack of comprehensive evaluations included a neuro psychological evaluation requested by the parents and evaluations to determine eligibility in suspected in suspected areas of disability including Autism Spectrum Disorder.

3. has failed to provide services to since September 2, 2005 in a manner that allows for the parents to exercise their option to enroll her in a pre-school kindergarten of their choosing as kindergarten is voluntary in Those services in the IEP can be provided in exactly the same way as have been provided before as she continues to be eligible for pre-school services.

4. *Unilateral and arbitrary changes to 's program of services, eligibility, and health care plans such that was denied the procedural and substantive protections provided her under federal* and state law.

5. Failure to make available to her a program of services and supports that would reasonably ensure her safety despite clear and compelling medical evidence that the program proposed by would threaten her health and even her life if implemented as proposed, and a failure on the part of to seek information from other providers who actually serve and manage her health and safety issues, which led to unilateral and uninformed decisions outside of the IEP process to deny needed services.

6. Unauthorized destruction of records, falsification of records, and alteration of records in violation of federal LAW.

7. Failure to make available all requested educational records.

The contends basically that received the services agreed upon until she was placed in a private system. contends that its attempt at evaluations have been frustrated by the parents. The has been unable to implement any plan because of parental obduracy. Finally, the schools provided have never been acceptable to the parents but are sufficient in opinion. denies the implication of mishandling of records. While originally there appeared to be a financial demand of greater magnitude, however, in the "stay put" Motion submitted at the Hearing the parent's advocate asked "that" be provided compensatory services, etc. (See Motion). In paragraph 14 of this Motion it states in pertinent part " 's parents are providing her with services in the form of a private preschool, for which they seek no reimbursement."

This Hearing was held over four days with an additional convocation on a telecon for a telephonic expert witness at a subsequent date.

## FINDINGS OF FACT

1. is a six year old girl (Date of birth January 1, 2000) TR 24 (Ex 33).

2. She is eligible for kindergarten (TR 2).

3. She is eligible for Special Education (Stipulation).

4. planned to assign a Public Health Training Assistant to her (TR 26 & 29 & 766 .) And had hired one.

5. suffers from multiple disabilities. Primarily Chiari 1 malformation (TR 38.39) but also Pervasive Developmental Disorder, Aspergers ( (TR 42) Epilepsy, inter alia.

6. At all times pertinent to this Hearing was willing to negotiate further (TR 56).

7. In a September 6, 2005 letter (ex 22/kk) by stated that there was no need for IEP meetings. The reasoning was that the IEP was complete (TR 635 & 636 ).

8. In fact a further IEP meeting was held on October 14, 2005 but terminated by the parents and their advocate without resolution. (TR 303-4 & 311).

9. attends , a private school. (TR 333)

10. was placed unilaterally without notice to the school. (TR 766-8)

11. was offered a choice of 3 schools, , , with transportation (TR 92 et seq) All were rejected.
(TR 171 et seq).

12. Parents signed August 24 the August 22, 2005 IEP except for placement in a

particular school (TR 112 ex26).

13. was to receive 4 hours of home based services in OT, speech, PT and special education (TR 118).

14. IEP team met a number of times specifically and relevantly October 21, 2004 (ex 33) June 17, 2005 (ex 34), August 24, 2005 (ex 35) October 19, 2005 (ex 36).

15. The October 14th meeting broken up by the parents with instructions to deal with. The Advocate.

16. At the August 22/24 IEP there was agreement on the IEP except for the actual school (TR 162 et seq).

17. The parents did not sign the IEP (IBID).

18. The public health teaching assistant.(PHTA) assigned to would be with her at all times (TR 179).

19. During the end of August 2005 period of negotiation the parents had already enrolled in the School unbeknownst to (TR 189).

20. does not consider to be enrolled in the School system (TR 192-4).

21. During 2005 attended RDI camp as part of her (ex 34) ESY program. ( TR 194 et seq).

22. There was no involvement of a nurse or health care plan in the ESY placement (TR 198 et seq).

23. No effort was made by the to place in school (TR206).

24. In preschool program for there is no indication of a nurse or healthcare plan albeit they were aware of her deficits (Adam Entenberg) ( TR 207-9).

25. could be placed in school (TR 235).

26. Starting with the May ll, 2005 IEP meeting Health Care plan was a work in progress with a completed plan by the August 22, 2005 IEP meeting (TR 247 et seq - TR 636 ) but at the October 14, 2005 meeting it was still a subject of negotiation.

27. The IEP was considered completed in the August 22, 2005 meeting the Health Care Plan a related issue but not part of the IEP proper (Ibid and Exhibit 26).

28. Physician's recommendation were solicited with Mrs help (TR 248 et seq

).

29. deals with many health plans over a broad spectrum of disabilities (TR 276).

30. There is no indication in any of the documentation that requires a full time nurse (TR 285 & TR 299).

31. The health plan was consistent with the recommendation from the Chiari Institute (TR 296).

32. The health plan was consistent with the recommendation from the University of Virginia Medical Center (TR 293 et seq)

33. The 's personal pediatricians, submitted a June 15, 2005 which was utilized in the Health Plan (TR 295-6 & Ex p)

34. refused to sign The Health Care Plan (TR 317 Ex jj)

35. is a very complicated, multi disabled, multi afflicted medically fragile child (TR 341 et seq Mrs , mother) who has an open craniotomy exposure.

36. When is not having episodes she is a normal behaving little girl (Ibid).

37. Dr. testified that she, the Assistant Director of Health (TR 362) for worked with various medical personnel connected with (Ex S,60,61,62, lower case P, TR 375 et seq). This included approval by . Later Drs. and said they could not sign the plan (TR 395 et seq.)

38. did not and would not suggest modifications (TR 398-9).

39. Dr. testified that their health plan could have had further work on the care plan it just stopped (TR 428).

40. Dr. had submitted the plan to pertinent physicians (Ibid 37 supra). And Nurse testified unequivocally that the Health Care Plan was appropriate (TR 307-09).

41. The parents want to be placed in school where there is a trained medical professional not necessarily a nurse. (TR 431-2). Mrs does not consider a trained lay person meets her criteria. (TR 434).

42. The parents want a health care plan unique to (TR 434).

43. Mr. on day three of the hearing testified that Elementary would be acceptable in contradiction to previous statements (TR 585-6). Neither or

would be acceptable.

44. 's neuro surgery (Craniotomy) took place late in December 2003. (TR 479). At the request of the services were suspended for a time. (TR 519 Ex 4).

45. While Mrs. had multi correspondence to re 's needs, programs, etc. there is no documentation of the missed services for which compensation is being requested (TR 528 et seq 494 et seq).

The RDI a private provider funded by had no nurse and no health care plan (TR 532-33).

46. Mrs. requested the September 2nd letter from (TR563) and wrote it (TR 572-3 Ex74).

47. Dr. , 's primary care physician, is a general pediatrician (TR 567 et seq). was adverse to helping with plan (TR 564).

48. The October 14 IEP meeting was telephonically attended by Dr. who terminated it in what was described by as scripted and abrupt. Prior to the log of the . and the termination there had been discussion of the evaluations and the Health Care Plan- what was needed (TR 607-12)

49. Expert witness opinion that would benefit from the PT and OT prescribed in her IEP and would benefit educationally from suggested schools (TR 708). This conclusion considers her medical condition (Ibid et seq).

50. Mobile systems would be available to accommodate any need might have (TR 712 et seq also mentioned in and testimony).

51. Various evaluations were scheduled (TR 772 et seq) however Mrs. had certain observation demands that were to be worked out. This was not done (TR 779).

52. was in the school system as a preschooler she never formally withdrew. She never registered for school (TR 780-781). No notice to her was required (TR 783-4).

53. Dr expert witness psychological testing stated would benefit from a neuro psychological evaluation (TR 836) based on his record reviews. He has never seen her (TR 841). He did not have knowledge of psychologists (TR 842-3).

54. Dr. Rostetter qualifies as an advocate (H.O. Ex 1 - HR 1350, 5.1248, D.O.E. letter July 1, 2005, VA Code § 22.1-214 (c).

## CONCLUSIONS OF LAW

1. is a child with multiple disabilities eligible for special education. With the aid of an advocate her parents the requested due process. All procedural requirements were met after re noticing in accordance with the new regulations.

2. has provided the mechanics for FAPE for by means of an accepted IEP. A completed IEP, and a ready health plan far exceed the minimum benefit requirement of Rowley. Board of Education of the Hendrick Hudson Central School District v. Rowley 458 U.S. 176 (1982).

3. The burden of proof in matters of this kind is the parents, the moving party as delineated in Schaffer v. Weast, 2005 U.S. LEXIS 8554 (November 14, 2005). The parents have failed to prove that program provide her with FAPE. The parents have not proved that the Health Care Plan is insufficient. They have only shown that they want more. Hartman v. Loudoun County Board of Education. 118 F 3d 996 (4th Cir. 1997).

4. Great deference is given to the local educators in determining the IEP. Similarly the IDEA points out that the view of the school system take precedence over the views of the parents. Hence Dr. view of the Health Plan must be disproved and it has not been. A.B v. Lawson. 3554 F 3d 315 (4th Cir 2004). Bales v. Clarke, 523 F. Supp. 1366 (E.D. Va. 1981)

5. An issue of missing services was raised and testified to in the Hearing (TR 494 et seq) Even if we considered argument that the December 20 letter met the statutory notice requirement the documentation is lacking, moreover it appears that this was sequential to the requested suspension of services (TR 5-18-20) and that IEP negotiations were almost always in process. This demand is vague, not quantified in the Hearing, and dubious on the compliance with the notice required by IDEA 20 U.S. 63 §1412 (a) (16) c) (111) (I) and West Linn-Wilsonville School District, 30 IDELR 337 (SEA Oregon 1999).

## DISCUSSION

This is a very emotional case heard over four days with additional telephone Testimony on a fifth day. Further action was necessary both by the necessity for ruling on a Pendency Motion submitted at the Hearing and answered subsequently and an objection by to parent's brief.

is a sympathetic figure, an attractive, friendly little girl who appears normal for periods of time, plays with dolls, in the school sand box and gets along with her peers. However, she is afflicted with multifarious deficits, the worst being the Chiari I syndrome with various life threatening episodes a looming possibility at all times. Truly one can empathize with her parents, who are obviously intelligent, concerned, attractive people who live in a constant agonizing state of worry and make one think of the funeral text "in the midst of life we are in death." One a purely emotional bases one would give them anything they want.

However the law and the evidence do not support the wish fulfilment nature of their demand. They cannot project a remedy that will protect their daughter completely and she will always be at risk.

has presented an IEP with which the parents concur. The hold up was the Health Care Plan which could ultimately have been resolved with a consultation between Dr and the relevant pediatricians Drs. and who would certainly work with Dr. if Mrs. told them to. This would certainly solve the holdup. It is so suggested..

The surreptitious placing of in a private school was an improvident action. The idea that removing the child from one system and placing her in another permits her to continue to receive her entitlement has a covert and unpleasant appearance.

Since the accepted IEP essentially established that she could receive FAPE the only obstacle to doing so would be her onerous medical condition. Considering the fact that she functioned routinely in the ESY-RDI, and also without the extreme system her mother wants, as well as the fact that the mother engineered the pediatrician's objections to Health Plan there is no clear and convincing evidence nor even a preponderance of evidence that Health Care Plan will not work. Further, it can be adjusted.

What seems to be happening here is a wish that could be made whole and immune to circumstance, and no plan can do that.

## DECISION

Clearly has been awarded FAPE in her IEP. Her Health Care Plan is a work in progress which needs the parental and pediatric input withheld by the parents.

The has offered several school options and at the Hearing it appeared that Elementary was acceptable.

Thus has complied with its responsibilities.

With regard to the issues:

1. Services not provided etc.

Services were provided while was in the system. Because of her medical problems at times they were suspended. There is an indication that less than the number of sessions was provided during the entire period, however, no evidence of when, why, what was done, notification was presented hence this is too vague on the unspecified deficit.

2. Lack of comprehensive evaluations etc.

These were in progress when communication broke down and when was removed from the system. They would be undertaken if she returned.

3. Services since September 12, 2005 etc.

See 1 supra, however, in this case this case the services were the subject of a Pendency Motion. The has volunteered to resume them but it was not required to do so. The so called missing services were not given while was and still is not in the system. What is being done is in the nature of an Individual Service Plan. The notion that can be in two systems' at once without notice or agreement is not a fact.

4. Unilateral changes to 's programs etc.

No evidence of this was introduced at the Hearing. To the contrary all witnesses including the petitioners' indicated great efforts on the part of the to work with the parents to further a mutually agreed on IEP which eventuated.

5. Failure to make available to her a program etc.

This is basically the same complaint as 4 supra and is similarly unproven.

6. Destruction of Records

No evidence of destruction was presented or alluded to and it is highly unlikely under the circumstances. The fact that the parents had constant access to the records and that they were reshuffled as alluded to in the Hearing negates this charge.

7. Failure to make available all requested records.

Despite the fact that the parents had access to the file, multiple copies of most if not all records the advocate insisted on getting 282 documents 2 boxes full. This charge is not sustained.

All issues raised by the advocate on behalf of the parents are denied.

If is enrolled in the it will continue to work with her . Obviously the IEP in place ends with this school year (2006). Ergo a 2006-2007 one will be needed. The Health Care Plan should be finished with the and input. The view of and health officials that a public Health Teaching Assistant appropriately trained and assigned to one on one meets her requirements. had done its job to date and is directed to continue to do so should re enter the system as we think she should since the consensus was that she would benefit from the public school education.

## APPEAL RIGHTS

This decision is final and binding unless either party appeals in a federal District Court with in 90 calendar days of the date of this decision, or in a State Circuit Court within one year of the date of this decision.

## ORDER

1. All issues raised by the through their advocate are dismissed.

2. No compensation is due the for any non delivered service.

3. It is considered that the present IEP if August 22, 2005 is the operative one should rejoin and this Order makes that assumption.

4. Obviously work should begin on the 2006-2007 IEP so that she can start afresh.

5. The Health Care Plan is still unfinished. It can only be finished with the input of Dr. and Mrs. can obviously facilitate the contact and the cooperation. It is directed that these actions be taken. Otherwise the present trained PHTA is approved. Intensive training is directed with parental input. This Order is issued with the presumption that will rejoin for the 2006-2007 school year and is operative in that context.

7. It is obvious that some students cannot get FAPE without a nurse. It is equally obvious that others can function just as well with a trained lay person. While . is medically vulnerable has guaranteed a trained lay person devoted to her. In Garrett, Cedar Rapoids Community School District v.. Garret.,526 U.S. 176 (1999) and Tatro, Irving Independent School District v. Tatro 468 U.S. 883,82 L. Ed/ 2d 664. 104 S. Ct. 3371 it is made abundantly clear that this will suffice 34 CFR 300.16 (a) (6) (4) (TR 11) cited in Garrett specifically says "qualified school nurse or other qualified person". Many difficult tasks are performed by such personnel. The evidence is clear that with 911 services, alert and medically trained personal on the premises, can be adequately monitored by individuals who are aware and who have been alerted to her condition. This permits her to achieve FAPE.

8. will attend . Elementary with whatever mechanical accommodation may be required.

9. has volunteered to resume home services as an ISP and this is approved..

10. If rejoins it is responsible for submitting an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

So Orderd

Charles G. Aschmann, Jr.
Hearing Officer

March 31, 2006.