

VIRGINIA DEPARTMENT OF EDUCATION
POST HEARING REPORT

School Division

Parents

Division Superintendent

Child

Counsel Representing LEA

Counsel Representing Parents/Child

Hearing Officer

Parent
Party Initiating Hearing

I. ISSUE

Is * eligible to receive an IEP from * Public Schools?

II. PROCEDURAL MATTERS

* requested a due process hearing to review the * Public Schools' decision finding

* ineligible for an IEP.

By letter dated *, the Director of Special Education for * Public Schools advised the Hearing Officer of his appointment to hear this matter. By letter notice dated *, the Hearing Officer notified the parties that a formal impartial hearing was scheduled for *. In the prehearing conference conducted by telephone, * counsel for * advised the Hearing Officer that mediation would be pursued prior to a hearing and requested that the hearing be rescheduled for a date during the first half of *. Accordingly, the Hearing Officer, with the consent of both parties, rescheduled the due process hearing for *.

While the due process hearing was commenced on *, the testimony of * was not completed on *. Mr. * requested that * be allowed to complete * testimony on *, to which request no objection was raised and the Hearing Officer agreed.

By telephone and letter dated *, * requested that the hearing be reconvened on *, rather than on *, due to * not being available to testify on *. Accordingly, the Hearing Officer continued the matter to *, at 9:00 a.m. On that day, * 's testimony was concluded and closing statements were presented by counsel.

Both parties had notice of and participated in the hearing. Requirement of notice to the parent of the hearing was met. The parent did not object to the hearing being conducted at * in the * Public Schools offices. At the request of the parent, the hearing was closed.

III. WITNESSES

On * the witnesses in order of appearance were as follows:

For the student:

1. *
2. *
3. *
4. *

For the School:

1. *
2. *
3. *
4. *

The hearing continued on *, with the conclusion of the testimony of *.

IV. EXHIBITS

The exhibits for the student, compiled in a separate binder, are the following:

1. Report from *, dated *
2. Report from *, dated [REDACTED], 2001
3. Report from * dated 1998
4. *'s medical records
5. * Police Department Incident Report dated *
6. Division Superintendent letter dated * (with transcript, not binder)

In addition, the curriculum vitae for * and for * were received and placed in the binder.

The exhibits for the school, contained in a separate binder, are the following:

- A. * Public Schools screening report
- B. Request for formal evaluation
- C. Invitation to eligibility meeting
- D. Evaluation data relied on by eligibility team
- E. Eligibility team summary of deliberations
- F. Parental notification form
- G. Offer of independent evaluation
- H. *, letter from *
- I. Clinic notes of *
- J. Report card for 2000-01 from *
- K. Scholastic and attendance record for 2000-01, *
- L. Report card from *
- M. Stanford Achievement Test results
- N. Virginia SOL grade test results
- O. Parental affirmation regarding previous student suspension/expulsion
- P. Certification of school health examination
- Q. * Public Schools disciplinary record
- R. * Multi-Disciplinary Team report
- S. Curriculum vitae for *
- T. Curriculum vitae for *
- U. Curriculum vitae for *
- V. Letter from *
- W. Community Service Board Diagnostic Records and contact notes

V. APPLICABLE LAW AND REGULATIONS

- A. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, et seq.
- B. Code of Federal Regulations

- C. Virginia Code Sections 22.1-213, et seq.
- D. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, effective 1/1/2001.

In addition, counsel cited the following case law:

- The Board of Education v. Rowley, 458 US 176 (1982)
- Babb v. Knox County School System, 965, F.2d104 (6th Cir.,1992)
- Springer v. Fairfax County School Board, 134 F.3rd 659 (4th Cir.1998)
- J.D. v. Pawlet School District, 224 F.3rd 60 (2nd Cir. 2000)

VI. SUMMARY OF THE EVIDENCE

* is 11 years of age. [REDACTED] currently attends * .

* attended*, a private day school, in *, Virginia, from kindergarten through [REDACTED] grade.

After completing the [REDACTED] grade, * was enrolled in * Public Schools for [REDACTED] grade. Near the end of [REDACTED] grade, [REDACTED] was expelled from * Public Schools due to a disciplinary incident in which [REDACTED] set a bathroom trash can on fire.

Following [REDACTED] expulsion from * Public Schools, the Special Education Eligibility Committee for * Public Schools, including *'s mother, *, met on * . Following their deliberations, the Committee concluded as follows:

Due to a long history (since pre-school) of * performing exceptionally well (high grades and achievement skills) in school, as well as [REDACTED] current cognitive potential, perceptual and achievement skills being assessed within the High Average range, the Eligibility Committee did not find * eligible for special education services.(Exhibit E)

All team members supported the conclusion with the exception of the parent, *.

The Eligibility Team, in reaching its decision, considered among other information, the following:

- Diagnosis of ADHD since kindergarten
- History of significant stress in [REDACTED] life
- Mother's concerns of hyperactivity, withdrawn behavior and stressful relationship with sister
- History of medications, concerning Concerta for [REDACTED] ADHD and Topimax for [REDACTED]

- depression, anxiety and anger
- Contents of earlier * and * reports

Also, the Eligibility Team considered the following facts:

- Math, reading and spelling skills all measured within the High Average range
- Cognitive, perceptual and achievement skills evenly developed in Average to Above Average range
- Demonstrates exceptional (High Average) level and ability to learn and perform academics

VII. DECISION

The parent has the burden of establishing that the student is eligible for special education. In the case before the Hearing Officer, in order to satisfy this burden, the parent must establish that the student has an "emotional disturbance" that adversely affects [REDACTED] educational performance.

34 CFR Section 300.7 (c) (4).

As counsel for the student correctly argued in [REDACTED] closing statement, the evidence must not only show that the student suffers from a condition exhibiting one or more of enumerated characteristics over a long period of time and to a marked degree, but must also show that such condition adversely affects the child's educational performance.

The first prong of the definition of "emotional disturbance" requires that the condition exhibit one or more of the following characteristics over a long period of time and to a marked degree:

1. An inability to learn that cannot be explained by intellectual, sensory or health factors;
2. An inability to build or maintain satisfactory inter-personal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression; or
5. A tendency to develop physical symptoms of fears associated with personal or school problems.

The record does indicate that * has exhibited one or more of the listed characteristics from time to time over a long period of time and, at times, to a marked degree. However, the record does not support the conclusion that any one or combination of those conditions have adversely affected *' educational performance.

The case of Babb v. Knox County School System, a 1992 6th Circuit case, was cited in support of the argument that *' condition or conditions adversely affected educational performance. In the Babb case, the Court reversed the district court's judgment and found that the student was eligible for special education services. In reaching its decision, the Court of Appeals stated that Jason Babb "has a long history of abnormal behavior and academic failure." However, while the opinion recites numerous instances of inappropriate behavior, the opinion does not recite any examples of "academic failure" other than the repeated instances of in-school suspension. The Court further stated that "even though standard intelligence quotient testing indicated that he has average to above-average intelligence, Jason Babb has a long history of academic failure that culminated during his three months in the Knox County School system." Again, the Court did not cite a single, specific instance of academic failure to support the stated conclusion.

In contrast is the opinion set out in the Fourth Circuit case of Springer v. the Fairfax County School Board, a 1998 case. In Springer, the Court of Appeals held that the student was "socially maladjusted" but did not have an independent serious emotional disturbance in addition to being socially maladjusted. Specifically, the Court found that even if the student exhibited some characteristics of serious emotional disturbance, there is no causal link between the characteristics and the alleged educational difficulties. Like the case before the Hearing Officer, in the Springer case the student progressed successfully from grade to grade in regular education programs. The

pattern continued until he developed significant behavioral problems in his eleventh grade year. While he repeatedly exhibited inappropriate behavior and had a high rate of absenteeism from school, he continued to score in the Average to Superior Average in intellectual ability of standardized tests.

On behalf of the school division, * suggested that the Hearing Officer consider the Second Circuit case of J.D. v. Pawlet School District, a Vermont case decided August 15, 2000. The undisputed facts in that case are the following:

- J. D. was an academically gifted child who also had emotional and behavioral problems. But again, in J.D.'s case, the school concluded that his emotional and behavioral problems did not adversely affect his educational performance.
- The Vermont opinion pointed out that neither IDEA nor the Federal Regulations defined the phrase "adverse affect on educational performance, leaving it to each State to give substance to the term." Accordingly, the Court relied upon the Vermont Special Education Regulations which, in turn, defined "adverse affect" as "functioning significantly below expected age or grade norms, in one or more of the basic skills."

Virginia does not in its regulations define the phrase "adversely affects a child's educational performance." However, the Hearing Officer finds that the parent must show more than the facts that emotional and behavioral problems existed and that school discipline resulted. While * attended private school both before and after attending school in the * Public School system, not a single teacher was called as a witness to demonstrate that * at any time suffered from an emotional disturbance which adversely affected [redacted] educational performance. None of *' counselors or teachers ever recommended or referred * for special education services until the Request For Formal Evaluation submitted *, by *, *'s [redacted] grade school teacher at *. (Exhibit B) *'s long-standing, emotional problems and the stressful conditions which existed in [redacted] life, a review of [redacted] school performance is telling.

* entered kindergarten at *, a private Christian school in *, Virginia, in the fall of 1995, and attended school there through ██████████ grade year. *'s end-of-year progress report for ██████████ kindergarten year included three grades of "A", one grade of "A-" and three ratings of "S" (satisfactory). ██████████ performance on the kindergarten Stanford Achievement Test included Average and Above-Average scores across all content clusters. No conduct concerns were noted at the end of the year.

*'s ██████████ grade end-of-year progress report included four grades of "A", four "S+" and two "S" ratings across all scholastic areas. * received a "needs improvement" check at the end of the fourth quarter for Cooperation and Obedience, but overall conduct concerns were not considered significant for the year. ██████████ performance on the first grade SAT's included Average and Above-Average scores across all Content Clusters.

*'s ██████████ grade end-of-year report included two "A+", four "A", two "A-", one "B+", and three "S" ratings across all scholastic areas. No conduct concerns were noted for ██████████ overall performance during ██████████ grade year. ██████████ performance on grade two SAT's included Average and Above-Average scores across all Content Clusters.

*'s ██████████ grade end-of-year progress report included four grades of "A", one "A-", four grades of "B", and two "S" ratings across all scholastic areas. Overall conduct concerns were not noted for the year. ██████████ performance on ██████████ grade SAT's included Average and Above-Average scores across all Content Clusters.

*'s ██████████ grade end-of-year progress report included one "A+", two "A", two "B" and two "S" ratings across all scholastic areas. Like previous years, * received "needs improvement" checks during various grading quarters but overall conduct concerns were not noted for the year. ██████████

performance on the [REDACTED]-grade SAT's included Average and Above-Average scores across all Content Clusters.

In the fall of 2000, * entered the [REDACTED] grade at * in the * School Division. [REDACTED] Mother reported that the decision to discontinue [REDACTED] enrollment at * was based on financial considerations and that she would have preferred that * continue at *. * had considerable difficulty adjusting to the new school. With respect to classroom behaviors during the 2000-2001 school year, *'s [REDACTED]-grade teacher, *, reported that * had difficulty attending to lessons, not completing homework, and apparently not establishing friendships. She also reported that other children "picked on *". Academically, * received grades of "A", "B" and "C" across all scholastic areas until the sixth (and final) marking period when [REDACTED] was suspended and subsequently expelled at the recommendation of the Board of Education for the * Public Schools for starting a fire in the boys' bathroom. For the sixth grading period, * received a grade of "D" for reading and written/oral language and a grade of "C" for science/health. The grades included in [REDACTED] Permanent Cumulative Record for [REDACTED] fifth-grade year include Average to Above-Average grades and ratings across all scholastic areas and indicate that [REDACTED] was promoted to the [REDACTED] grade. * took one of the [REDACTED]-grade SOL tests during the spring of 2001 and received an Advanced Passing score (English: Writing scaled score = 503). At the time of the hearing, * was enrolled as a [REDACTED]-grader at * in *, Virginia. *'s current teacher, *, reported that *'s academic performance is commensurate with grades of "B" and "C" in [REDACTED] course subjects. In non-academic subjects, including choir, worship and home economics, she reported that *'s performance is "good to excellent".

According to the Multi-disciplinary Team Report, there were discrepancies in reports of *'s current attitude towards school. During a structured interview, * reported that * did not like school

and that [REDACTED] often complained of headaches, stomach aches and allergies to avoid going to school. She further stated that [REDACTED] is not accepted by children of [REDACTED] age and [REDACTED] has no friends. In contrast, an interview with *'s teacher, *, indicated that * has many friends in the [REDACTED] grade and that [REDACTED] has even formed a close friendship with one [REDACTED]-grade boy. In a structured interview with *, [REDACTED] stated that [REDACTED] has many friends at school and stated that [REDACTED] likes going to school, feels free at school and that [REDACTED] has [REDACTED] best times at school. *'s teacher, *, emphasized that [REDACTED] behavior at * is very inconsistent. On some days, * is very focused and puts forth much effort. On other days, [REDACTED] is very unorganized and does not turn in [REDACTED] homework. * reported that while * has many friends at school, [REDACTED] sometimes makes inappropriate comments that some children do not like.

The Hearing Officer, in reaching [REDACTED] decision, has placed greater weight on the opinions of * and *, their credentials and experience being superior to those of * and *. As a result, their testimony, combined with the entirety of the evidence before the Hearing Officer, leads the Hearing Officer to conclude that * is not eligible for special education. Any emotional disturbance or condition exhibited by * has not had an adverse impact on [REDACTED] educational performance as can be determined by any record of academic progress or achievement. The Hearing Officer does not reach the conclusion suggested by * that any student who is inconsistent in completing homework on time, has difficulty attending to lessons, keeps [REDACTED] head on [REDACTED] desk, is inattentive, does not desire to complete [REDACTED] daily schoolwork or sets a fire in a school trash can, while at the same time making satisfactory academic progress, satisfies the definition of "emotional disturbance" under the Federal law and Virginia State Regulations.

VIII. NOTICE

The decision of the Hearing Officer shall be final and binding unless the decision is appealed by a party within one year of issuance of this decision.

Date

Hearing Officer

cc: * , Esquire, Counsel for *
 * , Counsel for * Public Schools
 * , Director of Special Education, * Public Schools
 Dr. Judith A. Douglas, Director, Office of Due Processing of Complaints
 Department of Education, P.O. Box 2120, Richmond, Virginia 23218-2120