

VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF ACCOUNTABILITY  
OFFICE OF SPECIAL PROGRAMS



CASE CLOSURE SUMMARY REPORT

_____	<u>Ms.</u> _____
School Division	Name of Parents
_____	_____
Director of Special Education	Name of Student
_____	_____
Counsel Representing LEA	Counsel Representing Student
_____	<u>Parent</u> _____
Hearing Officer	Party Initiating Hearing

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**HEARING OFFICER'S DETERMINATION OF ISSUES:**

The School Division met its burden of proof that the proposed IEP of the Student for placement at \_\_\_\_\_ is a free appropriate public education. The School Division did not violate any "stay-put" provision. Decision and Recommendation attached.

**HEARING OFFICER'S ORDER AND OUTCOME OF HEARING:**

I order that the proposed IEP of the Student for placement at \_\_\_\_\_ be so implemented.

\_\_\_\_\_  
Signature, Hearing Officer

\_\_\_\_\_  
Date

cc: \_\_\_\_\_, Esquire  
\_\_\_\_\_, Esquire  
\_\_\_\_\_, Director of Special Education  
Patrick Adriano, Esquire, State Education Agency



IN RE: \_\_\_\_\_, ("Student")

SCHOOL DIVISION ("LEA"): \_\_\_\_\_  
Represented by: \_\_\_\_\_, Esquire

Ms. \_\_\_\_\_, ("Guardian")  
Represented by: \_\_\_\_\_, Esquire

**DECISION AND RECOMMENDATION OF THE HEARING OFFICER**

This matter came on request of the Guardian, on behalf of the Student, for an impartial hearing under the Individuals with Disabilities Education Act ("IDEA") challenging the placement of the Student in a SECEP program assigned by \_\_\_\_\_ Public Schools by the Individualized Education Plan ("IEP") team for the \_\_\_\_\_ - \_\_\_\_\_ school year. By letter dated October 14, \_\_\_\_\_ from \_\_\_\_\_, Director, Special Education, \_\_\_\_\_ Public Schools, I was appointed Hearing Officer in this matter, originally filed on an expedited basis.

**I. PRE-HEARING MATTERS**

On October 16, \_\_\_\_\_, the hearing was set for November 3, \_\_\_\_\_. On October 16, \_\_\_\_\_, I was then informed by the Guardian that she retained \_\_\_\_\_, Esquire as counsel in this matter. On October 22, \_\_\_\_\_, the Student, through counsel, withdrew its request for an expedited hearing and requested a continuance to allow the presence of counsel citing representation and the extended time being in the best interest of the Student. The LEA did not object to the continuance, with the withdrawal of the expedited request for

hearing. A pre-hearing telephonic conference was held on November 6, at which time the hearing was set for December 1, . There was also to be an exchange of documents in the possession of the Guardian that was the subject of a subpoena duces tecum by counsel for the LEA by November 14, . The LEA provided its list of Witnesses and Exhibits on November 21, . The deadline for submission of the list of Witnesses and Exhibits was erroneously stated by my correspondence to be November 26, (with the Thanksgiving holiday, this would have been the deadline for an expedited hearing). On November 26, , the LEA filed a Motion to Dismiss based on the failure of the Student to file a list of Witnesses and Exhibits. On November 26, counsel for the Student sent by facsimile a list of Witnesses and Exhibits, all of the Exhibits being records produced to him by the LEA.

The hearing commenced on December 1, . I overruled the Motion to Dismiss based on the fact the noted Exhibits were known to the LEA, and, in fact, produced by them. The only Witness to be called by the Student, other than the Guardian, was the Student's aunt. I likewise overruled the Motion to Dismiss for failure to file a list of Witnesses since the witnesses to be called were relatives of the Student and any delay in producing their names was not prejudicial to the LEA. I also noted that my error placing the deadline of November 26 was forwarded to all parties and I would not prejudice any party because of my error.

After the hearing, the parties had until December 8, to file, in an informal way, a statement to encompass their Closing argument and to state their argument regarding: (1) with whom the burden of proof lies in this due process

hearing; and (2) authority regarding allegations of the LEA violating what are termed the "stay-put" provisions generally followed under IDEA. The record of this proceeding closed on December 16, with the transcript of this matter.

This opinion is delayed due to an unfortunate bout with a nasty flu, for which I note my regrets.

## II. FINDINGS OF FACT

The Student is 10 years old and identified with having a disability under IDEA. The Student was found to be Learning Disabled and Disabled due to Emotional Disturbance and Mental Deficiencies. The Student's intellectual skills have global cognitive deficits and show a lack of cognitive growth. Behaviorally, the Student's social skills, adaptability and leadership skills are extremely low. The Student had open heart surgery in , which appears to have added additional emotional trauma.

During the school year, the Student had some discipline problems which continued from prior years. The Student exhibited aggressive behavior to students and staff without provocation. Kicking was "quite a problem" as stated by the Student's Special Education Teacher at Elementary. The Student kicked other children to the point that the flow of student traffic in the classroom was often diverted from wherever the Student was sitting. Oftentimes, the Student also refused to do school work by throwing work off the school desk, crumpling up papers or stuffing work in the desk. The Student would mumble or hum fairly loud disturbing the classroom, especially during testing, and would occasionally fall asleep in class. The discipline problems were such that the

principal of \_\_\_\_\_ Elementary commented that the Student was the most challenging she ever had in 34 years of teaching and administrative positions.

On June 4, \_\_\_\_\_, the Student had another incident of hitting and kicking other students. \_\_\_\_\_ also kicked a teacher's aide, though deemed unintentional. The Student was suspended for seven (7) days due to the misconduct, although only five (5) school days remained in the school year. A manifestation hearing took place on August 28, \_\_\_\_\_ regarding the June 4, \_\_\_\_\_ incident and the manifestation determination was that the conduct was not the result of the Student's disability. That same date, the Student was recommended for long-term suspension from \_\_\_\_\_ Schools for the entire \_\_\_\_\_ school year, confirmed by the \_\_\_\_\_ School Board on September 8, \_\_\_\_\_, based on a history of discipline problems. There is nothing in the record to indicate this determination was appealed, although the lateness of the manifestation hearing and suspension determination so close to the beginning of the school year does cause some concern.

Also on August 28, \_\_\_\_\_, an IEP was proposed for the Student to be placed at \_\_\_\_\_, a public regional program which specializes in dealing with children with emotional disturbance problems. At \_\_\_\_\_, the Student would be in a class of small size (approximately 7 students) with two teachers and a teacher's aide. The \_\_\_\_\_ program proposed also has on-site a liaison education counselor who is the liaison between the school and the parents; two education specialists for testing, academics, de-escalation, etc.; a speech therapist and an occupational therapist. The facility is new and approximately 30

minutes from [redacted] Elementary. This distance does prevent the Student's guardian from visiting the Student there due to the guardian's work demands, unlike the close proximity of [redacted] Elementary.

At [redacted] Elementary, the Student was in a class of 7 students with 1 teacher and 1 aide, all students at the same grade level. The Student was in a regular education classroom for Social Studies and History, many times with and aide, as well as Physical Education.

### III. ISSUES PRESENTED

- A. Which party bears the burden of proof in this matter?
- B. Was is the appropriate placement for the Student?
- C. Should the Student have remained in [redacted] Elementary pending this decision.

### IV. SHORT ANSWERS

- A. The LEA bears the burden of proof in this matter.
- B. The [redacted] program in the proposed IEP is the appropriate placement for the Student.
- C. The Student was suspended from [redacted] Public Schools, therefore "stay -put" did not require that the Student remain there while due process was pending.

### V. OPINION

#### A. The Burden of Proof

The issue of the burden of proof in administrative hearings has not clearly been decided in the Fourth Circuit. While the LEA cites *Spielberg v. Henrico*

*County Public Schools*, 853 F.2d 256 (4<sup>th</sup> Cir. 1988) for the proposition that the party bringing the action has the burden of proof, I find the reference simply dicta and not controlling. Cases, decisions and academic literature on the issue runs the gamut. In issues regarding a plan proposed by an LEA, the burden has been placed on the LEA. See *Board of Education v. Michael M.*, 95 F. Supp. 2d 600, 32 IDELR 170 (S.D. W. Va. 2000). One district court held that the party seeking the change bears the burden of proof at an administrative hearing. *Brian v. Vance*, 86 F. Supp. 2d 538, 32 IDELR 69 (D. Md. 2000), *vacated and remanded in an unpublished opinion* 34 IDELR 257 (4<sup>th</sup> Cir. 2000) (directing that any issue with regard to the burden of proof be consolidated with consideration of the merits). In reviewing legal publications and various other Circuit Court opinions, the better and prevailing rule appears to be that the party who seeks a change in the status quo bears the burden. *Doe v. Brookline School Commission*, 722 F.2d 910 (1<sup>st</sup> Cir. 1983); *Walczak v. Florida Union Free School District* 142 F. 3d 119 (2<sup>nd</sup> Cir. 1998); *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 19 IDELR 1065 (3<sup>rd</sup> Cir. 1993); *S-1 v. Turlington*, 635 F. 2d 342 (5<sup>th</sup> Cir. 1981); *E.S. v. Independent School Dist. No. 196*, 135 F. 3d 566, 27 IDELR 503 (8<sup>th</sup> Cir. 1998) *Seattle School District No. 1 v. B.S.*, 82 F. 3d 1493, 24 IDELR 68 (9<sup>th</sup> Cir. 1996). See also, Thomas Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act*, 36 Clev. St. L. Rev. 67, 74 (1988) ("Placing the burden of proof on the party seeking to change the status



quo is consistent with the underlying theory of allocations of all burdens of proof").

Despite the argument by the LEA that the Student's current placement is suspension from \_\_\_\_\_ Schools, the *status quo* in this case, as was the case for several years, was the Student's placement in a

Elementary School special education class, with inclusion classes. This hearing is a determination of the appropriateness of the proposed IEP placing the Student at \_\_\_\_\_, not a hearing on the propriety of the suspension, since that issue is not before me. I deem the recommendation in the IEP for the Student to be placed at \_\_\_\_\_ as a change for which the LEA bears the burden.

B. "Stay - Put"

While I hold the *status quo* with regard to the change in placement recommended in the IEP to be placement at \_\_\_\_\_ Elementary, I do not find that the LEA was required to keep the Student at \_\_\_\_\_ pending the decision on the appropriateness of the IEP. The Student cannot argue that the manifestation determination was incorrect, nor that the suspension was improper in this forum, since those issues are not properly before me. Despite my sympathy for the Student along this line, I cannot hold otherwise. While I am dismayed with the time frame of the manifestation hearing and the suspension hearing, the Student was properly suspended from \_\_\_\_\_ Schools for a year and that suspension was not appealed under the provisions of the *Virginia Code*. *Virginia Code* Section 22.1-87. There was no request to review the manifestation determination which would have taken the matter, at least



temporarily, out of the hands of the School Board, which handles the disciplinary actions with regard to regular education students. Unfortunately, the suspension occurred, went unappealed and I can do nothing to resurrect it.

C. Proper Placement

The testimony is clear that . Elementary exhausted all avenues available to it for the education of the Student. Class size was small; and aide assisted as much as possible; and a number of precautions were taken to avoid situations which could result in discipline problems from the Student. The Student's own witness, her aunt, a special education teacher in Atlanta, GA, stated the Student needed more professional services, more one on one time, small class size and counseling. This is exactly what the Student would have at

. There are more counselors, educators and assistants at specifically trained and specifically on site to deal with behavioral and emotional concerns as those exhibited by the Student.

I am also swayed by the testimony of , the teacher from who would be the teacher of the Student. She was a teacher and counselor with a Master's degree in Science and Psychotherapy. The class would contain her and an associate teacher/counselor as well as a teacher's aid. I was impressed by her demeanor and assessment of the Student's disability, and knowledge of dealing with the disability. She described an environment that did not seem restrictive, certainly, I hold, the least restrictive environment for the Student, and an environment that the Student's witnesses themselves expressed was necessary for the Student. The recommendation of the placement

was supported not only by the Student's special education teacher at  
and its principal, but also by ' 's School Psychologist who observed the  
Student for several years at . The LEA met its burden in showing that  
the placement at was the appropriate education for the Student, and I  
hold that placement to be in the Student's best interests.

VI. CONCLUSION AND DETERMINATION

Based on the above, the record of this case, consisting of Exhibits and the  
transcript, I find that the proposed IEP complies with the Student's right to a free  
appropriate public education and should be so implemented.

Counsels' closing statements and argument will be attached as Exhibits to  
the record.

Date:

\_\_\_\_\_

Hearing Officer

Attorneys and Counselors at Law

POST OFFICE BOX  
, VIRGINIA

SUITE  
, VIRGINIA

E-MAIL:

POST OFFICE BOX  
, VIRGINIA

Ms. ,

, VA

Re: Due Process regarding

Dear Ms. :

As you are aware, I issued my Decision and Recommendation in the above matter on January , . At that time, I informed Mr. that you have the right to appeal this matter through the filing of a state or federal civil action. To clarify for your direct information, you should note that my decision is final and binding unless appealed in a state circuit court within one (1) year of the issuance date, or in a federal court. You should discuss any questions you may have regarding your appeal rights with your counsel.

Sincerely yours.

/s/

Cc: , Esquire  
Patrick Andriano, Esquire, Virginia Department of Education