

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS**



CASE CLOSURE SUMMARY REPORT

<u>Public Schools</u>	
School Division	Name of Parent(s)
 <i>Interim Division Superintendent</i>	Name of Child
<u>John F. Cafferky, Esq.</u> Counsel Representing LEA	<u>Hunter C. Harrison, Jr., Esq.</u> Counsel Representing Parent/Child
 <u>Robert J. Hartsoe</u> Hearing Officer	Party Initiating Hearing

HEARING OFFICER'S DETERMINATION OF ISSUES:

1. **Issue:** Whether the IEP provides the essential healthcare plan (e.g., a nurse, the personnel or equipment necessary to monitor and assess life threatening conditions, durable medical equipment and/or appropriate emergency personnel) to ensure the Child receives FAPE?
Determination: Yes.
2. **Issue:** Whether the IEP provides sufficient therapy to ensure FAPE for the Child?
Determination: Withdraw by agreement of the parties.
3. **Issue:** Whether the IEP provides sufficient teacher-to-student ratio to ensure FAPE for the Child?
Determination: Withdraw by agreement of the parties.
4. **Issue:** Whether the IEP provides a classroom environment, with its interaction with students and others, to ensure FAPE for the Child?
Determination: Withdraw by agreement of the parties.


5. **Issue:** Whether the IEP team impermissibly ceded its authority, as alleged by the Parent, to a "medically fragile team" for purposes of determining what resources were necessary to ensure that the IEP provided FAPE?
- Determination:** No.


HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:

ORDERED: It was ordered that

1. The LEA has provided the child FAPE.
2. As a result thereof, the LEA's obligation to pay one-half the cost of the School, as stated in the prior decision, ended on January 15, 2004, when the LEA offered the child FAPE.
3. The LEA is responsible for submitting an implementation plan to the parties, the hearing officer and the Virginia Department of Education within 45 day from the date of this decision.
4. The LEA was declared the prevailing party.

This certifies that I have completed the hearing in accordance with regulations and have advised the parties of their rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility regarding submission of an implementation plan to the parties, the hearing officer and the SEA within forty-five days.


Hearing Officer


Date

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



DECISION

<u>Public Schools</u> School Division	Name of Parent(s)
Interim Division Superintendent	Name of Child
<u>John F. Cafferky, Esq.</u> Counsel Representing LEA	<u>Hunter C. Harrison, Jr., Esq.</u> Counsel Representing Parent/Child
<u>Robert J. Hartsoe</u> Hearing Officer	Party Initiating Hearing

PROCEDURAL BACKGROUND AND ISSUES DEFINED:

On January 15, 2004, _____ requested a due process hearing on behalf of her son, _____ (“_____”), challenging the appropriateness of _____ Public Schools’ (“_____”) IEP, dated January 15, 2004, for the 2003-2004 school year in violation of the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 *et seq.* Ms. _____ alleged that the school system failed to provide _____ with a free appropriated public education (FAPE) and sought reimbursement for _____’s private placement at The _____ School in _____, Maryland. On January 20, 2004, this hearing officer was appointed.

On January 27, 2004, *via* telephone, the parties requested that the former hearing officer, Mr. James Mansfield, preside over this hearing.¹ Upon objection from the Department of Education and the Virginia Supreme Court, the request was denied.

¹As stated in previous pre-hearing reports, the parties opined that Mr. Mansfield’s background with the case would serve to reduce the time and cost in the instant matter. Both parties acknowledged that Mr. Mansfield is the current hearing officer’s law partner; any conflict was waived. Both parties represented that the current hearing officer did not have a conflict.

On February 5, 2004, the parties held their prehearing conference. The procedural issues discussed and decided are memorialized in the Fourth Prehearing Report, filed herein. During the prehearing conference (and the hearing), both parties stipulated that the educational component of the current IEP provided FAPE as well as the child's current placement at The School. (As stated below, the sole issue presented at the hearing was whether the current IEP addressed the child's medical condition sufficient to ensure FAPE.) The entire record from the previous hearing was made part of the record in the instant matter. The following issues were identified at the prehearing conference:

1. Whether the IEP provides the essential healthcare plan (*e.g.*, a nurse, the personnel or equipment necessary to monitor and assess life threatening conditions, durable medical equipment and/or appropriate emergency personnel) to ensure the Child receives FAPE?
2. Whether the IEP provides sufficient therapy to ensure FAPE for the Child?
3. Whether the IEP provides sufficient teacher-to-student ratio to ensure FAPE for the Child?
4. Whether the IEP provides a classroom environment, with its interaction with students and others, to ensure FAPE for the Child?
5. Whether the IEP team impermissibly ceded its authority, as alleged by the Parent, to a "medically fragile team" for purposes of determining what resources were necessary to ensure that the IEP provided FAPE?

In addition, the issue of burden of proof was also identified and, by agreement, to be decided before the hearing. Any other IEP procedural issues, notifications and deadlines were waived by the parties.² A two-day due process hearing was noticed for, and conducted on, March 2, 2004. Based on the stipulations of the parties before the hearing, Issue Nos. 2, 3 and 4 were removed, by agreement.

Before the hearing and on the record, the issue of burden of proof was argued by counsel. As stated on the record, the burden of proof was placed on the Parent as the party challenging the

²Throughout the process, counsel for the Parent intimated that both hearings were somehow one process. While both decisions involve similar issues, the instant matter is a distinct and separate matter from the prior hearing, with the exception that evidence, exhibits and prior decisions were considered as part of the evidence in the instant matter.

IEP. See Bales v. Clarke, 523 F.Supp. 1366, 1370 (E.D.Va. 1981); Hartmann v. Loudoun County School Board, 118 F.3d 996, 1000-01 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 888 (1998); Johnson v. Independent School District No. 4, 921 F.2d 1022, 1026 (10th Cir. 1990), *cert denied* 500 U.S. 905 (1991) *relying on* Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986), and Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *reversed on other grounds* 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984) (where the Court found that the burden of proof was placed on the party "challenging the student's IEP," based on the statutory "presumption" in favor of the education placement; thus, the party "attacking the IEP" has the burden of showing why the IEP was deficient.)³ As stated below, the overwhelming evidence was that the IEP provided FAPE; as a result, _____ would have prevailed even if it had the burden of proof.

FINDINGS OF FACT⁴

While the factual evidence was not in dispute, the opinions of the experts conflicted. All expert designations are accepted and incorporated by referenced. Further, their opinions and the factual basis for their opinions are incorporated by reference as if set forth in full. These opinions were considered and assigned the appropriate weight.

_____ is a six year old student presently enrolled at he The _____ School in _____,

³ Counsel for the Parent suggest that this allocation of burden amounts to a "presumption" forbidden by the regulations. However, this argument is flawed insofar as the allocation of burden of proof is separate from what would be considered a "presumption." A presumption is used in terms of evidence. For example, a fact finder can presume, subject to rebuttal, that a party to a contract is competent. Without rebuttal, the party will be presumed of such competence. With evidence of rebuttal, the fact finder must weigh the evidence and analyze what evidence is more credible and decide the issue. In contrast, the analysis of burden of proof is different. In the instant matter, the party challenging the IEP, a neutral designation, is required to show by a preponderance of the evidence, that the IEP is deficient. For example, an LEA can challenge an IEP on the basis that the child is not eligible for special educational services. In such cases, the LEA would have the burden of proof, *i.e.*, the burden of proof is not party specific. Accordingly, the regulation that suggests that nothing shall be presumed regarding the LEA is not violated.

⁴ Only a small portion of the transcripts of the hearing of the instant matter were ordered, based on the issues presented and the factual disputes at issue. As a result, reference to transcripts are omitted.

Maryland. Days after birth, he suffered respiratory and cardiac arrest. He was subsequently diagnosed with panhypopituitarism and optic nerve hypoplasia. He also has significant developmental delay. Optic nerve hypoplasia is an embryological defect that has resulted in having no significant vision in his right eye and impaired vision in his left eye. He is treated by an ophthalmologist for this condition. Panhypopituitarism is the defective formation of the pituitary gland which regulates the body's endocrine system. As a result of this condition, lacks the necessary hormones and steroids necessary to regulate a variety of body systems. 's condition is treated with hormone replacement therapy requiring daily administration of medication. must also be monitored for warning signs and "stressors" that can trigger a medical crisis requiring pharmacological intervention. Before a crisis, may not exhibit symptoms. The evidence is uncontroverted that 's panhypopituitarism is a life threatening condition. He has been under the care of Peter A. Lee, M.D., Ph.D., a pediatric endocrinologist at in Pennsylvania, since early childhood. Dr. Lee did not testify at either hearing. is also under the care of William C. , M.D., a local pediatrician. Dr. did not testify during the March 2004, hearing, but his prior testimony and his letter, dated November 19, 2003 (Parent's Exhibit 10), was considered. In this letter, he recommends that the school environment include the "full-time availability" of a "Registered Nurse" "fully trained" in 's condition.

From the age of one and one half attended a full-day, private program at the . Ms. withdrew from that program in September, 2002, because he was not receiving adequate medical services. From September 2002 until August 2003, Ms. took care of herself. Ms. and 's father

are divorced and [redacted]'s father lives in [redacted] Virginia. The Father has enjoyed visitation with [redacted] every other weekend for years. While the evidence established that he has medical professionals readily available, his medical training is limited with the exception that he has known the child (and his crisis-symptoms) since birth. During the hearing, Ms. [redacted], a licenced registered nurse, qualified as an expert witness without objection. She testified extensively regarding [redacted]'s medical condition, his symptoms and his treatments. She opined, *inter alia*, that a nurse, fully aware of [redacted]'s symptoms, was necessary to ensure FAPE. Further, she stated that the previous IEP did not provide FAPE insofar as it failed to monitor [redacted] sufficiently to avoid a crisis situation. As a result, only a trained nurse, such as found at The [redacted] School, could prevent the on-set of crisis, and therefore, prevent the necessity of administering stressor and/or life-saving medication.

In the winter of 2002-2003, Ms. [redacted] began looking at schools for [redacted] for the fall of 2003. On February 7, 2003, she filed an application for [redacted] with The [redacted] School, a private school in [redacted], Maryland ([redacted] Exhibit No. 40). On March 5, 2003 she also filed a referral with [redacted] ([redacted] Exhibit No. 3). [redacted], representatives first met with Ms. [redacted] on March 13, 2003, and subsequently again on March 27, 2003 ([redacted] Exhibit No. 3). Sometime in June, [redacted] received a single page letter from Dr. Lee dated June 11, 2003. ([redacted] Exhibit No. 32). The letter states [redacted]'s diagnosis and provides that:

He is subject to episodes of adrenal insufficiency that can be characterized with acute malaise, drop in heart rate, and blood pressure and collapse. Thus, he should be in a school environment that ensures that he can be promptly evaluated and treated should such episodes occur. Treatment involves administration of glucocorticoid (cortisol) by injections followed by an emergency visit to include IV fluids if indicated.

On June 12, 2003 an eligibility committee met to determine whether [redacted] was a child with a disability and in need of special education services ([redacted] Exhibit No.11). The committee determined that [redacted] was eligible for special education services as a student with visual impairment and other health impairment. ([redacted] Exhibit No. 12). Also on June 12, 2003, [redacted] notified Ms. [redacted] that [redacted]'s application for admission was accepted ([redacted] Exhibit No. 46). On July 3, 2003 Ms. [redacted] signed an Enrollment Contract with The School for the 2003-2004 academic year and made the required deposit ([redacted] Exhibit No. 47).

An IEP team met of July 23, 2003 and developed an IEP that provided occupational therapy, vision therapy and speech language therapy in a non-categorical program offered at [redacted] Elementary School ([redacted] Exhibit No. 17). By letter dated July 31, 2003, [redacted] advised Ms. [redacted] that they needed more specific information from [redacted]'s physician(s) concerning symptoms that might precede a medical crisis and detailed written instructions regarding emergency procedures so that an individual medical treatment plan could be formulated. ([redacted] Exhibit No. 13).

On September 2, 2003, [redacted] enrolled at The [redacted] School. At Ms. [redacted]'s request, [redacted] reconvened the IEP team to discuss available options to address her concerns and resolve the matter. ([redacted] Ex No. 14). On September 8, 2003 an amended IEP was proposed ([redacted] Exhibit No. 18). Ms. [redacted] did not agree with the amended IEP and by letter of the same date requested a due process hearing ([redacted] Exhibit No. 15).

As a result of the appeal, the Decision, dated October 23, 2004, and a Statement of Clarification, dated December 3, 2004 (hereafter, collectively, "Prior Decision") memorialized the prior-hearings' findings and decisions. As stated in the Decision, the following was ordered:

After careful consideration of all the evidence and arguments of counsel, I conclude that [redacted] could have, and should have, provided for related health services in [redacted]'s proposed IEP and that actions taken by Ms. [redacted] to assist in obtaining [redacted]'s medical records were unreasonable.

Accordingly, [redacted] is directed to reconvene the IEP team, refer the matter to its Medically Fragile Committee, and develop a medical care plan that will deliver the related services required to enable [redacted] to obtain an educational benefit in his proposed placement. Ms. [redacted]'s request for reimbursement is granted as to 50% of [redacted]'s tuition at The [redacted] School until such time as [redacted] offers an IEP that provides [redacted] with a free appropriate public education. [redacted] is responsible for submitting an implementation plan to the Parties, the hearing officer and the Virginia Department of Education within 45 day from the date of this Decision. Based on the above, I find that neither party prevailed in this proceeding.

Further, the Statement of Clarification provided:

Pursuant to 8 VAC 20-80-76 Q.2.b.(2) of the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, the Virginia Department of Education has instructed me to issue a statement of clarification concerning the decision rendered in this matter. Specifically, the Department has asked that in the event that Ms. [redacted] does not agree with the IEP developed by [redacted] in response to the decision, "does [redacted] pay 50% of [redacted]'s tuition until the IEP is offered, or must [redacted] continue to pay the tuition until the matter is resolved?" The Department correctly notes that if [redacted] offers an IEP it believes is sufficient to provide FAPE and Ms. [redacted] disagrees, the Parties will have to go to mediation or another due process hearing to resolve the matter. My decision requires [redacted] to pay 50% of [redacted]'s tuition *until* [redacted] offers an IEP that provides [redacted] FAPE. Webster's defines "until" as "up to the time of a specified occurrence." Accordingly, [redacted] is responsible for 50% of [redacted]'s tuition up to the time it offers FAPE. Whether or not any future IEP is sufficient in this regard can only be determined after it has been developed and proposed. If a conflict develops on this point and the Parties cannot resolve the matter short of due process, it will be up to the Hearing Officer appointed in the matter to determine whether or not the proposed IEP provides FAPE. If it is determined that it does provide FAPE, [redacted]'s reimbursement obligation ceased when the IEP was offered. If, however, the proposed IEP does not provide FAPE, it will be up to the Hearing Officer appointed in the matter to determine the issues raised in that case, including any request for additional tuition reimbursement and the denial or reduction of the same, based on the evidence presented.

In accordance with the hearing officer's decision, entered October 23, 2003, [redacted] convened the Medically Fragile Committee ("MFC") to seek a recommendation regarding

's condition and FAPE. The MFC was composed of employees as well as a doctor and other professionals from Health Department. 's Mother participated in the MFC. She also provided Parent's Exhibit 10, the letter from Dr. , dated November 19, 2003. Further, the MFC considered a communication with Dr. Lee. As a result, the MFC recommended that a "skilled nurse" was unnecessary to ensure FAPE for . (See Exhibit 56.)

In further compliance with the decision, entered October 23, 2003, convened an IEP meeting on January 15, 2003. As part of the meeting, the IEP team considered all available information regarding 's condition, including a recommendation from the MFC. As a result, the IEP team recommended the IEP which is the subject of the instant hearing.

At the hearing, introduced evidence from Dr. Satouri. Her opinion, after reviewing several, relevant, sources of information, was that the current IEP was reasonable and appropriate, under the circumstances. Her credentials and testimony were persuasive and unbiased.⁵ She opined that 's condition could be monitored by "laymen" and that the IEP would, in essence, guard against crisis. Further, she opined that the proposed IEP provided for a "plan" in the event of crisis. Overall, she opined that the IEP adequately addressed all of 's medical needs.

ANALYSIS

A. The IEP Team Did Not Cede Its Authority, as Alleged by the Parent, to the "Medically Fragile Team" for Purposes of Determining What Resources Were Necessary to Ensure that the IEP provided FAPE

On this issue, the uncontroverted evidence was that the IEP team reviewed the MFC only as a recommendation to be considered along with all other sources of information. As such, the

⁵ Her testimony is incorporated herein by reference as if set forth in full.

IEP reached its decision considering the recommendation from the MFC along with all other information available.

B. The IEP provided the essential healthcare plan to ensure the Child receives FAPE?

In Cedar Rapids Community School District v. Garret F., 56 U.S. 66 (1999) the United States Supreme Court ruled that in appropriate circumstances local school districts are required to provide a registered nurse to constantly monitor a handicapped child as a "related service" in order to ensure integration into the public schools. Pursuant to 8 VAC 20-80-10 "[r]elated services" are defined as:

transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education and includes speech-language pathology and audiology services; interpreting and transliterating; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation and psychological counseling; orientation and mobility services; medical services for diagnostic or evaluation purposes; school health services; social work services in schools; and parent counseling and training.

Based on the evidence, the IEP provides FAPE to .⁶ While his condition, without immediate intervention, can lead to shock and death, the overwhelming evidence revealed that the teachers, assistants and the trained medical personnel at the proposed placement have the capacity and plan, as contained in the IEP, to address 's condition. In response to the Parent's evidence, the overwhelming evidence revealed that monitoring of does not require hourly blood tests or pulse checks.⁷ A review of the evidence reveals that 's

⁶The failure of Dr. Lee, the child's endocrinologist since birth, to testify, even by telephone or otherwise, and address the issues raised by the Parent has to be considered detrimental to the Parent's position. While Ms. 's expert opinion and Dr. 's testimony and Parent's Exhibit 10 were considered, the overwhelming evidence from credible experts support a conclusion that the proposed IEP provides FAPE.

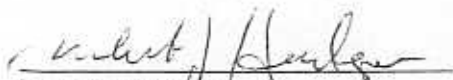
⁷While Ms. opined that the healthplan for The School was written for a nurse who inherently knows that such evaluations are necessary, the directions from the treating physicians do not mandate such evaluations. As such, hourly evaluations are discretionary; i.e., the treating physicians did not require, or testify, that such actions were part of 's protocol while at school.

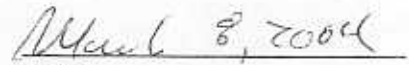
condition can be adequately monitored simply by individuals who are aware of his condition and act accordingly. [redacted] ' experts' opinion, plus IDEA's mandate that a child be placed in the least restrictive environment nearest his home, dictate a conclusion that the proposed IEP provides FAPE.

CONCLUSION

After careful consideration of all the evidence and arguments of counsel, I conclude that [redacted] has provided the child FAPE. As a result thereof, [redacted] ' obligation to pay one-half the cost of the [redacted] School, as stated in the prior decision, ended on January 15, 2004, when [redacted] offered the child FAPE. [redacted] is responsible for submitting an implementation plan to the parties, the hearing officer and the Virginia Department of Education within 45 day from the date of this decision. Based on the above, I find that [redacted] prevailed in this proceeding.

Finally, 8 VAC 20-80-76 O. provides that "[a] decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal court."


Hearing Officer


Date