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VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

In the matter of
[redacted] a minor

by [redacted]
Petitioner

v.

'UBLIC SCHOOLS

DECISION OF HEARING OFFICER

This matter came to be heard on [redacted] upon the written request of [redacted] (hereinafter referred to as [redacted]), *pro se*, [redacted] of [redacted] (hereinafter referred to as [redacted]"), a minor, to terminate special education services for [redacted] and return [redacted] to a regular classroom setting. [redacted] a rising [redacted] grade student attending [redacted] School, [redacted] Virginia, was first evaluated and recommended for special education services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, *et. seq.*, in [redacted] With the [redacted] written consent, [redacted] has received such services since [redacted] placement in special education in [redacted]

At the beginning of the hearing, it was the position of the [redacted] Schools ([redacted] that [redacted] required reevaluation pursuant to the IDEA guidelines, but the [redacted] had previously refused to give permission for testing. During the course of the hearing, the [redacted] gave [redacted] permission and signed the necessary documents for [redacted] reevaluation. Therefore, the issue is moot as to whether [redacted] should be reevaluated without the [redacted] consent. All parties agreed that it would be in [redacted] best interest for the Hearing Officer's decision to be delayed until such time as the results of

[redacted] reevaluation could be considered and briefs could be submitted. The Hearing Officer granted the request for delay.

Based on the results of the reevaluation and other evidence admitted during the hearing, it is the position of the [redacted] Public Schools ([redacted] that [redacted] should not be removed from the special education program but should continue to receive special education services and remain in special education classes. The [redacted] Public Schools contend that both [redacted]s academic and behavioral performance, as well as the results of [redacted] reevaluation, clearly dictate [redacted] ontinued need for special education services, and, that to remove [redacted] from the special education environment would result in a denial of [redacted]'s right, as a disabled child, to receive a "free appropriate public education" (FAPE), as required by Section 1412 of the IDEA (20 U.S.C. Section 1412 *et. seq.*)

It is the position of the [redacted] that in [redacted] when [redacted] initially agreed for [redacted] to be placed in the special education program, [redacted] greed for the limited time of three years. The [redacted] also contends that it is [redacted] right, as [redacted] to remove [redacted] from the special education program and have [redacted] placed in a regular classroom setting. The [redacted] also contends that when [redacted] initially agreed in [redacted] for [redacted] to be placed in special education, [redacted] did not fully understand that [redacted] would be placed in a special education classroom but thought [redacted] was agreeing for [redacted] to receive "other services" as allowed under the IDEA. The [redacted] further contends that [redacted] has been receiving good grades and is therefore no longer in need of special education services.

In [redacted] was initially determined eligible for special education in the area of [redacted] with [redacted] and [redacted] services. Based upon [redacted] most recent reevaluation, the Eligibility Committee on [redacted], again determined that [redacted] was eligible for special education services in the areas of [redacted] On or about [redacted]

[redacted] the [redacted] presented evidence suggesting that [redacted] was no longer in need of [redacted] and [redacted] services. The Hearing Officer admitted such evidence with no objection being raised by the [redacted] Public Schools.

The issues in this case are three-fold: (1) Whether the [redacted] provided "informed consent" as required by the IDEA when [redacted] initially agreed for [redacted] to be placed in special education classes. (2) Whether [redacted] having been evaluated as a handicapped child pursuant to the IDEA guidelines, could receive a "free appropriate public education" if completely removed from special education classes and placed in a regular classroom environment. (3) Whether [redacted] has been mainstreamed to the maximum extent possible.

Whether the [redacted] provided "informed consent" as required by the IDEA when [redacted] initially agreed for [redacted] to be placed in special education classes.

The IDEA requires parental consent before conducting an initial evaluation or reevaluation. Parental consent is not required before: (1) Reviewing existing data as part of an evaluation or a reevaluation; or (2) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of the parents of all children. 20 U.S.C. 1415(b)(3); 1414(a)(1)(C) and (c)(3). If the parent of a child with a disability refuses consent for initial evaluation or a reevaluation, the agency may continue to pursue those evaluations by using the due process procedures outlined in 34 CFR §§300.507-300.509, or mediation procedures as set forth in 34 CFR §300.506, if appropriate.

In [redacted] provided [redacted] written consent for [redacted] to be evaluated for special education services. [redacted] was determined eligible for special education services and was placed in a self-contained special education classroom. Since [redacted] initial placement, [redacted] has remained in special

education. In [redacted] the [redacted] requested that [redacted] be removed from the special education program and placed in a regular classroom environment. [redacted] contends that when [redacted] initially agreed for [redacted] to be placed in the special education program, [redacted] thought the program would be for only three years. The [redacted] also contends that when [redacted] initially agreed in [redacted] for [redacted] to be placed in special education, [redacted] did not fully understand that [redacted] would be placed in a special education classroom but thought [redacted] was agreeing for [redacted] to receive "other services" as allowed under the IDEA.

Pursuant to 34 CFR §§300.500-300.529, ***consent*** means that: (i) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; (ii) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and (iii) (A) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime. (B) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

The evidence suggests that in [redacted] was experiencing severe academic problems, having tested well below average in both math and reading. The evidence also suggests that [redacted] had become a school disciplinary problem. At the time of the initial evaluation in [redacted], [redacted] was displaying an inability to get along with other students, defiance, an uncooperative attitude, defensiveness, and excessive aggression.

[redacted], the [redacted], was well aware of the problems that [redacted] was having in school and saw [redacted] enrollment in the special education program as a means to prevent [redacted] child from continued

academic failures as well as further and more severe disciplinary actions by the school. [redacted] was fully informed about the evaluation and [redacted] planned placement in a self-contained special education class. Th[redacted] gave [redacted] written permission to have [redacted] placed in the special education program and was provided with a copy of all documentation held by the [redacted] regarding [redacted] placement. The [redacted] consent was voluntary. [redacted] was in no way coerced or forced to sign the consent document. I therefore find that the [redacted] knew, or should have known, that [redacted] was giving permission for [redacted] to be placed in the special education program and that [redacted] was fully advised of the meaning and purpose of the program when [redacted] gave [redacted] written consent. I further find that the [redacted] believed that [redacted] enrollment in special education would provide [redacted] child with some protection from further or more severe disciplinary consequences and would also provide [redacted] (who by this time had been evaluated as [redacted]) with the best and most reasonable FAPE at that time and that [redacted] gave "informed consent."

I am, however, concerned about the [redacted]s seeming inability to understand that [redacted] academic achievements while in special education were a direct result of [redacted] being taught on a grade level commensurate with [redacted] ability to learn and [redacted] Individual Education Program (IEP). The [redacted] presented clear and convincing evidence, through both oral testimony and written documentation, (Tr. at 73) of [redacted]'s present level of learning, same being far below regular [redacted] grade work. Nonetheless, the [redacted] seems to honestly believe, without any substantiating evidence, that [redacted] could function and learn in a regular [redacted] grade classroom setting without benefit of any special education services. Given the [redacted] seeming inability to understand these fundamental principles, it is recommended that the [redacted] and child be provided counsel, or at minimum, a representative, in any future proceedings to insure that the child's best interests are protected.

Whether [redacted] having been evaluated as a handicapped child pursuant to the IDEA guidelines, could receive a "free appropriate public education" if completely removed from special education classes and placed in a regular classroom environment.

Every school district is legally required to identify, locate and evaluate children with disabilities (20 U.S.C. §1412(a)(3)). After the evaluation, a disabled child may be provided with specific programs and services to address his or her special needs. IDEA defines "children with disabilities" as individuals between the ages of three and 22 with one or more of the following conditions (20 U.S.C. §1401(3)(26); 34 C.F.R. §300.7): *mental retardation (emphasis added)*, hearing impairment (including deafness), speech or language impairment, visual impairment (including blindness), *serious emotional disturbance (emphasis added)*, orthopedic impairment, autism, traumatic brain injury, specific learning disability, or other health impairment. [redacted] has been evaluated and identified as [redacted] and [redacted] For [redacted] to have qualified for special education under IDEA, it was simply not enough that [redacted] have one of these disabilities. There must also have been evidence that [redacted] disability adversely affected [redacted] educational performance.

The findings of the Eligibility Committee clearly suggest that [redacted] is academically performing well below average -- between a second and third grade level. (See Summary of Eligibility Committee dated [redacted]) [redacted] violent and aggressive behavior was also of considerable concern to the Eligibility Committee. In [redacted] was hospitalized for seven days at the [redacted] as a direct result of [redacted] violent behavior, i.e. attacking [redacted] with a knife. (See Tr. at 12; 15) During the [redacted] school year, [redacted] behavior was both disruptive and defiant. [redacted] was cited on numerous occasions for truancy, fighting, throwing chairs,

verbal threats, and assaulting school employees and students. (See office referrals for [redacted] school year.)

Given [redacted] disruptive and violent behavior, coupled with [redacted] low academic abilities, I find that [redacted] complete removal from the special education program would deny [redacted] FAPE. [redacted] most recent evaluation as [redacted] and [redacted], clearly identifies [redacted] continued need for special education services. I find that [redacted] should continue enrollment in the special education program pursuant to the IDEA, and should continue to receive special education services. I further find that the [redacted] efforts to terminate special education services for [redacted] are not in [redacted] best interest and would result in the denial of a FAPE for [redacted] 8 VAC 20-80-58(B)(3).

Whether [redacted] has been mainstreamed to the maximum extent possible.

In the case of ***Sacramento City Unified School District vs. Holland***, No. 92-15608, U.S. Court of Appeals, Ninth Circuit (1994), the Court upheld a lower court's decision in which the lower court found that when school districts place students with disabilities, the *presumption and starting point is to mainstream (emphasis added)*. In this case, the parents challenged the School District's decision to place their daughter half time in a special education classroom and half-time in a regular education classroom. The parents wanted their daughter placed in a regular classroom on a full-time basis. The child in this case was an 11-year-old with mental retardation, and was tested with an I.Q. of 44. The School District contended the child was too "severely disabled" to benefit from full-time placement in a regular class. The court found in favor of including the child in a regular classroom. This case established the following four-part balancing test to determine whether a School District is complying with IDEA by placing the child in the "least restrictive environment" (LRE): (1) The educational

benefits of the child's placement in a regular class with appropriate aids and services; (2) the non-academic benefits of interaction with non-disabled children; (3) the effect of the disabled child on the teacher and other students in the classroom; (4) the cost of supplementary aids and services associated with mainstreaming the child with a disability.

Upon application of this four-part balancing test when determining whether [redacted] has been placed in the LRE given [redacted] disabilities, I find that [redacted] should not be mainstreamed given [redacted] documented defiant, disruptive and often violent behavior. I find that [redacted] behavior would most likely impede classroom progress. Further, I find that [redacted] level of learning could frustrate [redacted] if mainstreamed with non-disabled children who are learning on appropriate grade level.

Goals and objectives should be of primary concern when addressing the needs and daily program of [redacted] as detailed in [redacted] IEP. As a general rule, the goals and objectives refer to academic, linguistic and other cognitive activities, such as reading or math. IDEA specifically calls these "measurable annual goals, including benchmarks or short-term objectives" related to a child's specific educational needs and involvement in, if appropriate, the general curriculum (20 U.S.C. §1414(d)(1)(A)(ii)). While the goals and objectives are usually academic and cognitive in nature, there is no restriction on what they may cover. They should reflect whatever the IEP team determines is important to a child's education. Goals and objectives can relate to physical education and how a child socializes or interacts with peers and staff. Whether a child is receiving a "free appropriate public education," as required by the IDEA, may depend on whether the program offered by the school district can help that child to achieve individually set goals and objectives. The IEP must include information about the instructional setting or placement for a child.

At the root of IDEA is the requirement that children with disabilities be placed in the "least restrictive environment" (LRE). This requirement is often referred to as mainstreaming. While IDEA expresses a preference for regular education, it recognizes that some children with disabilities should not be placed in a regular classroom setting. I find this to be the case with [redacted]

Individual need determines the appropriateness of a placement. If regular classroom placement is not appropriate, as is the case with [redacted], the IDEA requires that the school district provide a range of alternative placements, including the following: *regular classes for part of the school day (emphasis added)*; special classes in regular schools-for example, a special class for children with learning disabilities; special public or private schools for children with significant difficulties, such as a school for emotionally troubled students; residential programs; home instruction; and hospital and institutional placement. The IEP must specifically include related services – developmental, corrective and other supportive services, such as speech therapy, transportation or counseling services - - necessary to facilitate a child's placement in a regular classroom or to allow the child to benefit from special education services. The IEP may also include other components, such as specific teaching methods or class subjects, or anything else the IEP team agrees should be included (20 U.S.C. §1414(d)(1)(A)).

[redacted] disruptive and often violent behavior is of great concern as well as [redacted] "acting out" and apparent disrespect for authority. [redacted] level of learning and disruptive behavior dictate that [redacted] remain in a self-contained special education classroom setting. ***Daniel R.R. v. State Board of Education***, No. 88-1279, U.S. Court of Appeals, Fifth Circuit (1989), held that although IDEA requires children with disabilities to be educated with children who are non-disabled to the maximum extent appropriate, the school is not required to mainstream a child with a disability if the regular education classroom setting

is unable to meet the educational needs of the child and provide FAPE. This case created a two part test of the appropriateness of the placement - (1) may the child be educated satisfactorily in a regular classroom with supplementary aids and services, including a comparison of the benefits a child will receive from the regular classroom as opposed to the segregated, special education classroom and the possible negative effects on inclusion on the other students in the classroom, and (2) has the school mainstreamed the child to the maximum extent possible.

When applying this test, I find that [redacted] would benefit more from enrollment in a segregated special education environment, and that [redacted]ill-disciplined, disruptive behavior would negatively impact students in a regular classroom setting. I therefore find that the school has mainstreamed [redacted] to the maximum extent possible. To remove [redacted] from the special education program and [redacted] present classroom setting would deny [redacted] a FAPE.

It is therefore ORDERED that [redacted] remain in a self-contained special education classroom and continue to receive special education services; that an IEP team be convened to draft an IEP consistent with the recommendations of the Eligibility Committee and that establish measurable annual goals, including benchmarks or short-term objectives; that the IEP be implemented absent the [redacted] consent and with an aim towards behavior modification that could allow for [redacted] eventual mainstreaming.

ORDERED: [redacted]

[redacted] Esquire
Hearing Officer