

VIRGINIA DEPARTMENT OF EDUCATION
 DIVISION OF INSTRUCTIONAL SUPPORT SERVICES
 RECONSIDERED POST HEARING REPORT



[REDACTED]
 School Division

[REDACTED]
 Name of Parent

[REDACTED]
 Name of Division Superintendent

[REDACTED]
 Name of Child

[REDACTED]
 Counsel Representing School Division

[REDACTED]
 Counsel Representing Parent

[REDACTED]
 Name of hearing Officer

[REDACTED]
 Party Initialing Hearing

PROCEDURAL HISTORY

Sometime prior to the first eligibility of [REDACTED] hereinafter "Student", was involved in a motor vehicle accident. [REDACTED] had "multiple trauma characterized by spinal chord injury and an acquired brain injury". The sight of [REDACTED] left eye was impaired. Student was, and still is, in a wheelchair. [REDACTED] does not have function below [REDACTED] waist. [REDACTED] has average to above average intellect.

Student and [REDACTED] became dissatisfied with the IEP proposed for Student when [REDACTED] entered [REDACTED] school. Student's [REDACTED] did not sign the IEP proposed on [REDACTED] for [REDACTED] to [REDACTED] school year. Student's attorney requested due process by letter dated [REDACTED] addressed to [REDACTED] Superintendent of Schools. Apparently, there was a scheduled informal meeting subsequent to the due process request but there was never action taken on the due process request. Again, by letter dated [REDACTED] Student's attorney addressed the attorney for [REDACTED] Public School System, hereinafter "School" and informally requested due process. The Hearing Officer knows of no other formal request

for due process. However, by [REDACTED] the School had requested assignment of a Hearing Officer.

Within five days the Hearing Officer contacted both counsel to set up a pre-hearing conference.

The pre-hearing conference was held by telephone conference call on [REDACTED]. A letter from Hearing Officer dated [REDACTED] and faxed or hand delivered to both counsel outlined the expectations of the conference. During the conference a hearing date was agreed upon, also a request for sharing information, an identification of the issues to be heard, and a request to file appropriate information before the hearing date were discussed.

All parties agreed to the hearing being scheduled at Student's [REDACTED] school on [REDACTED] at 1:00 p.m. in the library.

It was agreed there was a single issue to be heard, that being:

"The method by which a disabled child will gain access to [REDACTED] school building. Child's advocate requests automatic doors. School board advocates having an aide available to open standard doors."

Copies of the pre-hearing report were mailed to counsel and DOE.

On [REDACTED], Student's counsel mailed a statement of [REDACTED] case and proposed applicable law to opposing counsel and Hearing Officer. On [REDACTED] Student's counsel requested witness subpoenas and production of documents as well as submitted [REDACTED] witness list. No information was ever received from School's attorney.

The hearing commenced on [REDACTED] at Student's [REDACTED] school at 1:00 p.m. and started with a view of the school grounds. The hearing continued until 5:45 when it was agreed to

reconvene at 1:00 on [REDACTED] at the school board office. The testimony was completed on [REDACTED]

Student's attorney presented the following witnesses, who were cross examined by

School's attorney: [REDACTED] Student; [REDACTED] Student's [REDACTED] [REDACTED]

[REDACTED] Head of Transportation for school; [REDACTED] Director of Special

Education; [REDACTED], aide to school; and [REDACTED] Superintendent of Schools.

After obtaining testimony from all the witnesses, Student's attorney rested [REDACTED] case.

School's attorney presented no witnesses and also rested [REDACTED] case at that time.

The Hearing Officer made a ruling that only the issue identified at the pre-hearing conference would be addressed. However, counsel for Student requested expansion of the issues to include several other areas of dissatisfaction of which [REDACTED] had already elicited testimony. Counsel for the School agreed it would be expeditious to consider all information at one time. Therefore the hearing proceeded in a manner that permitted all areas of Student's concerns to be addressed. The concerns involved both Section 504 and IDEA concepts. It was determined the [REDACTED] to [REDACTED] IEP was the present "stay-put" IEP.

ISSUES

As stated above, several issues were voiced. They appeared to fall in the following categories of which some specific examples will be given:

Access The chief complaint was whether or not student had adequate access to and from school buildings without automatic doors to accommodate [REDACTED] wheelchair passage.

Safety Concerns included Student's reliance on other persons to remove [REDACTED] from upper level floors in the event of an emergency. Also, the manner in which [REDACTED] wheelchair was secured to the bus floor for [REDACTED] transportation concerned Student.

Accommodations Concerns included Student's seating relative to [REDACTED] instructors especially [REDACTED] director. Also, the future possibility of [REDACTED] needing a specially equipped [REDACTED] vehicle was mentioned

Transportation Student was not receiving the transportation provided for [REDACTED] in [REDACTED] IEP.

FACTS PRESENTED

The School is in a very [REDACTED] area. It is sprawled across various level areas dug out from mountain slopes. There are several separate buildings. Navigating separate buildings between classes is an extraordinary challenge to a wheelchair bound student. All doors that lead outside are heavy metal doors. The school has modified the buildings with some ramps and slopes at door treads. An elevator in one building has been added. Some classroom doors are light enough for Student to push open and go through. There are several areas of the school that Student is not able to access including the auditorium stage, the vice principal's office and the classroom in the vocational building.

The School did have a safety plan on paper for Student's removal from school in an emergency and did have provisions for expedient release of the wheelchair restraints on the school bus.

Student stated [REDACTED] was unable to see [REDACTED] director when [REDACTED] sat on the bleachers at sports events. The band plays at the sports events. School did modify the bleachers to accommodate Student's wheelchair. Student projected that [REDACTED] will need a specifically

equipped [REDACTED] and trained instructor when [REDACTED] takes [REDACTED] in the future.

The current "stay-put" IEP requires bus transportation for student to and from school and related activities. Yet, the first day Student received bus transportation was the day after this hearing started. Student's [REDACTED] was providing some of the transportation that the school should have been providing. The School did purchase a standard size specially equipped bus during the summer of [REDACTED] to meet Student's needs.

Student is a very resourceful child. For instance, [REDACTED] plays saxophone in the marching band using [REDACTED] elbow to manipulate the wheelchair into formation on the playing field while playing [REDACTED] saxophone. Student gave testimony [REDACTED] was embarrassed by an aide being assigned to open doors for [REDACTED]. Both Student's [REDACTED] and the aide stated that the aide was not always available when student needed access.

Student stated [REDACTED] found it difficult to make some academic choices based on the amount of "trouble" [REDACTED] would be if making those choices.

The school has been aware for at least the last two years that Student would be entering the [REDACTED] school. While significant accommodations had been made others, such as access to the auditorium stage, were not made.

Student is making significant academic advancement.

Student's IEP of [REDACTED] to [REDACTED] became the "stay-put" IEP when Student's [REDACTED] refused to sign the proposed [REDACTED] IEP and filed for due process prior to [REDACTED]. Student's latest eligibility was [REDACTED].

APPLICABLE LAW

29 USC 794(a) seq. requires that no otherwise qualified individual with a disability in the United States, shall, solely by reason of [redacted] or [redacted] disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. Further, a local educational agency (LEA) is considered a program under this code section. However, small providers are not required to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternate means of providing the services are available.

42 USC 12132 provides that no qualified individual with a disability shall by reason of such disability, be excluded from participating in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

20 USC Section 1400, et seq. provides that handicapped services be designed to meet the unique needs of the disabled.

"Section 504" requires federally funded schools to meet the individual educational needs of the handicapped as adequately as the needs of non-handicapped persons are met. A funding recipient is prohibited from selecting facilities for the handicapped, which are different than those occasioned by the non-handicapped. The federally funded entity must not make provisions that have the effect of excluding handicapped persons from, denying them the benefit of, or otherwise subjecting them to discrimination under any program.

Code of Virginia Section 22.1-221; 34 CFR Section 300.306 entitle each child with a disability to transportation to and from educational program as well as provide the child with the least restrictive environment during transportation. Also, non-academic and extra curriculum services and activities should have the same transportation options as those offered non-disabled students.

42 USC Section 121341(5) states that the term "public school transportation" means transportation by school bus vehicle of school children, personnel and equipment to and from the public elementary or secondary school and school related activity.

34 CFR Section 300.526 provides that during the pendency of any administrative or judicial proceeding the child involved in a due process complaint must remain in his or her current educational placement. Also, 20 USC 1415(e)3 requires "stay-put" provisions.

DISCUSSION AND DECISION

Relating the factual situations stated above to the applicable codes stated above, this Hearing Officer finds:

The school system was in violation of its positive duty both under the current IEP and applicable federal code and state code to provide transportation to Student. The Hearing Officer finds that the School shall provide all necessary transportation to and from school and all school related activities. The School shall also be fined Fifteen Dollars (\$15.00) per day payable to the [REDACTED] for the days that [REDACTED] was required to transport Student to and from school when the school bus was not available for Student and shall further compensate [REDACTED] Fifteen Dollars (\$15.00) for any future trip provided by [REDACTED] when the School is unable to provide the required transportation. [REDACTED] shall

not, however, be required to provide any services. Where service is available and [REDACTED] or Student choose another source of transportation, then no fine is applicable.

The seating of Student or visible positioning of [REDACTED] instructors as well as visibility and usability of any educational aids shall be detailed in Student's next drafted IEP. It is obvious that Student would receive no educational benefit from lack of these accommodations.

Accessibility throughout Student's school is required by law and required in such a fashion that it does not single out Student's disability. This Hearing Officer was impressed by the negative impact the lack of accessibility had on Student. This would necessarily negatively affect [REDACTED] educational success. However, more importantly, the School's approach to providing access could have a chilling effect on Student's educational choices. That is, by hypothetical example, if Student were a [REDACTED] and the school proposed a [REDACTED] level elective class be brought to a "[REDACTED]" floor for Student's convenience, Student may choose to not take the class for fear of embarrassment or reprisal from [REDACTED] classmates from them all having to go to the [REDACTED] floor. Already, there is an issue about Student joining the Drama Club because it will require adaptation of the school stage. It was stated that the stage hadn't been altered yet because Student had not yet "paid [REDACTED] \$2.00 to join". Student should never be required to make choices based on accessibility, which occur after [REDACTED] decision. Accessibility needs to be in place before Student makes [REDACTED] educational choices.

There is no law that requires disabled students to receive top of the line treatment. But, by the same token, no law provides that a minimum effort is necessarily sufficient. What

is required is that the disabled person's unique needs be met in a non-discriminatory manner. Because of the above, this Hearing Officer is approving neither of the proposed solutions to Student's problem regarding the outside fire doors. That is, the Hearing Officer will decide neither that providing an aide nor the installation of automatic doors is the appropriate solution. The appropriate solution should be one that is always available, non discriminatory, has no chilling effect and is as cost effective as possible. Neither of the above mentioned solutions meet all of these criteria.

The School shall provide a plan whereby no part of the School building that is accessible to other [REDACTED] students shall be inaccessible to Student. No proposed plan, which singles out Student's disability is acceptable. That is, by example, if a ramp is available to Student, all students should be able to use it. If an aide is provided to open heavy doors for Student, then the aide must be available to open doors for all students. This is not to say all students must use the method available to Student but to say that Student's method should not be so exclusive as to be discriminatory. For instance, elementary schools make use of "safety patrols" to shepherd first graders across streets and through doors too big for them to handle. However, these same safety patrols open doors and provide safe passage to all students, even parents, traversing the streets or entering the doors. If automatic doors were installed for these first graders, all students and parents would benefit too.

This Hearing Officer recommends parents, Student and School personnel work together to find creative solutions to Student's accessibility difficulties. This decision has upheld Student's rights to the fullest extent of the law but is not intended to send a message to

Student that [REDACTED] need not compromise with School on cost considerations and may not make, nor be required to make, demands that disadvantage other students to [REDACTED] advantage.

To recap the decisions:

On the matter of transportation to and from school and to and from extra-curricular activities, Student and Student's parent have clearly shown the School to be in non-compliance prior to this hearing and School must be in compliance immediately.

On the matter of safety, the School appears to have adequately provided for Student's safety.

On the matter of accommodation by providing instructors visibility and providing instructional aids, the school will need to make the accommodations that are presently needed immediately and must specify accommodations in the next drafted IEP that will be of educational benefit to Student in the future.


On the matter of accessibility School shall submit a plan that affords free access to Student and provides the Student's present needs immediately. The plan for all future years must be implemented by [REDACTED]

This is the Final Order of the Hearing Officer.

APPEAL INFORMATION








A decision made by the hearing officer is final, unless a party to the hearing appeals the decision. The correct procedure for appeal is found in Section O of 8VAC 20-80-76 of the 2001 State Regulations for Special Education Programs. Either party may appeal

within a one year time period to a Virginia State Circuit Court and a Federal District Court
in the jurisdiction that is appropriate to the case


Administrative Hearing Officer


Date

CERTIFICATION

This is to certify that this was mailed to Department of Education, PO Box 2120,
Richmond, VA 23218-2120,  Attorney at Law, 
VA  and , Attorney at Law,  VA  on
this the  day of 