

CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

Public Schools
School Division

and
Name of Parents

Name of Child

Counsel Representing LEA

John F. Cafferky, Esq.

Counsel Representing Parent/Child

n/a

Party Initiating Hearing

and

Hearing Officer's Determination of Issue(s):

IEP of August 27, 2009 is approved as providing FAPE. Placement at School is approved. There shall be an immediate updated assessment of the student's reading skills.

Date of Decision

Decision 9/30/09 Opinion 10/5/09

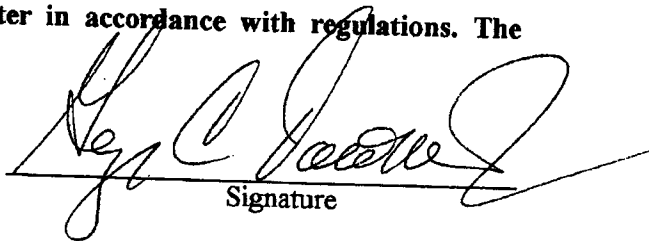
Prevailing Party

Public Schools

Hearing Officer's Orders and Outcome of Hearing: **Attached**

This certifies that I have completed this matter in accordance with regulations. The written order is attached.

George C. Towner, Jr.
Printed Name of Hearing Officer


Signature

cc: Parent(s); School Division; State Education Agency

Received

OCT 23 2009

**Dispute Resolution &
Administrative Services**

VIRGINIA:

DUE PROCESS HEARING

Student,
v.
Public Schools

DECISION

Statement of the Case

On July 15, 2009, a Request for Due Process Hearing on behalf of () was emailed by his parents, Mr. and Mrs. (), to the Virginia Department of Education (VADOE). The Department in turn submitted it Public Schools (PS) on July 22, 2009. On July 22, 2009, George C. Towner, Jr., was appointed as Hearing Officer. On July 23, 2009, by letter and email the Hearing Officer scheduled a conference call on July 27, 2009, to set a date for hearing and establish October 5, 2009 as the date by which a decision would be due. On July 24, 2009, PS filed an objection to the Request for Due Process Hearing on the grounds that:

“Specifically the request for due process fails to provide a sufficient, ‘description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem,’ and also fails to identify any proposed resolution. 20 U.S.C. §1415(b)(7)(A)(ii)(III-IV); 34 CFR §300.508(b)(5).
“Moreover, to the extent the request can be read to identify

any potential complaints by the Parents, many of the allegations (without supporting facts) fall well outside the two year statute of limitations and are not properly raised at this time.” 20 U.S.C. §1415(0(3)(c).

At the conference call on July 27th, and as later confirmed by letter dated July 28, 2009, the Hearing Officer ruled:

“If the text does not include the information required by the code it must be deemed insufficient. Clearly the Request for Hearing failed to identify any proposed resolution. However, the subsequent email asserted 11 separate proposed resolutions. In view of addition of these new proposed resolutions PS indicated its willingness consent to the filing of an Amended Request for Hearing.

Accordingly the Hearing Officer, pursuant to the provisions of 34 CFR 300.508(d)(3), does hereby grant to the leave to amend their Request for a Hearing provided that the Amended Request is filed with PS, the Virginia Department of Education and the Hearing Officer on or before August 5, 2009.”

On August 4, 2009, the filed an Amended Request for Due Process Hearing. On August 6, 2009, the Hearing Officer scheduled the pre-hearing conference for September 11, 2009, and scheduled the hearing for September 28, 2009. On August 14, 2009, PS filed its response to the Amended Request for Due Process Hearing. On August 18, 2009, the advised that they would not be represented by counsel. The requested that the resolution meeting be recorded. PS advised that it would not be recorded by PS. On August 18, 2009, the Hearing Officer advised the parties that:

“While I agree that PS is not required to provide a Court Reporter or record the resolution meeting I do not agree that PS can prohibit the _____’s if they wish to do so from bringing a Court Reporter to transcribe the Resolution Meeting or to record the resolution meeting at their own expense.”

The Hearing Officer also ruled that:

“....., in order to implement parental rights guaranteed under IDEA, that Counsel for PS provide the _____ in a timely fashion with copies of all cases, statutes or regulations cited to the Hearing Officer.”

On August 19th the _____ advised the Hearing Officer that the Resolution meeting was unsuccessful but the parties had agreed to hold an IEP meeting, but insisted that the Hearing Officer review the tape of the Resolution meetings as well as other documents prior to the IEP meeting. The Hearing Officer on August 20, 2009, advised the parties that the _____ should attend the IEP meeting and that there was no need for the Hearing officer to listen to any audio or video tapes or examine any evidence at this time. The IEP meeting was scheduled for August 27, 2009, and was held on that date.

The Pre-Hearing Conference was held on September 11, 2009. Following that meeting the Hearing Officer directed that, because _____ was still not attending school, the hearing date would be advanced to September 16th .

The hearing commenced as directed on September 16, 2009, with additional sessions held on September 17th and September 21st. The _____ requested that the tape of the IEP meeting of 8/27/09 be transcribed so that the statements of participants at that

meeting could be used to contradict testimony given by PS witnesses. The Hearing Officer directed PS to proceed with the transcription of the tape. On September 23, 2009, after being advised by counsel for PS that the transcription of the tapes was proceeding unsuccessfully, the Hearing Officer directed that the transcription be terminated, that the tapes be made available to the , and that the provide the Hearing Officer with a transcript of such portion of the tape as they believed related to the testimony given at the hearing by September 28th. On September 28th the did advise the Hearing Officer of the testimony they wanted included in the evidence. There was no objection to the testimony by PS and the hearing was concluded.

Statement of Facts

is one of the three children of and was born on May 9, 1995. According to the witness :

“ was born to a 23-year-old mother. He was the sixth child and he was born actually in the parking lot of Hospital at 30 weeks gestation and he weighed 3 pounds, 12 ounces. And he was placed in a foster home, in your foster home actually, when he was about two months old or a month old. And at that time he already had a brother in the home who was four.

“So he was placed there with his four-year-old brother. And that's how -- that's a little history of his early background.

“His mother also -- he had a multitude of medical problems when he was born. And his mother was positive for opiates and HIV, although was negative for HIV. But, you

know, he, as you can imagine, had a hard time in the beginning and had a lot of challenges to deal with in his early life." (Tr. 9/17/09 p. 222)

was adopted by the

According to the PS Sociocultural Assessment prepared by Geri M.G. Daines, DSW, dated November 6, 2001, which recites that it was based upon an interview with the on October 25, 2001, the birth and developmental history of was:

"Mrs. was 31 years of age and in good physical health when she was pregnant with . She did not use any medications, drugs, alcohol or smoke throughout the premature pregnancy. There is a maternal history of premature pregnancies. was born 2-1/2 months premature, weighing 2 pounds 7 ounces. He was hospitalized for one month and was released from the hospital with an apnea monitor which he used for 1-1/2 months. was breast fed " a little" but was mostly formula fed. He ate and slept well. Developmentally, walked at 13 months of age and successful toilet training occurred at 24 months of age. His initial speech and speech development was delayed. He pointed and he was also difficult to understand which then led to frustrating behaviors. Private speech therapy was initiated at 30 months of age." (PS Ex. 29)

There was no evidence presented to the Hearing Officer to explain the discrepancies for the two developmental versions set out above. For purposes of the Due Process Hearing the Hearing Officer accepts the version provided by

In 1998 his older brother experienced some difficulties with his attendance at Elementary and Elementary. His parents withdrew from PS. Subsequently in August 2000 the parents sought to enroll both and

in (Ex. S-10). Subsequently on September 18, 2000, PS enrolled and at Elementary (Ex. S-16). This was an administrative placement as was not the school the children should have attended based upon their residence. The residence placed them within the School pyramid while was in the School pyramid. As with all administrative placements PS did not provide transportation to the children.

Shortly after arriving at the sought to have declared eligible for special education. He had received private speech and language therapy during the year prior to his enrollment at . Eventually on December 13, 2001, was declared eligible for special education services with his area of eligibility being specific learning disability (Ex. PS 01). PS held IEP meetings with the resulting in parent approved IEPs dated March 2, 2004 (Ex. PS 05), November 10, 2005 (Ex. PS 06), November 10, 2006 (Ex. PS 07), and March 2, 2007 (Ex. PS 22), together with an IEP addendum dated September 12, 2007 (Ex. PS 23), and a subsequent IEP dated February 13, 2008 (Ex. PS 24). The submitted medical reports from Dr. (Ex. S-25, S-32, PS 53), a family physician, Dr. (Ex. S-22, S-23, S-24, S-27), an optometrist, and Dr. , PhD. (Ex. S-16, S-17, S-18, FCPS 52), a psychologist, which were considered by the IEP team and accommodations based on these reports were included in

the IEPs. The IEP of 2/13/08 provided for special education services for [redacted] in the following areas: (1) Written Expression, (2) Reading Comprehension, (3) Math, and (4) Communications (Oral, written and reading). By 2008 Primary Services were provided 20 hours a week with four hours in a special education setting only. Speech and language services were provided for an additional 45 minutes a week (Ex. PS 24).

[redacted]'s standardized test results and grades improved consistently through the years. At [redacted] School he was on the Honor Roll and his 2009-10 proposed IEP called for him to take an Honors Biology course in 9th grade (Ex. PS 42-47).

The administrative transfers were sought each year by the [redacted] and were granted each year by PS. The [redacted] sought to have [redacted] designated as their base school but PS refused to do so, maintaining that a student's residence determined the location of the base school (Ex. PS 11). In 2007 as [redacted] was moving into middle school the [redacted] sought placement at [redacted], which was part of the [redacted] pyramid, which was granted for the two year period he would be attending [redacted]. The letter granting the request noted that the [redacted] were directed to contact PS in April 2009 at which time high school placement would be discussed (Ex. PS 17).

In February of 2009 PS initiated communication with the [redacted] with regard to preparing an IEP to cover [redacted]'s movement into 9th grade at an PS high school

(Ex. PS 48). An IEP meeting was held on February 18, 2009, with Mrs. [redacted] and [redacted]. While agreement was reached on the goals and services to be provided, Mrs. [redacted] deferred on signing the IEP until she had clarified issues with Dr. [redacted] and [redacted] also resolved the issue of school placement. On February 19, 2009, Mrs. [redacted] met with [redacted], Assistant Superintendent for [redacted] schools, to discuss placement for her children. Mrs. [redacted] sought to have PS (1) drop its requirement of requiring administrative placement requests submitted annually, (2) provide transportation to the [redacted] children to schools outside of their base area, and (3) allow the [redacted] children to attend schools outside of their base area for their remaining school years. By letter dated February 25, 2009, Ms. Butz denied all the [redacted] requests and directed that for the 2009-10 school year [redacted] attend [redacted] School (Ex. PS 18). The [redacted] received a letter dated May 15, 2009, from the English Department at [redacted] School providing summer ready requirements for incoming students (Ex. S-36). Subsequently they received a letter dated May 28th from [redacted], Director of Student Services at [redacted] School, containing a list of 9th grade courses which [redacted] had signed up for (Ex. S-37). On June 17th [redacted] wrote the [redacted] that the prior letters were in error, that [redacted] would be required to attend [redacted] School, and that his course requests were being forwarded to [redacted] School. The [redacted] were directed to register [redacted] with [redacted] School (Ex. PS 19).

On July 15, 2009, the filed their request for a Due Process Hearing.

Decision

1. Does Administrative Placement Overrule IDEA?

The parents of argued vigorously at the hearings in this matter that the fact that had been administratively placed in schools in the pyramid should impact and become a part of his IEP placement. PS argued just as vigorously that administrative placement and IEP placement were two separate processes and one did not affect the other.

IDEA provides that special education services should be provided in the least restrictive environment.

C. Placements. (Regulations Establishing Standards for Accrediting Public Schools in Virginia (8VAC20-131); 34 CFR 300.116)

1. In determining the educational placement of a child with a disability, including a preschool child with a disability, each local educational agency shall ensure that:
 - a. The placement decision is made by the IEP team in conformity with the least restrictive environment provisions of this chapter.
 - b. The child's placement is:
 - (1) Determined at least annually;
 - (2) Based on the child's IEP; and
 - (3) As close as possible to the child's home.
 - c. Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that the child would attend if a child without a disability.

It is clear that these provision operate under the assumption that the school closest to the child's home is, from the point of view of the child, the ideal placement.

PS at the same time recognized that there were occasions when a student should not have to attend school at their base school. To accomplish this PS developed administrative regulations whose avowed purpose was *"To provide procedures for granting exceptions to school-age (K-12) students to attend a school other than their base school."* See PS Regulation 2230.8 EFF 02-2707. Once again these procedures as with the IDEA regulations were designed to benefit the student.

The PS regulations apply to all students, not just students receiving special education services. Most significantly, while the regulations provide for the right of appeal of the denial of a transfer from the base school, the ultimate decision made by the Director of Social Work and Support Services in collaboration with the appropriate cluster superintendent is final and is based upon that official's judgment. (See Regulation 2230.8 (F) pg 5)

Since placement under IDEA would normally be at the student's base school and since changes from the base school are being requested by the student, attendance at the non base school becomes the least restrictive environment. That placement is not a critical element of the IEP unless attendance at the non base school is required by considerations set out in the IEP.

Accordingly before the administrative placement can have impact on the IEP the data before the IEP team must show that the physical placement of the student at a particular school is uniquely required to provide the needed special education services to the student. The evidence in the present case fails to show that the services needed by _____ can only be provided by _____ High School. Absent such evidence the administrative decisions of _____ PS as to whether to permit or not permit transfers to non base schools are solely within its province and not subject to review by the Hearing Officer. Accordingly, the Hearing Officer determines that administrative placement does not overrule IDEA under the circumstances of this case.

2. Do References to Schools in _____ Pyramid in School Documents Estop _____ PS From Placing _____ in Schools in _____ Pyramid?

_____’s parents throughout the hearing pointed out a variety of circumstances where _____ PS took actions which indicated that schools in the _____ pyramid were _____’s base school. Most prominent was the letter dated May 28, 2009, from _____ of _____ School addressed to _____’s parents containing “...the list of the courses which your student has registered to take in the 2009-2010 school year.” (Ex. S-1) The evidence showed that counselors from the high schools came to _____ School to discuss courses offered in high school and to provide the students with course selection sheets to take home to their parents. The questioning of Ms. _____ and the other witnesses did not clearly reflect how _____’s course selection

data got to _____, but the evidence is clear that when this fact became known to Ms. _____ she wrote the parents on June 17, 2009 advising that

“... it appears that _____'s (sic) registration was sent to _____ School instead of to _____ School, his base school. While I understand that _____ (sic) was a student transfer at _____ this year, that transfer does not extend into the 2009-10 school year” (PS Ex.19)

While such administrative deficits may have been upsetting to _____'s parents, they do not preclude PS from correcting the information, which is what they did with the June 17th letter.

Other examples cited by the parents in their questions were the designation of _____ and _____, both schools within the _____ School, as the “Neighborhood/Base School” in _____'s IEP for 3/2/04, 11/10/05, 11/10/06 and 9/12/07 (Ex. S-5, S-6, S-7, S-8). Once again The _____' efforts to make these schools as the base school were continually refuted by PS's refusal to provide transportation which would have been required if these schools were truly base schools. In addition _____, Director _____, made it clear in his letter of May 24, 2002, that there would be no change in the base school for _____ absent a family relocation (Ex. PS 11).

As noted above, while such administrative deficits may have been upsetting to _____'s parents, PS clearly maintained that the base pyramid for _____ was

School. Accordingly the Hearing Officer determines that the typographical errors in school documents do not estop PS from placing at School.

3. Were Parents Given a Proper Role at 8/27/09 IEP Meeting?

Mr. , Coordinator, Procedural Support Services for PS, on August 28, 2009, wrote the following the IEP meeting on 8/27/09:

“You asked that each IEP team member enter their respective opinions and rationale for placement on the IEP document separately. The PS members of the team did not agree to do so, as the document represents the consensus of the team rather than individual positions.

“You objected to instances in which statements that you wished to include in the IEP were paraphrased or combined with elements suggested in a collaborative fashion by other IEP team members, asserting that you had the right to have things stated in the IEP document as you worded them without alteration. Although some statements in the proposed IEP document did reflect your exact wording, there were instances in which the wording as offered did not meet with agreement (consensus) from the rest of the IEP team members. You were encouraged to provide, in a separate document, any written statements that you felt needed to be worded in a specific manner, for inclusion in 's record.”
(Ex. PS 05)

The asserted that Mr. 's view of the IEP process was not in accord with the parent's proper role under IDEA. This matter has been carefully considered by the Courts in the case of *Fitzgerald vs Fairfax County School Board* 556 F. Supp. 2d 543 (2008), USDC EDVa (2008) where the Court stated:

Importantly, the IDEA does not rely solely on the IEP requirement to achieve the goal of a FAPE; additionally, the IDEA provides a range of procedural safeguards to ensure parental participation in the process. Indeed, "Congress placed every bit as much emphasis on compliance with procedures giving parents . . . a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205-06. This reflects, as courts have recognized, that "While core of the statute . . . is the cooperative process that it establishes between parents and schools." *Schaffer*, 546 U.S. at 53 (citing *Rowley*, 458 U.S. at 205-06).

While this focus on parental involvement is understandable based on the IDEA's goals, there is a difference between parental involvement and parental consent. Congress certainly intended parents to be involved in the decisions regarding the education of their disabled child; nevertheless, this participation does not rise to the level of parental consent or a parental veto power absent an explicit statement by Congress. *See, e.g.*, 20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. 300.300 (requiring parental consent for initial evaluations, the provision of special education services, and reevaluations). Put differently, the IDEA is designed to ensure parental participation in decisions regarding their disabled child, but it does not ordinarily require parental consent such that parents may usurp or otherwise hinder an LEA's authority to educate and discipline disabled children.

Recognizing this distinction, courts have repeatedly rejected the notion that the IDEA's focus on parental participation gives parents the power to control or veto educational decisions related to their disabled child. *See, e.g., A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 683 n.10 (4th Cir. 2004) (stating that "the right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP Team's decisions") (citing *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003)).

It is clear from Mr. _____'s letter that due consideration was given to the _____'s comments. Accordingly the Hearing Officer determines that the parents played a proper role at the 8/27/09 IEP meeting.

4. Did _____'s IEP of August 27, 2009, Provide FAPE?

After the failure of the resolution meeting to resolve the differences between the _____ and PS, the parties met on August 27, 2009, to consider the IEP proposed by the IEP team. This IEP team included staff from both _____ School and _____ School. As expressed in Mr. _____'s letter discussed above (See PS Ex. 5) the IEP reached consensus on the goals for _____ and the special education services that would be provided to him. This was acknowledged by Mrs. _____ on the first day of the hearing when she stated:

I'm not challenging the IEPs in here. ...I'm saying that because of the placement and because Administration keeps playing with _____'s placement, they are -- they are violating the IEP. (Tr. 9/16/09 p.33)

Accordingly, it is the decision of the Hearing Officer that, to the extent that the IEP provides special education services, it provides with FAPE.

5. Did Any of _____'s IEPs Provide a Basis for Placement Based Upon "Medical, Emotional, Social or Family Adjustment" Reasons?

The record is clear that beginning in September of 2000 [redacted] attended [redacted] School as the result of an administrative placement. The Record contains an undated student assignment application executed by Mrs. [redacted] together with the recommendation of the [redacted] Principal, [redacted] (Ex. PS 09). Mrs. [redacted] wrote as part of her recommendation:

“This request for pupil placement may be in compliance with Regulation 2230.2 under section III, number 3. However, to date, no documentation substantiating [redacted]’s circumstances has been provided. Although I will recommend approval that [redacted] attend [redacted] based on a possible "Medical, Emotional, Social or Family Adjustment" (Regulation 2230.2, section III, number 3), there is no justification for [redacted] PS to provide transportation.”

The application for transfer of [redacted] and [redacted] to [redacted] School was approved as is evidenced by the letter dated September 21, 2000, from [redacted], Director of Student Services (Ex. PS 08). There is however no evidence either oral or documentary to confirm the basis for the exception to school registration requirements. The [redacted] in their questioning of witnesses continually referred to “social emotional” reasons as being the basis for [redacted]’s attendance at schools in the [redacted] pyramid. They also presented evidence from their family physician, Dr. [redacted], a family physician who treated the [redacted] children for 10-15 years, that stressed the social aspect of [redacted]’s attendance at schools in the [redacted] School pyramid. Thus in his report of August 20 Dr. [redacted] stated:

"The reasons for their successes are many and include the valiant efforts of Mrs. _____, the teachers and the personnel office who worked diligently to help Jalynn and _____ and not to forget, the very positive influence of their peers. The social network which _____ and _____ have established in elementary and middle school, respectively, has had a critical impact on their development and achievements.

"Mrs. _____ was in to see me because of the talk about placing Jalynn and _____ in the _____ School pyramid, their base school pyramid. Such a placement has the makings of complete failure and regression. This placement would negate the success that both have shown over the course of the years and would be emotionally and socially devastating leading to academic failure." (Ex. PS 53)

The difficulty with Dr. _____'s analysis in the context of IDEA is that the record contains absolutely no evidence of emotional or social difficulties on _____'s part in prior IEPs. An examination of the goals and proposed special education services to be provided _____ reflects that his areas of need included "Written Expression, Reading Comprehension, Math, Communication (Oral, written and reading)". At no time were any areas of need with regard to emotional and social needs mentioned. Mr. _____ in his testimony clearly identified _____'s situation. He stated:

Q And _____, you said, had been designated as a student with a learning disability. What does that mean, essentially?

A Okay. Just in general, it's a student who has been found through evaluation to have, I'll say --I'll call it a disruption in learning based on a problem in one or more psychological processes. Sometimes, you know, we might find a student having problems processing auditory information. In other cases -- in

particular was found to have some difficulties in specific areas of visual processing.

Q Visual processing.

A And, you know, there are other areas. Some students may have difficulties applying motor coordination, visual motor coordination, that would manifest itself in paper-and-pencil activity.

Q Okay.

A That would be tied to corresponding problems with actual academic learning, so that their – their achievement in one or more areas would be adversely affected.

Q Okay. Is that different than -- Is there another area of eligibility called emotional disability or serious emotional disability?

A Yes, there is.

Q What's the difference between that and a learning disability, in general terms?

A Both of them -- I'll start with a similarity, I guess, in the sense that both would have a negative effect on a student's ability to learn and to progress in school. And the similarities end there, pretty much. The difference here is that, with a learning disability, the -- the cause of the problem with learning is due to a presumed deficit in -- in a cognitive ability area. And in fact, the presence -- the possible presence of an emotional disability is intended to be ruled out in finding a student as eligible for L.D. And, actually, I should amend that. I would say that emotional disability as the primary cause would be ruled out, because some students might be found to have both.

Q Okay.

A Just to -- to flesh that out a little bit in terms of the emotional disability, that's a student who would -- would meet one of a number of criteria that should have been present for -- on a long-standing basis and it should be fairly severe kind of a condition that affects their ability to form or maintain positive relationships with peers or adults. It would also often be manifested in inappropriate feelings or behavior under normal circumstances. You might think of depression or -- or very highly elevated levels of anxiety, for example.

Q Okay. Mr. _____, is there any suggestion in any of the eligibility determinations that have been done for _____ over the last three -- the last three of them going back to 2001, that he had any symptoms of an emotional disability at all?

A No, not at all. (Tr. 9/13/09 pp. 129-131)

The documentary evidence and testimony further illustrated that _____ made significant progress both at _____ and _____ school. Indeed _____'s proposed schedule for 2009-2010 showed him taking an Honors Biology course (Ex. _____ PS 48). His teachers make reference to how _____ is providing assistance to other students. This is a far cry from the student entering _____ who would hardly speak for his first year.

While the parents' concern for _____ as he moves up the ladder of maturity is real and genuine, that concern is one shared with all parents whether or not their children receive special education services. Much was made in the questioning of the fact that two

of _____'s friends will be going to _____ School. The parents asserted that even if _____ didn't have these students in his classes he would have the common bond of going to the same school, which would be beneficial to _____. However, it is equally clear that new friends can be made as new interests are developed. Even Dr. _____ agreed that strong support services at _____ School and from _____'s parents will go a long way to overcoming any challenges he may face at _____ School. As noted previously, the record is conspicuously free of evidence to suggest that _____ would face anything other than the absence of some friends at _____ School.

_____, the Assistant Principal at _____ School, testified:

THE HEARING OFFICER: In preparation for the IEP did you review the records that had been made available to you regarding _____ ?

THE WITNESS: As much as was given to us, which was minimal at that time.

THE HEARING OFFICER: Was there any history given to you that at any time in his school career _____ had been subject to bullying?

THE WITNESS: No. I have not seen that, and that would have been something that I, because I do the discipline, I would have noticed and I would have addressed immediately. But not only was there nothing in the records, but oftentimes if a student had been bullied and there had been something done, well, there should be, that would also be in the SASE records. We have a discipline module for that, and it would say, you know, it might say something about that, but there was nothing that I could find on bullying.

THE HEARING OFFICER: But you said this came up in the IEP meeting; you have a recollection of the --

THE WITNESS: I think I -- and forgive me, Mr. , I thought it came from you, mentioned something about bullying at the IEP meeting, that's the first that I had heard of it.

THE HEARING OFFICER: Did you see anything at the time of the IEP meeting that there were any social or emotional difficulties that had encountered in : school that would cause you concern so that you would want to prepare for those, make sure they didn't occur . school; do you have any recollection of that?

THE WITNESS: I don't remember anything that would cause us to be concerned, other than to make him feel welcome. I had the feeling from the family that they felt that he might be uncomfortable coming to a school and that we would just welcome him and make him feel comfortable as we would any of our freshmen. There was nothing that was outstanding or different than we would see in any freshman who would have trepidation about coming to a school, which is so much larger. (Tr. 9/21/09 pp 59-61)

It is also true that the purpose of IDEA is not to provide the student with disabilities the "best" possible educational experience but only to provide the student with "some" educational benefit. This applies to . All the students from School, including the non special education students going to , will face new experiences with new classmates. undoubtedly will benefit from this experience as they will. There is nothing in the evidence to show as Dr. predicted that 's experience at will be a failure.

As noted above the record is silent as to why the [redacted] initiated the change to the [redacted] pyramid. Since the [redacted] family lives in the [redacted] pyramid, it has to be assumed (1) that [redacted] lives closer to [redacted] School than to [redacted], (2) that he would find more of his classmates as close neighbors than he would find at [redacted], and (3) that if needed he will be able to use the regular school bus for transportation which he would not be able to do at [redacted].

Accordingly the Hearing Officer finds that there is no demonstrated social and emotional basis to justify [redacted]'s unique placement at [redacted] School, and the placement at [redacted] School meets the requirements of IDEA.

6. Should the Fact that [redacted] was Adopted Impact His Placement?

The parents offered the testimony of [redacted] who identified herself as a post adoption specialist the City of [redacted]. While the record lacks clarity as to [redacted]'s status as an adoptee, Ms. [redacted] testified that she expected that [redacted] as an adoptee would experience feelings of rejection along with identity problems which would be compounded by the change in schools. Thus she testified

THE WITNESS : Well, I'm sure that if [redacted] did not go to [redacted], he'll be – he'll be okay. But I think he will be better off if he went to [redacted]. I mean, I don't think he is going to fall apart if he goes to [redacted]. I don't think he is going to, you know, go back to where he was in the third grade.

But I think that – it's – we're looking at it as an enhancement to where he now for him to be able to continue

the relationships, to continue – its kind of a progression. It's kind of, you know, a stair step where you keep going up. Going to would be going down a few steps. (Tr. 9/17/09 p. 250)

At the same time Dr. , a senior school psychologist with PS, opined

that:

THE HEARING OFFICER: Can you make any observation about the incidence or likelihood that students who are adopted are special needs students?

THE WITNESS: I've found that a number of the adoptees that we have had come into our school from international adoptions have come from environments that were highly deprived, and yet a number of these students do come to us with a variety of both physical and educational needs. In terms of the adoptions that are within the country, I would say that there are unique needs to those children, especially as has been said, when they move into adolescence. But in terms of learning needs, I don't find them to have necessarily different physiological processing type of different background.

THE HEARING OFFICER: Excuse me for interrupting, but it seems appropriate here. Simply because a child is adopted, do the statistics show that it's any more or less likely that child will have special needs?

THE WITNESS: No, it's more that the basis of the home from which that child was adopted or the prenatal care of the mother that put the child forward for adoption, those have very significant impact. But just the fact that the child is adopted is not the factor that most often we see as having an impact on special needs as we are talking about them, in terms of special ed. They do have special needs, because they have emotional needs, which may be somewhat different. But in terms of special needs requiring special ed attention, no. (Tr. 9/21/09 pp. 229-230)

Once again as with assisting in [redacted]'s social and emotional adjustment the goal of IDEA is not to provide the "best" outcome but an outcome that provides "some" educational benefit. Accordingly the Hearing Officer finds that the fact that [redacted] was adopted does not require the modification of his IEP or require his placement at [redacted] School.

7. Did the facts presented require placement of [redacted] at [redacted] ?

[redacted]'s ability to attend schools in the [redacted] School pyramid was always an exception granted by PS and never a requirement of any IEP. Why PS chose not to renew that exception has not been shown by the evidence. Clearly had they done so this proceeding would not have been required. However, the granting of the exception is not part of the IEP process nor required by IDEA. The appropriateness of that decision is thus not within the purview of this Hearing Officer.

The record clearly demonstrates that the special education services which [redacted] requires can be provided not only at [redacted] but most likely any PS school.

While admittedly there were a variety of mislabeled documents created, none of these events were of such a nature as to preclude PS from correcting the situation when they became aware of the problem.

Accordingly the Hearing Officer finds that there are no facts that mandate the placement of _____ at _____ School, and the placement at School provides _____ with FAPE.

Lastly the entire hearing process tends to gloss over the most important element of this matter which is that a young man through his own efforts, the efforts of his special education teachers, and the vigorous and unyielding efforts of his parents, has progressed greatly from the days when his principal Ms. _____ reported that “ _____ did not speak at all during his first few years at _____ ”. To move forward as an honor student and to participate in honors classes demonstrates vividly the value of IDEA. The Hearing Officer believes that the parties would be better served if they would terminate their battles, put their arms around each others shoulders and step back and watch as _____ matures and moves ahead with his life. All three would be winners.

Conclusion

After having listened to four days of testimony and examined the exhibits submitted by the parties, I find that my decision is governed by the ruling of the US Court of Appeals for the Fourth Circuit in case of *AW, by his parents, Debra D. WILSON and Christopher D. WILSON, Plaintiff-Appellant, v. FAIRFAX COUNTY SCHOOL BOARD, Defendant*, 372 F. 3d 674 (2004) where the court stated:

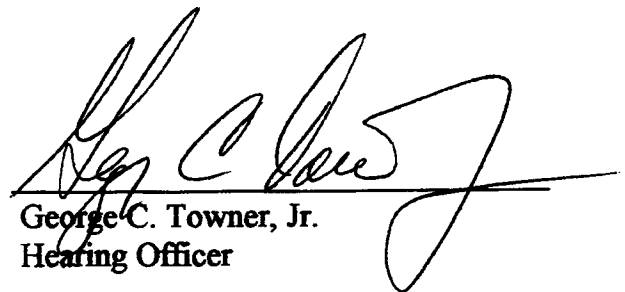
Consideration of the structure and the goals of the IDEA as a whole, in addition to its implementing regulations, reinforces our conclusion that the touchstone of the term "educational

placement" is not the location to which the student is assigned but rather the environment in which educational services are provided. To the extent that a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of "mainstreaming" and affording access to a FAPE, the goal of protecting the student's "educational placement" served by the "stay-put" provision appears to be met.

The evidence before the Hearing Officer demonstrated clearly that the educational services provided at _____ School provide an educational benefit equivalent to _____ School and thus satisfy the requirements of IDEA.

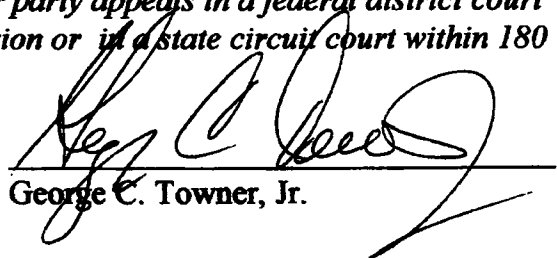
Accordingly the placement of _____ at _____ School is approved and the IEP of August 27, 2009, shall be implemented together with the addition that there shall be an updated assessment of reading skills immediately upon his enrollment at _____ School.

Date of Decision: September 30, 2009
Date of Opinion: October 5, 2009


George C. Towner, Jr.
Hearing Officer

APPEAL NOTICE

The parties are hereby notified pursuant to 8 VAC21-81-T and Virginia Code Sec 22.214 D that a decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision or in a state circuit court within 180 calendar days of the date of this decision.


George C. Towner, Jr.