

DEC 18 2007

Dispute Resolution & Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

REVISED DECISION

SCHOOL DIVISION: _____ SCHOOLS
 LEA COUNSEL: H. WOODROW CROOK, ESQUIRE
 LEA REPRESENTATIVE: _____
 NAME OF PARENTS & CO-GUARDIANS: _____
 NAME OF GRANDMOTHER/CO-GUARDIAN: _____
 NAME OF CHILD/STUDENT: _____
 NAME OF ADVOCATE: JONI T. GRIFFIN
 NAME OF COUNSEL: NONE
 PARTY INITIATING HEARING: _____ SCHOOLS
 VDOE REVIEWER: REGINALD B. FRAZIER, SR., ESQUIRE
 HEARING OFFICER: SARAH SMITH FREEMAN, ESQUIRE

IN RE:

SCHOOLS

v.

_____ and _____, Parents and Co-Guardians,
 on behalf of _____

INTRODUCTION

This matter came for hearing on November 1, 2007 at the administrative offices of _____ Schools, _____ Street, _____, Virginia, before a duly appointed hearing officer. Present in person, in addition to the court reporter and the hearing officer were the mother and father ("Parent" or "Parents" & "Co-Guardians") and the maternal grandmother, ("Grandmother" or "Co-Guardian"), counsel for the local educational agency, (the "LEA"), the LEA Representative and the VDOE Reviewer.

The LEA has requested this due process hearing in order to resolve this dispute and to request a written decision in conformity with federal special education law, the Individuals With Disabilities Education Act, (the "IDEA"), 20 U.S.C. 1400 et seq., the regulations at 34 C.F.R., Part B, Section 300 et seq., and the Virginia Special Education Regulations ("the Virginia Regulations") at 8 VAC 20-80 et seq.

ISSUES PRESENTED

(1) Does the LEA's change of eligibility category from Developmentally Delayed to Multiple Disabilities, required by law, provide an appropriate special education classification for Student?

(2) Will Student be provided a free, appropriate public education in a placement for children with Multiple Disabilities if his IEP requires transfer from his home school to a more distant, unfamiliar elementary school?

FACTUAL FINDINGS

1. Student is a special education student in this LEA who was born on January 11, and qualified for special education services as "Developmentally Delayed" on January 6, 2004. (LEA-12)
2. A social history which was originally prepared on December 10, 2003 indicated that Parent's pregnancy was complicated by preclampsia and elonephritis. At birth, Student was diagnosed with cerebral palsy and diaphragmatic hernia for which he spent the first 56 days of his life in a hospital. (P-13)
3. Parent received adequate pre-natal care at the onset of her pregnancy. Parent did not use alcohol, drugs or tobacco during her pregnancy. Student's present medical problems are the result of pre-term labor, pyelonephritis and ruptured membranes. (P-13)
4. An up-dated developmental-sociocultural report provides an overview of Student's present level of performance. The report states that Student is a 7 year old first grade student enrolled School during the 2006-2007 school year. At the end of this school year, Student will "age out" of the category for "Developmentally Delayed" ("DD") placement. (P-13, Tr. 13, 9-11)

5. Developmental milestones indicate that Student did not crawl until the age of 4 years. Student has cortical blindness, seizure disorder and cerebral palsy. Student is unable to walk and he is not toilet-trained. Although Student's speech and language skills are undeveloped, Student is able to babble words. Student's fine motor skills and gross motor skills are "improving." Student assists with dressing, transfers objects from hand-to-hand and his father states that Student has good eye to hand coordination. Student's gross motor skills enable him to propel his wheelchair, climb onto the couch, grab objects with his left hand, pull his body into a standing position and feed himself "finger food." (P-13)

6. Because of Student's significant physical disabilities, the educational evaluator asserted in her report that it is not possible to measure Student's progress in terms of his chronological age. In her report, the evaluator stated, "[A]n age appropriate measure does not exist." Student was assessed on the Early Learning Accomplishment Profile (E-LAP) which is designed for children at stages from birth to 36 months. (P-16, LEA-10)

7. Evaluation of Student's emotional status indicates that Student "does tend to be aggressive towards others," in particular, his sisters. Sometimes he throws temper tantrums and screams. He has a great laugh and he will smile to auditory or tactile stimulation. He is inquisitive, mischievous and "happy." (P-13)

8. Student takes Depacote, an anti-seizure medication. Student has not had any seizures for three years. (P-13)

9. Pursuant to Student's current IEP, Student receives physical therapy, vision therapy, speech intervention, and occupational therapy in a self-contained model. (P-11, P-13)

10. _____, Vision Specialist, provided an evaluation of Student's present level of visual functioning June 6, 2007. Primarily, the evaluator observed Student's interactions with people and objects to best assess Student's visual performance level. Although Student wants to put all objects into his mouth, the evaluator noted, Student will "fixate on familiar objects and track them with some accuracy." Although Student's visual skills are estimated to be at the level of a 4-6 month old infant, Student's functional vision has improved over the past year. The evaluator recommended that Student work on "tracking skills" in an overall vision program to help student in "every day life." Student "would benefit from continued vision services twice a week." (LEA-8, P-14)

11. _____, Speech & Language Pathologist, provided speech and language evaluation of Student on June 1, 2007. On a rating scale, Ms. _____ assessed Student's speech articulation. Comprehension and language skills are deficient in the "severe" range of disability. Evaluation reveals that Student is learning a modified sign language that he now utilizes when presented with "high interest items." At playtime and mealtime, he will use the "more" sign. The speech evaluator indicated, however, that considerable progress has been made in Student's ability to attend to tasks. He is working

on "social greetings" but not much progress has been made. Student understands basic words, "eat," "no," and "milk." Student has produced words but Student has not been known to do so during the past school year. (LEA-9, P-15)

12. _____, the LEA Representative, Special Education Director for the LEA, testified at the hearing that she requested consent from the Parents to re-evaluate Student on April 2, 2007 because the IDEA requires parental consent when a change in eligibility is contemplated by the LEA. In this case, the eligibility committee considered Student's disabling condition for a more appropriate classification change, "Developmentally Delayed" to the "Multiple Disability" category. Ms. _____ testified that, "by law," children are allowed to "develop" until the age of 8 years "until the apparent strengths and weaknesses crystallize." (Tr. 13, 16-23, Tr. 15, 6-11, Tr. 23, 17-21, P-11)

13. Parents have submitted a letter from Dr. _____, MD, of Family Medical Care. Dr. _____ is Board Certified in Pediatrics and Internal Medicine. The subject of Dr. _____'s letter was Student's "transfer" of elementary schools. On October 22, 2007, Dr. _____ stated therein that Student has "adapted to this school and to his teacher. Transferring [Student] would most likely set him back a few months... His dad's opinion should be considered strongly since he knows [Student] best." Dr. _____ opined also that Student would do "better in a stable environment." (P-1)

14. The eligibility committee met on June 13, 2007 and an IEP meeting was scheduled shortly thereafter on July 11, 2007 upon written notice having been provided to both of the Parents. Both Parents attended the eligibility meeting, reviewed the updated evaluations and executed consent to change Student's disabling condition to "Multiple Disabilities." (Tr. 16, 15-20, LEA-3, 6,7,8,9,10,11,12,13,14)

15. Parents were notified in writing of the IEP meeting, however, the Parents did not attend the IEP meeting on July 11, 2007. Student's Grandmother, Co-Guardian, attended the IEP meeting and consented to the change of placement for the proposed IEP which provided for Student to receive educational services in his new placement. (Tr. 24, 17-25, Tr. 25, 1-9, P-11)

16. The IEP developed at the above meeting provided self-contained placement for 270 minutes/5 days weekly of direct instruction to address Student's primary disability. Student's day would be 75% of direct instructional time and the rest of the time, on various weekdays, would be devoted to related services: physical therapy, occupational therapy, vision therapy and speech and language therapy as well as transportation on a bus with a lift for Student's wheelchair. (Tr. 28, 11-12, P-11, LEA-6, 7, 8, 9, 10, 11, 12,13,14)

17. When Student's Grandmother, Co-Guardian, executed consent to the IEP, she was told that the Multiple Disability placement offers educational programs to Student that are not available in the Developmentally Delayed placement. She was also

advised that the MD program is offered only at _____ Elementary School. (Tr. 29, 21-25)

18. At this LEA, there are fewer than 10 students with the severity of Student's disabling condition. The Multiple Disabilities program, which is centrally located within this LEA, is not available at another school in this LEA. (Tr. 34, 1-16)

19. Presently, Student is at home because Parents do not agree with the change of placement proposed by the LEA. Because Student's Grandmother is a legal guardian, and her signature effectuates consent to the IEP, Student is no longer entitled to attend school at _____; he may only attend _____ . (Tr. 41, 1-25)

20. Questioning of Student's Grandmother revealed that she shares joint legal custody of Student, however, physical custody of Student is with both Parents. Student's Grandmother stated that she has the legal right to make decisions on behalf of Student's best interest. (Tr. 77, 14, Tr. 80, 3-9)

21. Grandmother, Co-Guardian, admitted that she did not verbally object to the proposed change of placement and she was provided the procedural due process "rights form" when it was presented to her at the IEP meeting on July 11, 2007. Grandmother admits that she read it. Grandmother admitted she consented to the IEP and that she acknowledged her right to refuse it. (Tr. 78, 1-25, Tr. 10-18)

22. Grandmother testified that she "voiced" her concerns at the above IEP meeting: Student does not adapt lightly to a change in his environment. "He [Student] likes the same smells and sights," Grandmother stated at the hearing, "I just signed it [the IEP]"... "[T]hey more or less told me nothing had changed except his labeling. And that he would be going – attending _____ ." (Tr. 77, 15-18, 23-25, Tr. 79, 4-8)

23. _____, Principal at _____ Elementary School, stated she has observed Student in the classroom at _____ Elementary on many occasions. Ms. _____ testified she knows of no reason why Student would not do well at _____ though she has never observed Student in the _____ setting. (Tr.89, 22-25, Tr. 90, 1-6, Tr. 91, 1-8)

24. _____, Assistant Principal at _____ Elementary School, stated that she had participated at the eligibility meeting for Student. Based upon her classroom observations, Student's skills are "very low." Ms. _____ clarified by enumerating Student's "global" delays in speech and language, motor skills and cognition. Although Ms. _____ admitted that Student "hasn't made much progress," this witness noted that Student has learned to crawl and he has learned one word in sign language, "more." (Tr.92, 18-25 & Tr. 93, 1-8)

25. Ms. _____ agrees with the eligibility committee's determination that Student's disabilities place him in the "severe & profound" functioning level and his condition is best defined by the special education category, "Multiple Disabilities." (Tr. 93, 14-20)

26. Ms. testified that she does not know of “any reason” why Student would not “do just as well” at Elementary School. (Tr. 94, 5-8).

27. , state certified special education teacher at Elementary School, testified that she assisted the eligibility committee by preparing the educational development evaluation on April 23, 2007 for the committee’s review of Student’s classroom performance. Summarized, Student scored as follows: Gross motor skills – 55 (age equivalent of 9 months), fine motor skills – 13 (age equivalent of 4 months), cognitive subtest – 20 (age equivalent of 5 months), language – 18 (age equivalent of 8 months), self-help – 5, (age equivalent of 9 months), social-emotional –16 (age equivalent of 9 months). (Tr. 97, 5-14, LEA-10)

28. Ms. concurred with Student’s IEP team that Student requires a program and related educational services which are available only at Elementary School, not at Elementary School. (Tr.98, 1-7, LEA -10)

29. Ms. has obtained state endorsements in “Learning Disabled, K-12,” however, she has not yet satisfied the requirements for an endorsement in “Multiple Disabilities.” Ms. holds a masters degree in special education. (Tr. 98, 22-25 & Tr. 99, 1-4, Tr. 100, 4-9)

30. When asked if Student would ever make any progress beyond the ages of four to nine months, Ms. stated, “I wouldn’t be able to answer that.” (Tr. 99, 16-19)

31. , state certified special education teacher at Elementary School, was Student’s special education pre-school teacher. Also, this teacher taught Student in summer school this year. (Tr. 102, 12-24)

32. Ms. has obtained state endorsements to teach “Learning Disabled” and “Emotionally Disturbed” children. (Tr.102, 4-9)

33. Ms. testified Student’s adjustment to pre-school was “difficult” at first. Eventually, he stopped crying and he enjoyed music and circle time with his pre-school class. Overall, Ms. testified she believes “[Student] appeared to enjoy the music component of circle time.” (Tr.103, 19-25, Tr. 104, 1)

34. When Ms. first met Student at the age of four years, Ms. testified, Student was not very “mobile.” Student could not eat by himself or crawl. Now, because of progress he has made at school, Student can “pick up finger food by himself and eat it.” After summer school this past year, Ms. stated, “[Student] was able to crawl quite well.” (Tr.104, 2-14)

35. Ms. ’s testimony affirmed that Student has made progress with his mobility: Student is able to remain upright in a “stander” for a longer period of time

than he could maintain in pre-school. A "stander," Ms. explained, is a piece of equipment that enables Student to stand on his own. (Tr.104, 15-20)

36. Student's needs are "functional," Ms. testified. Other than Student's obvious enjoyment of the musical aspect of "circle time," Student "wasn't able to really participate in any of the academic activities" of Ms. 's class this summer. (Tr. 104, 21-24)

37. Ms. testified Student "did very well with me in summer school." If Student became "agitated" or cried, school personnel typically took Student for a walk and "he liked the movement." Ms. also testified, she was "tickled" that Student "was able to adjust to us [Ms. & her two assistants] so well " during summer school this year. (Tr.106, 1-6 & Tr.105, 9-13, Tr. 107, 8-9)

38. is the assistant principal at Elementary School. Ms. is a state certified elementary school teacher and she has obtained a master's degree in school administration K thru 12th grade. Ms. opines that is qualified to deliver all educational services required by Student's IEP to him. (Tr. 112, 14-25, Tr. 113, 1-2, Tr. 116, 22-25, Tr. 117, 1-6)

39. On August 30, 2007, Parents and Grandmother visited an "open house" at . During the open house visit, Parents and Grandmother inquired regarding arrangements for changing Student and they inquired about "magnets on the wall." (Tr. 113, 19-25, Tr. 115, 10-12, Tr.117, 13-18)

40. Ms. showed Parents and Grandmother a large hydraulic lift changing table with wheel chair where a child can be easily moved about and changed. During Parents' visit to the school, the lift changing table was located at the clinic, not in the classroom. The lift changing table is now in the Student's classroom. During their visit, Parents and Grandmother did not question the location of the chair to lift changing table. (Tr. 115, 9-25, Tr.116, 1-9)

41. Ms. testified she indicated to Grandmother that school personnel would remove all magnets from the classroom if these were objectionable. (Tr.116, 9-16)

42. Ms. testified she could not recall any specific objection or question by Student's father, "[h]e just stated he didn't care for Austin to come to ." Shortly thereafter, Student's father abruptly exited the school building with Student. Ms. could not identify a reason for the father's objection because, "[h]e didn't really state why," he disapproved of the school. (Tr.116, 17-21)

43. , special education teacher at Elementary School, testified at the hearing. Ms. has a masters degree in special education with state certification in LD and emotional behavior impairments. Ms. is provisionally state certified to teach severe to profoundly disabled students. (Tr. 120, 22-25, Tr.121, 1-5)

44. On August 30, 2007, Ms. testified Parents and Grandmother visited her classroom for 15 minutes during the open house at . Ms. testified she would be Student's classroom teacher and she is familiar with the services to be provided to Student according to his IEP. (Tr.121, 1-16)

45. During the school visit with Parents and Grandmother, Ms. acknowledged there was no changing table then in the classroom. Ms. also confirmed there would be hot and cold running water in the classroom. Ms. assured, however, will adjust Student's classroom setting in order to meet Student's needs: There is now a changing table with a lift in her classroom. If necessary, the hot tap water can be reduced in temperature. (Tr.121, 22-25, Tr. 122, 1-13)

46. Ms. testified she "skimmed" Student's IEP, she has not studied it. Ms. testified that could provide all of the services required by Student's IEP. (Tr. 116, 22-25, Tr. 117, 1-6)

47. , school psychologist for Schools, has a master's level degree and a certificate of advanced study. Ms. testified she was not the psychologist who administered the educational evaluation used by the IEP team to create Student's IEP. Ms. was qualified to interpret results of the Batelle Developmental Inventory regarding Student's present levels of performance. (Tr. 126, 20-25, Tr. 131, 24-25, Tr. 132, 1-5)

48. The Vineland Adaptive Behavior Scale indicates Student's scores are more than two standard deviations below the mean. "Significant delays" are indicated by Student's scores on the Vineland. (Tr. 130, 1-12)

49. Student's Batelle score of 50 also indicated one or two standard deviations from the "norm" of 100 as a scaled score. Overall performance for Student is in the "below the average range, his developmental age being about 11 to 12 months. Individual "sub-domain" skill scores may be higher or lower than the overall developmental score. For self care, Student scored in a range similar to a child 12 months old. For personal responsibility, Student scored "less than 23 months." (Tr. 128, 11-25, Tr. 129, 1-21)

50. Ms. testified the eligibility committee considered his developmental scores in Student's classification as a child with multiple disabilities. (Tr.130, 13-18, LEA -12)

51. Although Ms. admitted that she did not know if there are special education programs available to Student at Elementary School, she testified that the special education program being offered to Student at is appropriate for a child with multiple disabilities. (Tr. 130, 19-25, Tr.131, 1-8)

52. , supervisor of occupational and physical therapists, , testified on behalf of the LEA. Occupational therapy is a service offered to

Student by the LEA. Specifically, learning is effectuated in Student's IEP by "play therapy" with the child. Skills are developed through "playing" activities. (Tr. 135, 5-14, LEA-6, 7)

53. Ms. testified that she has overseen Student's OT & PT since 2003. Ms. has managed therapists for Student as an outpatient and as a student. Ms. oversees PT & OT throughout the county which includes and Elementary Schools. Many different therapists have worked with Student. (Tr. 135, 24-25, Tr. 136, 1-23)

54. Ms. testified that Student has not had any trouble adjusting to the different physical therapists he has had this year at Elementary School. (Tr.137, 4-11)

55. Dr. testified at the hearing. Dr. is the Associate Superintendent for curriculum and instruction, Special Education and Student Services for the LEA. Dr.'s Doctorate is in Administration Supervision with an emphasis on special education from the College of William & Mary. (Tr. 140, 9-15)

56. Dr. stated that she had received a letter from Student's father in which he had questioned Student's placement for the 2007-2008 school year at Elementary School. Dr. scheduled a meeting with the Student's father in order to address Parent's concerns stated in his letter of July 17, 2007 to her. (Tr. 141, 1-25, Tr. 142, 1-20, LEA-18, 19, 20, 21)

57. At the meeting on September 11, 2007, Parent expressed concerns about the school setting as follows: the classroom was not carpeted; the changing table was not private; hot water flowed from an accessible tap. (Tr. 143, 17-25, Tr.144, 1)

58. In order to resolve Parents' concerns regarding the school setting, Dr. testified that the classroom was relocated to one that is totally carpeted, the hydraulic lift changing table, purchased just for Student, was relocated to the classroom and the school nurse was instructed to check the water temperature at 9:00 A.M. & at 3:00 P.M. daily. (Tr. 144, 1-13)

59. It is not possible for Student to receive his primary instruction at with delivery of related educational services elsewhere because this would represent a "disjoint." Student's IEP classifies him as a child with "Multiple Disabilities." Dr. testified she explained to Parent that a teacher with MD endorsements is not available at , only at . In order for Student to receive a complete FAPE, Student must receive his "primary service" in an educational setting together with related services of OT, PT, speech and vision therapy, in an "MR" model. An IEP drafted for an MR student can only be delivered at , not at , Dr. testified. (Tr. 141, 1-22, Tr. 148, 12-15)

60. Dr. testified Parent expressed to her his intention for Student to be educated "in his zone school. Elementary School." Also, Parent stated that

Student does not adjust well to change. (Tr. 145, 12-15, Tr.145, 17-18)

61. _____, teacher assistant at _____ Elementary School, testified for the Parents. Ms. _____ has been employed by the LEA for one year. (Tr. 170, 23-25, Tr. 171, 1-6)

62. Ms. _____ testified that she fed, changed, and did “[e]verything” for Student at _____ from October, 2006 until June 16, 2007. (Tr. 171, 9-11)

63. Student does not adapt well to changes, he becomes “aggravated,” Ms. _____ testified. (Tr. 171, 14-15)

64. Student enjoys many activities in the classroom, Ms. _____ testified. Student enjoys nursery rhymes, having books read to him, and [he responds to] adaptive [educational] devices. (Tr. 173, 19-25, Tr. 174, 9-11)

65. Ms. _____ objects to the change of placement because she was not consulted regarding Student’s preferences in the classroom. When asked what aspect of _____ would not transfer over into the new placement, Ms. _____ related that the classroom does not have carpeting on the whole floor, Student would not be able to “play in the sink” which he loves to do nor would he be entertained with the “little songs” he enjoys. (Tr. 177, 16-17)

66. Although Ms. _____ did not qualify as an expert witness, she provided enlightening insight into this child’s preferences based upon her daily experience and one-to-one contact with Student for nearly one school year. Ms. _____ projected that transition [from _____ to _____] could be accomplished “with the right setting and the right people willing to do [it] ..it could be done.” (Tr.178, 18-20)

67. Student’s mother testified at the hearing. Student lives with his Parents and two siblings. Student’s mother related that she shares physical custody of Student with Student’s father and the grandmother, mother and father share legal custody of Student. The court order adjudicating child custody was not provided at the hearing. Student’s mother stated that the court order dates from October, 2006 in the Juvenile and Domestic Relations District Court. (Tr. 181, 17-25, Tr. 182, 1-25, Tr. 183, 1-15)

68. Student’s mother admits that she did not express her reservations about the change of location at the June 13, 2007 IEP eligibility meeting. Student’s mother recalls only a change of Student’s classification to “Multiple Disabilities” was discussed at the earlier eligibility meeting. (Tr.184, 12-25, Tr. 185, 1-2)

69. Student’s mother testified that Student is “fussy” in an unfamiliar environment. She testified that Student is unable to make progress when he is “uncomfortable.” She stated, “I know it will set him back if he was to change right now.” Student’s mother noted “great progress at _____.” (Tr. 185, 8-15)

70. Student's mother admitted that Student has not attended school at all this year. Student benefits from the related services, she admitted. She testified "it has set him back" that he does not presently receive any related therapeutic services. (Tr.185, 16-17, Tr.186, 1-8)

71. Student's mother also expressed concerns about the distance of the new location from her home, concerns about the building and she testified that the classroom teacher did not speak to Student at the open house. Student's mother continues to express reservations about the changing table because it is not in a private room. Student's mother stated, "I don't feel comfortable with my child being changed in front of other students." (Tr. 186, 13-22, Tr. 187, 7-13)

72. Student's father testified that he believes that the LEA should permit Student to attend school in his home school district "[w]here he would normally attend school as if he did not have a handicap." (Tr.196, 8-11)

73. Student's father testified that the LEA has shown "prejudice" against his child because he is being taken out of his familiar setting, his zoned school, and Student is now being required to attend a school which is farther away. (Tr. 196, 17-22)

74. Student should be permitted to stay in his prior placement at _____, Parent testified, even if it would mean maintaining his classification as DD, with a lesser panoply of services offered to Student than he would receive as MD. (Tr. 196, 22-25, Tr. 197, 1)

75. Student's father prefers to keep Student at _____ even if it means that the teacher is not a state endorsed teacher for children of multiple disabilities. "I feel that the school he's in right now would offer, continue to offer, and continue his progress. I think by changing locations I think would --- would set him back." Student's father wants to keep the same teacher, Mrs. _____, and the same teacher assistant, Ms. _____, though he knows these educators do not have MD endorsements. (Tr.197, 1-9, LEA-19)

76. Student's father noted that he is opposed to changing locations because Student does not adapt well to changes of settings and he does not adjust easily to "different people." Parents know what is best for their children, Student's father testified. (Tr.198, 5-10)

ARGUMENT

Parents assert that Student has already received a free, appropriate public education at his home district elementary school, _____ Elementary School, as a "Developmentally Delayed" special education student. Parents fear that Student will not

adjust well to his placement as a child of “Multiple Disabilities” because transition to a new school, Elementary School, is required by the LEA’s changed classification.

Parents allege that Student, who is profoundly disabled, will strenuously oppose unfamiliar surroundings and different teachers. Parents anticipate Student will regress from his current level of functioning. Further, Parents believe that the school setting is unsafe for Student.

Parents assert that their refusal to send Student to school is warranted by the “prejudice” exhibited against their child by the LEA. Student is disabled, they assert, therefore, he should not be removed from his home school district. Student should be allowed to receive academic instruction along with his peers in his home school district..

Parents proffer the rationale that Student’s disability is so severe that academic progress is unlikely. Therefore, Parents opine, there is no justifiable reason why Student cannot be left in the “Developmentally Delayed” placement in a school setting with which he is familiar.

Parents propose that Student be permitted to remain in the special education “Developmentally Delayed” placement indefinitely because Student will be able to attend his home school, Elementary School. The LEA, Parents allege, should be required to provide related educational services in conformity with Student’s demonstrated needs even if Student remains in a “Developmentally Delayed” placement.

BURDEN OF PROOF

In *Schaffer v. Weast*, 126 S. Ct. 528, the United States Supreme Court has ruled that under the IDEA, in an administrative hearing, the burden of proof properly rests upon the

party who seeks relief. In resolution of the issue of which party bears the burden of proof at a due process hearing, the court stated therein: “[t]he burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district.”

In the instant case, the LEA bears the burden of sufficiency of the evidence in this case.

APPLICABLE LAW

8 VAC 20-80-56 E. 1. & 8 VAC 20-80-56- E. 2, 34 C.F.R. 300.313

defines eligibility for a child with developmental delay as follows:

1. The local educational agency shall include developmental delay as one of the disability categories when determining whether a pre-school child, aged two to five, inclusive, is eligible under this chapter.
2. Other disability categories must be used for any child with a disability aged two to eight, however teacher assignment requirements specified in 8 VAC 20-80-45 shall apply.

8 VAC 20-80-45 A.2.c., 34 C.F.R. 300 136 (1) and (b)(1), of Virginia

special education staffing requirements indicate that:

- 2.c Personnel providing services to a child who has more than one disability are not required to be endorsed in all areas of the child’s disabilities. The child shall receive some services for each disability from appropriately endorsed personnel.

Virginia maintains two separate lists for teaching specializations (A) & (B) which dictate endorsements for special education teachers in this state. For Multiple Disabilities, a teacher must obtain state certification in Severe Disabilities or in any other special education endorsement appropriate to student needs. For a student categorized as Developmentally Delayed, ages 5-8, any special education endorsement, as appropriate to student needs is sufficient.

All children residing in the state of Virginia must be provided a FAPE pursuant to federal law, the IDEA, and in conformity with Virginia regulation at 8 VAC 20-80-60 A.1., 34 C.F.R. 300.300; 300.304 as follows:

A. Age of eligibility:

1. A free appropriate public education shall be available to all children with disabilities who need special education and related services, aged 2 to 21 inclusive, residing within the jurisdiction of each local educational agency.

Pursuant to 34 C.F.R. 300.7(b); 300.313 “Developmental Delay” means a disability affecting a child ages two through eight:

1. Who is experiencing developmental delays as measured by the appropriate diagnostic instruments and procedures, in one or more of the following areas:

physical development, cognitive development, communication development, social or emotional development, or adaptive development;

and
2. Who, by reason thereof, needs special education and related services.

Pursuant to 34 C.F.R. 300.7 I (7) “Multiple Disabilities” means two or more impairments at the same time (for example, mental retardation – blindness, learning disability- orthopedic impairment), the combination of which causes such severe educational needs that cannot be accomplished in special education programs solely for one of the impairments. The term does not include deaf-blindness.

Pursuant to 8 VAC 20-80-76, 34 C.F.R. 300.507 (a) (b); 300.525; 300.526, the LEA has the right to request a due process hearing and a decision from a hearing officer if a dispute develops with a Parent or Parents regarding educational placement and services or the provision of FAPE to a child entitled to special education services in this

state. The law is as follows:

B. Basis for due process hearing request.

1. Either a parent or parents or a local educational agency may request a due process hearing when a disagreement arises regarding any of the following:
 - a. Identification of a child with a disability;
 - b. Evaluation of a child with a disability (including disagreements regarding payment for an independent educational evaluation);
 - c. Educational placement and services for the child; and
 - d. Provision of a free, appropriate public education to the child.

Special education students must receive instruction in the least restrictive environment for their proper placement. Pursuant to 8 VAC 20-80-64, 34 C.F.R. 300.550

(b) general requirements for least restrictive environments and placements are as follows:

A. General least restrictive environment requirements state that:

1. Each local educational agency shall ensure:
 - a. That to the maximum extent appropriate, children with disabilities, including those in public or private institutions or other care facilities, are educated with children without disabilities; and
 - b. That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

DISCUSSION AND CONCLUSIONS OF LAW

The LEA has properly requested due process in order to resolve a conflict with Parents regarding their refusal to comply with the LEA's placement decision and their refusal to send Student to school. Parents were properly notified of the LEA's IEP meeting before the IEP was signed by Student's Grandmother. Parents agreed to

updating Student's evaluation and Parents "signed off" on the notes of the eligibility meeting. Student's Grandmother stated at the hearing that she knew of the location change when she consented to the IEP. Consent to this IEP is effective for implementation.

Parents have expressed sincere reservations regarding Student's change of placement to "Multiple Disabilities." The IEP, to which the child's legal guardian executed written consent, requires that Student transfer to a new school.

Recent educational and psychological evaluations reveal, Student tests in the range of a one to two year old child. Sadly, Student's primary disabling conditions, cerebral palsy and cortical blindness, are permanent, not developmental factors. These facts, along with Student's chronological age, almost eight years, meant that the eligibility committee had to reach a decision about a future plan for Student's education.

From the perspective of educators, Student was a child about to "age out" of his program by his next birthday. Educators knew that federal and state law requires that Student's educational status had to be evaluated to determine proper classification and placement for Student. Alternatively, Parents perceived Student to be like an infant who required their protection from harm.

Recent medical documentation and evaluation reflect that Student's disabilities are caused, primarily, by the global nature of his diagnoses. Secondary conditions, seizures, mobility issues and inability to speak, also complicate Student's progress. Consensus of the eligibility committee was correct: The multiple disability category is appropriate.

Student needs to be in school. If Student is not in school to receive the services he

desperately requires, Student will never function. Student's mother admitted that Student benefits from learning skills. She confirmed Student's regression at home. The steady progress Student has made in speech, language, mobility and self-help skills, will be soon be lost.

Provision of FAPE to this child is a daunting prospect. By all accounts, it is difficult to even identify elements of FAPE for Student. His educational record reflects that it is not productive to examine Student's developmental milestones in congruity with a child of Student's chronological age.

In his own way, Student has progressed in school. The evidence shows that Student has achieved certain developmental milestones unique to him. Student's ability to conform to changes in his educational environment has also evolved: Ms. testified that she had taught Student in pre-school and again in summer school this past year. When Student first enrolled in pre-school, Ms. confirmed that he "cried a lot" and "adjustment took a long time." This past summer, Ms. recalled that she was "tickled" to observe that Student was able to adjust "smoothly."

Neither does Student appear to be averse to different individuals providing similar services for him. Student's therapy provider supervisor, Ms. , related that therapists may "come and go," but Ms. has been the only "constant" in Student's OT over the years. Ms. observed that Student was able to adjust to many different assistants this summer.

At the outset of her testimony, Ms. noted that Student does not "adapt well" to change. Later, even Ms. admitted that change could be effectuated for Student "with the right setting and the right people ... it could be done." Ms.

knows this Student. Parents asked this witness to testify because of her singular rapport with their son. If Ms. _____ believes that Student can successfully transition from one school to another, without any regression by him, Parents should be convinced that Student's transition can be achieved uneventfully.

Parents enumerated environmental complaints regarding _____ Elementary School. It appears that the LEA has, in good faith, made an effort to address all of their concerns. The LEA has purchased a "lift" changing table for Student. For convenience, the LEA has located the changing table in the classroom. The LEA has assigned a nurse to monitor the "hot" water spigot so that Student will not burn himself. The LEA has relocated the class to a carpeted classroom in response to Parents' complaint that Student could not freely move about on the floor.

With the exception of one limitation in the environmental improvements made by the LEA to Student's proposed educational placement at _____, it appears that all of Parents' environmental requests have been fulfilled. Student's mother noted one additional situation which should be corrected: Student is almost eight years old. Presumably, the lift changing table will be used for many years for its intended purpose. For the protection of Student's privacy, a "privacy curtain" should also be purchased for occasions when the changing table is "in use."

Parent's contention that Student has made little or no academic progress is not accurate. Parent's position that Student will not make academic progress in school is untenable. Parent stated, effectively, that Parents ought to be the primary decision makers in the education of their children. While this notion is essentially true, it is also a

fact that Parents must zealously pursue the independent right of their children to obtain a free, appropriate public education. It is unconscionable for Parent to conclude now that Student will not make progress in the setting.

Parent's position that he and the mother are somehow able to provide a FAPE, at home, is not credible. An unstructured, "makeshift" academic program for this Student is wholly inadequate and does not, in any way, serve the best interest of this child. Student, who is severely and profoundly disabled, requires not only sensitive handling, he requires an optimal level of professional services and educational expertise. Parents must not allow their fear of change to cloud their judgment. Student needs a real educational program with accompanying services all of which should be delivered at school. The LEA's evidence at the hearing proved that Student's best interests are served by placing Student into an MD program. If the program happens to be located at Elementary School, that is where Student needs to be.

The LEA's evidence reflects that Student was beginning to learn a modified sign language when he was taken out of school. Student enjoys school. He loves songs, nursery rhymes, colors, "circle time," water play, and having books read to him. He has mastered standing upright in his walker. He knows how to crawl. He can pull himself up on his own. Student can feed himself. These are all milestones achieved by Student. If Student is permitted by his Parents to return to school and attend a regular program for MD students, their son will accomplish more milestones. Parents must not deny Student the opportunity to receive a FAPE.

In light of the LEA's testimony that the LEA's entire district contains only about 10

students with needs at the same level as Student's, the LEA's testimony that there exists only one MD location with a limited amount of qualified teaching staff is reasonable.

Though the LEA's teachers appear qualified in all respects, it is disheartening to learn that Student's prospective primary teacher has only "skimmed" his IEP. If the Parents do come to terms with this change of placement for their son and re-enter him in school, it will be mandatory for his classroom teacher to be mindful of all of Student's needs. Because Student is, in essence, a toddler, his teacher must always function as a vigilant caretaker of this child. His teacher must anticipate that he will perform like a toddler: He will place objects in his mouth constantly. He will move urgently toward the water. He will likely cry "a lot" at first. If Student's MD teacher studies Student's IEP she will be able to address these issues before a problem occurs.

Notwithstanding the above, the LEA has proven that Student's proposed placement as an MD student at Elementary School is the least restrictive environment for delivery of Student's primary instruction and related services.

Based upon all of the evidence presented, applicable statutes, regulations, case law, and the arguments presented by the parties, the hearing officer makes the following conclusions of law:

1. ("Student") is handicapped, having "Multiple Disabilities," and comes within the purview of IDEA.
2. This Student requires specific conditions and related services in order to derive educational benefit from his education.
3. At all times relevant hereto, Student's Parents and Grandmother, Co-Guardians of Student, have resided in Virginia, thus the local educational agency, ("the LEA), is

responsible for educating _____ and providing him with a free, appropriate public education (“FAPE”).

PROVISION OF FAPE

In consideration of the LEA’s evidence presented at the hearing, testimony of the witnesses and presentation of exhibits, it does appear to this hearing officer that the LEA has provided _____ with a FAPE.

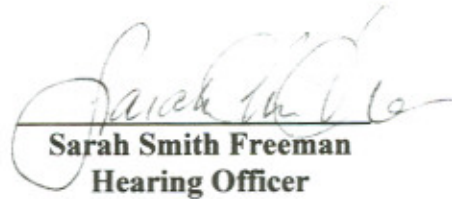
4. I find that parental notice requirements were satisfied by the LEA.

Accordingly, I find that:

5. The LEA has properly requested a due process hearing because Parents dispute the LEA’s placement decision and have refused to send this child to school. Change of placement from “Developmentally Delayed” to the “Multiple Disabilities” special education category is in conformity with 8 VAC 20-80-56 E.1. Student’s disabilities are multiple and permanent. Student will “age out” of the DD program on January 8, 2008 pursuant to Virginia Regulations. Student requires an MD program and teacher in conformity with 8 VAC 20-80-45 A.2.c. The LEA has properly requested due process in conformity with 8 VAC 20-80-76 because Student does not now receive a FAPE including related educational services pursuant to the IDEA, Virginia Regulations and to 8 VAC 20-80-60 A.1. The LEA provides a FAPE by making a primary instructional program with related educational services available to Student pursuant to 8 VAC 20-80-76 B.2. The LEA provides a FAPE in the least restrictive environment for his placement as an MD student pursuant to 8 VAC 20-80-64 A.1. (a.& b.).

6. The LEA has provided this Student with a FAPE.

DATE OF DECISION:
November 28, 2007


Sarah Smith Freeman
Hearing Officer

IDENTIFICATION OF THE PREVAILING PARTY

Pursuant to 8 VAC 20-89-76 K.11. this hearing officer has the authority to determine the prevailing party on each issue that is decided. Prevailing party on each issue is as follows:

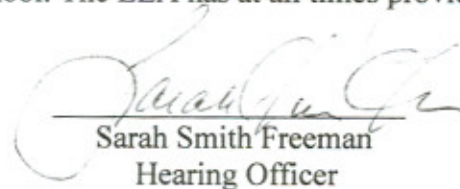
(1) Does the LEA's change of eligibility category from Developmentally Delayed to Multiple Disabilities, required by law, provide an appropriate special education classification for Student?

The LEA prevailed on this issue. MD is the appropriate special education category and placement for Student's needs.

(2) Will Student be provided a free, appropriate public education in a placement for children with Multiple Disabilities if his IEP requires transfer from his present, home school to a more distant, unfamiliar elementary school?

The LEA prevailed on this issue. Parents have not sent Student to school. He has not received FAPE since his removal from school. The LEA has at all times provided a FAPE to Student.

Dated:


Sarah Smith Freeman
Hearing Officer

APPEAL INFORMATION

8 VAC 20-80-76 O.1. states as follows:

1. This decision 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 one year of the date of this decision.

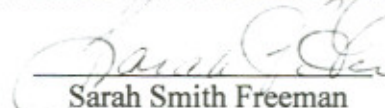
2. The appeal may be filed in a state circuit court or in a federal district court without regard to the amount in controversy.

3. If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change of placement is appropriate in accordance with subsection E of this section. In those cases, the hearing officer's order must be implemented while the case is being appealed.

IMPLEMENTATION PLAN

It is the LEA's responsibility to submit an implementation plan to the parties, the hearing officer and to the Virginia Department of education within 45 calendar days.

Dated: *November 28, 2007*


Sarah Smith Freeman
Hearing Officer