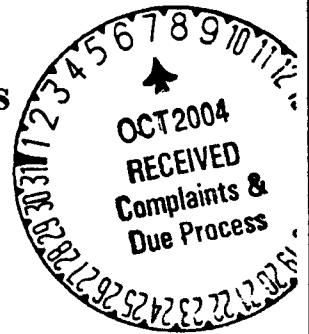


VIRGINIA DEPARTMENT OF EDUCATION  
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES



Case Closing Summary Report

Local hearing  X

State level appeal    

Public Schools  
*School Division*

Mr & Mrs  
*Parents*

*Child*

September 22, 2004  
*Date of Decision*

Leonard Wallin, Esq.  
*Counsel for School Division*

None  
*Counsel for Parent/Child*

The Parents  
*Party Initiating Hearing*

LEA  
*Prevailing Party*

**HEARING OFFICER'S DETERMINATION OF THE ISSUES:**

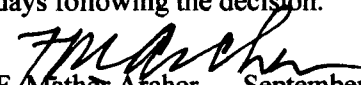
1. Is the IEP of 6/9/04 appropriate in all respects?
2. Is his placement in a collaborative kindergarten the most appropriate placement for . . . ?

**HEARING OFFICER'S ORDERS AND THE OUTCOME OF THE HEARING:**

The LEA prevailed upon both issues, it being clear that the only viable placement for for his best interests to be served was in the collaborative kindergarten program at School – the nearest school to his home. The IEP called for placement in that program, and is the nearest. The Parents wanted him to attend , a magnet school. could not fulfill the requirements of 's IEP and is located far from his home.

Accordingly, the IEP was affirmed, and it was ordered that the most appropriate placement for is in the collaborative kindergarten program at Elementary School.

I hereby certify that I have completed this hearing in accordance with regulations and have advised the Parties in writing of their appeal rights. The written decision of this hearing was forwarded earlier. I advised the LEA, in the Initial Prehearing Report, of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days following the decision.

  
F. Mather Archer    September 29, 2004  
Hearing Officer

### **Summary of the case.**

is a five-year-old boy who is developmentally delayed because of verbal and fine motor apraxia. He has been enrolled this – 2003-04 – school year at Elementary School in the preschool program. The IEP Committee, on June 9, 2004, determined that required placement in a collaborative kindergarten setting with resources. Although the Parents agreed to the IEP, they have since reconsidered and asked the Committee to change their placement to the school setting would attend if he were not disabled, but with the resources and an aide in a regular classroom. The Committee denied the Parents' request.

Mediation was attempted but was not successful, and the Parents proceeded with the due process hearing they had requested. The Parents complain that the addition of a special education teacher, as required in the collaborative setting, to serve with the regular education teacher and an aide/assistant, is outside the bounds of the least restrictive environment for . Therefore, the Parents complain that the IEP placement of in a collaborative setting is too restrictive and inappropriate under the IDEA.

There is presented in the case a fine line between what is and what is not the least restrictive environment of kindergarten for . On the evidence and the law, I find and conclude that any less restrictive environment than the collaborative setting required by his IEP would deny to the fullness of the educational benefits called for under the IDEA and regulations.

### **Findings of Fact.**

Having heard and observed the demeanor of the witnesses, and considered the documentary evidence presented by the Parties, I find the following facts.

1. is a boy who is aged 5 years as of April 9, 2004 and has just completed preschool. He is disabled, in the Developmental Delay category, as a result of verbal and fine motor apraxia. He cannot communicate orally, and is limited in the use of his fingers and hands for writing, drawing and other nonverbal communication uses. (Tr (Montgomery), pp 30-32; Ex SB 22)
2. The requirements of notice to the Parents were satisfied.
3. is a child with a disability.
4. needs special education and related services.
5. Public School Division is providing a free appropriate public education to .
6. has just completed his preschool year at Elementary School, and is

preparing to enter his kindergarten year. The Parents want [redacted] to enroll in Elementary School, which is a magnet school; while the Schools would place him in [redacted] Elementary School, which is the school closest to his home. (Tr [redacted]), pp 160-161).

7. Dr. [redacted]'s Neurodevelopmental pediatrician explained that apraxia is a congenital disorder; in [redacted]'s case it is both verbal and physical. Verbal apraxia makes it difficult for him to communicate by getting his words out; while the fine motor apraxia limits his use of his fingers and hands to communicate by writing, drawing, signing and other means involving fingers and hands. Apraxia does not limit his intelligence – thinking, learning and understanding – except in the matter of communicating what he thinks, learns, and understands. Dr. [redacted] has not observed [redacted] in his classroom. (Tr [redacted]), pp 30-32, 36; Ex SB 5)
8. Ms [redacted], [redacted]'s speech/language therapist, has worked with [redacted] at the [redacted]. [redacted]'s receptive language skills are average; his expressive language skills are severely below average. She recommends that [redacted] be enrolled in a regular education class with only a one-on-one aide, or with the addition of a special education teacher on call as a consultant for the aide, rather than in a collaboration kindergarten program. She has not observed [redacted] in his classroom. (Tr [redacted]), pp 71, 79-81, 95-96, 117-119, 127; Exs SB 1,19, 22)
9. [redacted] uses the Communication Builder, Big Mac and the Chat PC assistive devices to communicate. The Chat PC device comes closer to matching [redacted]'s receptive language than the others. (Tr [redacted]), pp 80-81)
10. The total communication approach, including the assistive devices and engineering the classroom is appropriate for [redacted], because it provides for him the assistance that he needs to help him to communicate in the classroom. (Tr [redacted]), pp 84-86)
11. The paraprofessional (aide or assistant) in the classroom is in consultation with the teachers, therapists and parents. The classroom teacher, therapists and parents, in consultation with the aide, design the programming of the devices and the engineering in the room. It is the responsibility of the aide to input the programs into the devices and to place the various signs and otherwise activate the engineering of the room. (Tr [redacted]), pp 86-87)
12. [redacted], in this kindergarten year in his regular education class room consisting of regular education children and special education children (including [redacted]), should have, in addition to a regular education teacher, a special education teacher on a

consultative basis, an aide for 1 on 1 assistance to him, together with the part-time resources for occupational therapy and speech/language therapy. (Tr ( ), pp 126-128)

13. was chosen in the lottery to attend Elementary, a magnet school, beginning in 2004. However, he will not be accepted there, because his disability and the requirement in his IEP call for placing him in a collaborative kindergarten program; and the collaborative program requires, in addition to the regular education teacher, a special education teacher and a classroom aide. does not provide a one-to-one aide but only special education and regular education teachers. The school operates on a half day basis. (Tr ( ), pp 135-149)
14. Both Elementary and Elementary are schools would attend if he were not disabled; by virtue of his passing the lottery, and by virtue of its being in the school zone that is nearest his home. , as noted above, is not available to him because his IEP calls for a collaborative kindergarten program.
15. , for the 2004-05 year has instituted such a program, and presently has 11 regular education children and 9 special education children enrolled in that collaborative program. That program utilizes, full time, a regular education teacher, a special education teacher, and an aide for the whole school day; and occupational (OT) and speech/language (ST) therapy support and resource. The class is comprised of the mixed, or merged, special education and regular education students in the same classroom. The special education children are not physically separated from the regular education children. The teachers and the aide operate as a team to serve the students. (Tr ( ), pp 224-229; SB Ex 22, pp 2, 8)
16. The difference between a collaborative kindergarten class/classroom and a self-contained class/classroom is: the collaborative includes some special education children and some regular education children with a regular education teacher, a special education teacher and an aide; while the self-contained includes only special education children together with a special education teacher and an aide. (Tr ( ), pp 249-252, 257-258)
17. , in his adaptive behavior, registers low on the social scales. His abilities in the areas of self-care, of his social contact with peers, parents and school personnel are impacted by his developmental delays. The degree of the impact in various settings varies according to the people and places in which his social contacts arise and his

- familiarity with them. His social behavior is better when at home than when he is at school. (Tr ( ), pp 269-273; SB Exs 14 & 20)
18. In the speech/language area, , through the 2003-04 year, made the most progress in the 2 of the 3 sessions of therapy per week because he enjoyed the other students being in the group. participated more in the group sessions. The collaborative kindergarten class, with regular education and special education children, with the support of both the regular education and the special education teachers, and an aide in the class is an appropriate environment for . The IEP committee, in the July 8<sup>th</sup> meeting, decided not to change the IEP. (Tr ( ), pp 286-288; SB Exs 19, 26)
19. A one-to-one assistant for would be restrictive for him. doesn't like being singled out, and he would see it as his being different from the other students in his class. It would not be a good experience for him. The aim of the speech/language therapy is to work toward independence, and to provide his own aide might stifle his becoming able to communicate on his own. (Tr ( ) pp 298-302; ( ) pp 308-312)
20. The "Assistive Technology Plan" is not a document that is separate from the IEP. The assistive technology plan is part and parcel of the IEP, consisting of the various parts thereof that are related to meeting the needs of with the assistance of assistive devices. (Tr ( ) pp 290-295; SB Ex 22)
21. These devices consist of low technology, mid technology and high technology devices that are used in conjunction with the teachers and the aide to help accomplish the objectives set in his IEP. As he progresses in the goals and objectives, the assistive devices in use move from the low tech to the mid tech to the high tech to match his progress and move him on through meeting the objectives set for him. (Tr ( ) pp 313-321; SB Ex 17)
22. The one-on-one aide model desired by the Parents would deprive him of the training that the special education teacher has, and separate him from his general education peers. It would impede development of his communication skills, and limit his ability effectively to communicate on his own. (Tr ( ) pp 326-330; SB Ex 16)
23. has been in the preschool environment through the 2002-03 school year, which is a self-contained special education setting. The collaborative kindergarten environment is intended to provide the special education student with a year of

transition experience when moving from preschool to kindergarten. The special education students are not separated from the nondisabled students in the classroom. The classroom is a regular education classroom, with a special education teacher and an aide for the disabled students. A one-on-one aide alone, with the general education teacher, could not provide the services that can be provided by the special education teacher. The latter has the special training to insure that the proper modifications and accommodations are afforded the special education student. An aide alone could not accomplish that service. (Tr ( ), pp 332-339; SB Ex 26)

24. The least restrictive environment requirement is environment specific, not place specific. Thus a student can be placed in the least restrictive environment in any of several particular schools that provide that environment. In . 's situation, a one-on-one aide could not meet his needs and provide the services that will meet his needs. Rather, a special education teacher, not a one-on-one aide, is necessary to provide for his needs. Thus, the collaborative kindergarten environment, with a special education teacher and the other related services as prescribed by the IEP committee, not the specific school or place for delivery of those services, is the placement determined by the IEP committee. (Tr ( ), pp 346-367; SB Exs 22, 26, 27, 36)

#### **CONCLUSIONS OF LAW.**

At the outset, it is necessary to deal with Issue 2 first, because the principal problem involved in this case is the matter of placement in the least restrictive environment (LRE) for . Discussion of Issue 1, the IEP question is subsidiary, if it has not been buried in the placement question, since it is so closely involved in Issue 2.

#### **Issue 2. Is his placement in a collaborative kindergarten the most appropriate placement for ?**

The IDEA and regulations under it define LRE to mean

(T)hat to the maximum extent *appropriate*, children with disabilities . . . are educated with children who are not disabled. . . . (Emphasis supplied). 34 CFR Sec. 300.550 *et seq*; 8 VAC 20-80-10.

As for placement of a child with disabilities in the LRE, the IEP team makes the placement decision, and placement . . . is based on the child's IEP, and must be located as close as possible to the child's home. Furthermore, CFR 300.552, and 8 VAC 20-80-64 C.1. require

- (c) Unless *the IEP* of a child with a disability *requires* some other arrangement, the child is educated in the school that he or she would attend if not disabled; (and)  
(d) In selecting the LRE, consideration is given to any *potential* harmful effect on the child *or on the quality of services* that he or she needs. . . . (Emphasis supplied).

These provisions of law are the controlling principles concerning the question of the appropriate placement of [redacted] in his school in the 2004-05 school year.

[redacted] had just finished his preschool in June of 2004, where he was placed in a self-contained special education class. He is now moving into the kindergarten stage of his education, and the question has become in what sort of environment to place him, and in what location as close as possible to his home. There is one school that the Parents are interested in for [redacted], that is [redacted] Elementary School, the magnet school ([redacted]), but it is not the school that is closest to his home. Furthermore, even though [redacted] “won” the lottery for [redacted] and would be accepted there, his IEP requires a collaborative kindergarten program that [redacted] does not provide. Therefore, [redacted] would not be accepted there without a change in his IEP, and the IEP committee will not change the IEP from requiring a collaborative kindergarten program for [redacted].

The school closest to [redacted]’s home is [redacted] Elementary School ([redacted]). That school provides the collaborative kindergarten program specified for [redacted] in the IEP. [redacted] is the school that [redacted] would attend if he were not disabled because (1) it is the school closest to his home, (2) his IEP requires no other arrangement than educating [redacted] in the collaborative program, and (3) [redacted] in fact fulfills the requirements of the IEP.

Accordingly, [redacted] is the school where [redacted] is to be educated in the collaborative kindergarten program provided there, unless an examination of the IEP should show otherwise.

#### **Issue 1. Is the IEP of June 9, 2004 appropriate in all respects?**

The Parents’ objection to the collaborative kindergarten environment is that it requires not only a regular education teacher, but also a special education teacher. They have no objection to an aide in the classroom, nor to the specified therapy and assistive technology specialists and the benefits they would provide.

The Parents maintain that a special education teacher is not necessary for [redacted] to receive educational benefit, and that he can fair as well, if not better, with a one-on-one aide for him in a regular education class room, together with the therapists and the assistive technology devices.

The expert witnesses presented by the Parents to support their position were a professional speech/language therapist, Ms [redacted], who has been working with [redacted] and using the assistive devices; and [redacted]’s Neurodevelopmental pediatrician, Dr. [redacted]. Both these professionals have examined and worked with [redacted] at the

( ); but neither has worked with or observed him in the classroom. Their determinations are more general when it comes to whether the collaborative kindergarten model is best for , or how he would progress in educational benefit in a regular education class with a one-on-one aide only for him.

In contrast, the Schools' witnesses were unanimous, or clearly nearly so, in their belief that ought to be in a regular education class with a special education teacher full time, and with an aide for the special education students including , namely in the collaborative kindergarten program provided at (since July, 2004). These witnesses were special education teachers, supervisors, therapists, and assistive technology specialists who have worked with in the class room, or served as supervisors, and some of whom may be working with him in the collaborative kindergarten. Their concern about the proposal desired by the Parents was that with his own special one-on-one aide in a general education class and a general education teacher only, would feel singled out and that he was different, which would work against his educational progress and benefit and limit his participation in class and with his peers.

The Parents question that the collaborative kindergarten is the least restrictive environment (LRE), particularly if he is placed in preferring instead a regular education class with a one-on-one aide for at . It is clear that is the school in which would be educated if he were not disabled, because it is the closest school to his home, and his IEP presents another arrangement, namely, the collaborative kindergarten program which provides. on the other hand, will not provide the collaborative kindergarten program his IEP requires, and is far away from his home.

In *Hartmann v. Loudoun County Board of Education, et., al.*, (Fourth Cir 1997) The Court was faced with an autistic boy who had spent his previous school years in his kindergarten and 1<sup>st</sup> grade years, he was placed in a self-contained program for half his time and the other half in a regular education classroom. In 1993, he moved to , where he was placed in a regular education classroom with a special education teacher to provide the child with 3 hours per week and to advise the regular education and the child's aide. In May, 1994, the IEP was changed to place him in a self-contained class for half the time for academic purposes, and a regular class for nonacademic courses the other half.

The case went to due process when the parents refused to agree with that IEP on the ground that it did not provide for mainstreaming to the maximum extent appropriate. The hearing officer, and the administrative appeal officer upheld the May 1994 IEP. The U.S. District Court reversed the hearing officer and state appeal officer and reinstated the 1993 IEP.

On appeal, the Fourth Circuit reversed the District Court and remanded the case to the



District Court with orders to dismiss the case, thus upholding the May, 1994 IEP.

In *AW v. Fairfax County School Board* (Fourth Cir, 2004), involved a boy with ADHD and oppositional defiance disorder (ODD). Following disciplinary procedures, AW was transferred to another school in the same gifted student program, and continued the once per week special education teacher's work.

The parents filed suit in the District Court, and the Court granted judgment for the school board. The Parents appealed to the Fourth Circuit. That Court examined the LRE requirement of the IDEA, and its preference for mainstreaming disabled children. But in determining the LRE The Court ruled that the mainstreaming preference reflected in the definition of "educational placement" is not absolute and "permits the delivery of educational services to disabled children in less integrated settings as necessitated by the student's disability. *AB ex rel. DB v. Lawson*, 354 F.3d 315, 330 (4<sup>th</sup> Cir. 2004). The definition of "educational placement", although reflecting the term "mainstreaming", does not include the precise physical location where the student is educated. The LRE directs that the student be assigned to a setting that resembles as closely as possible the environment to which he would be assigned if he weren't disabled.

Accordingly, the June 9, 2004 IEP is affirmed, and [redacted] must be assigned to a collaborative kindergarten program in [redacted] Elementary School.

Accordingly, it is **ORDERED** that [redacted] be placed in the collaborative kindergarten program in [redacted] Elementary School.

**NOTICE:** This decision is final and binding unless it is appealed by either party to a State circuit court within one (1) year following the issuance of this decision on September 22, 2004, or to a Federal district court, without regard to any amount in controversy.

  
F/ Mather Archer      September 22, 2004  
Hearing Officer

cc: Parties and Counsel or advocate  
Virginia Department of Education