

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES



CASE CLOSURE SUMMARY REPORT

Public Schools
School Division

Name of Parents

Name of Child

December 9, 2004
Date of Decision

Esquire
Counsel Representing LEA

N/A
Counsel Representing Parent/Child

[Parents]
Party Initiating Hearing

Public Schools
Prevailing Party

Hearing Officer's Determination of Issue(s):

1. The September, 2004 IED is appropriate and would enable _____ to receive educational benefit.
2. _____'s education for the fourth grade at _____ Elementary was appropriate and provided him with a free appropriate public education (FAPE).

Hearing Officer's Orders and Outcome of Hearing:

1. _____ Public Schools is the prevailing party.
2. _____ provided _____ with a free and appropriate public education and no decision is made with regard to the question of the appropriateness of the parents' private placement.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer and the SEA within 45 calendar days.

William S. Francis, Jr.

VIRGINIA DEPARTMENT OF EDUCATION
 DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
 OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES



DUE PROCESS HEARING REPORT

Public Schools
 School Division

Name of Parents

Division Superintendent

Name of Child

Esquire
 Counsel Representing LEA

N/A
 Counsel Representing Parent/Child

William S. Francis, Jr., Esquire
 Hearing Officer

[Parents]
 Party Initiating Hearing

ISSUE(S) AND PURPOSE OF HEARING:

Due process request by parents of student regarding placement/appropriateness of public school placement/need for private placement.

HEARING:

DATE(S)	BEGINNING	DURATION OF PROCEEDINGS	CONCLUSION
October 22, 2004	9:00 A.M.	7 Hours 10 Minutes	4:10 P.M.
October 25, 2004	9:00 A.M.	30 Minutes	9:30 A.M.

INTRODUCTION

This case is about a fifth grade student with Asperger's syndrome which affects his social and educational ability. During the late Winter and Spring of 2004 because of his disability the student was teased and bullied at his school, _____ Elementary School, in his fourth grade class. Because of the teasing and bullying he now attends a private school, _____ Academy.

On behalf of their son his parents advocate that the effect of the teasing and bullying given their son's disability was such that the _____ has failed to abide by the law in their educational offering. They ask me to make the _____ responsible for the cost of the private

school.

The [redacted] disagrees and maintains that the education offered to this young man satisfies all legal requirements and it is, therefore, not their responsibility to pay for private school costs.

This issue is decided by the evidence presented at the hearing, the testimony and exhibits, and pursuant to the applicable law.

The due process hearing was requested in writing by the parents in a letter presented to Ms [redacted] special education consultant on September 3, 2004. The parents verbally withdrew their request pending the completion of the IED for their son which was currently in review. After the IED meeting on September 9, 2004, the parents asked that the request for a due process hearing be acted upon and I was appointed as Hearing Officer and assigned to hear the case on September 16, 2004. The basis for the due process hearing was, as stated by the parents, that they felt the appropriate placement for [redacted] would be [redacted] Academy and that his tuition should be paid at public expense since Public Schools cannot provide an appropriate placement.

A pre-hearing conference was held on October 18, 2004, and the hearing itself was held for a portion of two days on October 22, 2004 and October 25, 2004. The transcript was prepared and received by this Hearing Officer on October 27, 2004. My decision is issued this day well beyond the 45-day requirement of the applicable regulations. I specifically find that the extra time required to reach the decision in this case was and is in the best interest of the student and was necessary to properly consider the 309 page transcript of the oral testimony and the 700-900 pages of documents contained in the 100 exhibits introduced into evidence.

DISCUSSION OF CASE/SUMMARY OF TESTIMONY AND EXHIBITS

The student presented four witnesses. Both parents, [redacted], testified; the student's psychologist, [redacted], Ph.D., testified; and the student's present teacher, [redacted], at the private school, [redacted] Academy, testified. The principal at the student's fourth grade school, [redacted], testified as did the student's fourth grade teacher, [redacted], on behalf of the [redacted].

Mrs. [redacted], the student's teacher at the time of the due process hearing of [redacted] Academy, offered evidence that when [redacted] first began school he was nervous, shy, withdrawn and somewhat overwhelmed by the environment around him. She testified that [redacted] did not feel great about himself, that he stuttered and that he did not volunteer. She offered evidence that he stayed alone by himself with no interaction. Mrs. [redacted] stated that the emphasis in her class was on [redacted]'s social skills, considering his high function and the stress upon him by feeling that he did not fit. She believes that [redacted] needs

a small, very structured environment with other students where he fits in. Again she emphasized the need to feel good about yourself to learn. This teacher testified that she believes because of [redacted]'s disability that he will be bullied. She finds [redacted]'s disability mainly to be with regard to social skills, meaning that he needed to feel safe in order to feel good about himself.

[redacted], Ph.D., identified [redacted] as his patient and summarized the characteristics of Asperger's syndrome and confirmed that bullying of children with Asperger's frequently occurs. Dr. [redacted] believes that [redacted] was about two years delayed in his social development and that his social functions at the time he had last seen him was in the second grade. He testified that [redacted], as is very common with Asperger's, has motor clumsiness. When [redacted] gets excited or agitated there is what is described as hand flapping almost as if one were trying to fly, which Dr. [redacted] calls classic that you see routinely with Asperger's kids. He points out that modulation of voice in Asperger's is often difficult and he had seen [redacted] speak too loud or speak with a monotone voice and often the facial effects that would accompany verbal expression from [redacted] is flat and lacking in emotion. Dr. [redacted] pointed out that [redacted] made errors in what he called "practice of communication", which is observed as the behavioral component that goes along with effective communication, i.e., maintaining eye contact. He had observed that when greeting [redacted] he would turn away, just the opposite of what you would expect at the point of a greeting. He points out that [redacted] seemed to not be attending the conversation, that he was distracted and absorbed with activities, playing with objects in the room and very focused on small details of objects.

As to the issue with regard to comment about a sniper, Dr. [redacted] noted that [redacted] has a very obsessive cognitive style anyway and that he talked about the sniper comment in a repetitive fashion. He noted that [redacted] had a tendency to obsess on particular topics at one point or another. Previously it had been vacuum cleaners. On that particular day that he saw [redacted] he repetitively talked about the sniper statement. As to its effect, Dr. [redacted] said that the sniper comment impacted [redacted] in a profound way; that it was "something he obsesses about." As to [redacted] going to the [redacted] public schools Dr. [redacted] stated that he "would love it if [redacted] had a well-defined program for children of all ages with Asperger's syndrome." [Transcript Volume 1 p. 62] He said that he "encountered difficulty with other children with this condition at all stages of development in the elementary school." [Transcript Volume 1 pp. 62-63] He was "not really aware of any clearly defined state-of-the-art, well-researched program within the [redacted] school system for kids with this disorder", i.e., Asperger's. [Transcript Volume 1 p. 63] He said he worried about all of the kids with Asperger's and in particular he worried about [redacted]. When asked questions about whether a child can learn effectively if he feels unsafe, Dr. [redacted] stated that that would be a problem

for any child with or without Asperger's syndrome. He stated that if a child was being bullied that would be an obstacle to effective learning.

As to the September, 2004 IED that is at issue here, Dr. , though not remembering the IED in terms of offered recommendations, was familiar with the social skills' objectives. He believed they were appropriate goals but said he was "having trouble understanding how the current programming that's available to him at his school is actually going to help him reach those goals and if that program is intense and focused enough to really help him overcome what are really quite profound deficits in this area." [Transcript Volume 1 p. 81] Going back to the psychological impact of the sniper comment Dr. testified that it would be helpful to fully evaluate the psychological impact if all the circumstances leading up to the statement were known as well as what happened afterwards. He was unable to make a judgment thereabout and deferred to me as the Hearing Officer on having the broadest view in knowing how to make such a judgment. When asked about the amount of bullying that had been subjected to this witness commented that found it distressing and upsetting, that he was struggling to comprehend it, digest it and manage his emotions related to the bullying, which Dr. found "typical with Asperger's kids with their limited ability to just comprehend and sort out and process social interaction, which is their major vulnerability." [Transcript Volume 1 pp. 101-102] He said that did not have a positive experience in the fourth grade, that he was unhappy and didn't like school.

, the mother of this student, testified. She stated that prior to what she describes as the "death threat", and I have labeled the sniper incident, she had made the school personnel aware of the continued bullying and abuse going on with regard to and that it had been happening on a frequent, daily basis. She testified that the bullying incidents consisted of being subjected to food taken from his lunch tray in an attempt to intimidate and ridicule him for anything that he had expressed an interest in. She stated that was not even allowed to speak at all at lunch and that whenever he attempted to talk the primary bully would "shut him down". [Transcript Volume 1 p. 116] She testified that on some days the same bully would single out and follow him around to ensure that he could not swing and purposefully walk in front of the swing to interrupt the swing motion and otherwise belittle her son. She testified that 's personal effects were suspected of being stolen when they disappeared. She testified that had to remain home from a field trip because of her concern at the prospect of bullying and the loss or theft of his personal property. She testified that she believed the comment made to was that "it would be a High Holy Day if you were shot dead by a sniper." [Transcript Volume 1 p. 119] Mrs. said that had asked her a question that seared her heart and haunted her forever and that was "why can't you protect me?" [Transcript Volume 1 p. 120]

Mrs. queried in her testimony that it was not appropriate for a child to question his safety at school and that if he didn't feel safe he couldn't learn effectively.

Along with her husband Mrs. reached a decision to place her son at the private Academy to address 's academic needs and provide the type of social support and structure that he needed to be successful. Mrs. testified that made some educational gains explaining that what you see on paper, however, does not truly reflect what is producing. She stated that she did not know how the school got him to pass his SOL test. She didn't know how he did that well on the standardized test. She testified that what she knew was that she had a son who spells and writes on probably a second grade level and cannot do multiplication and simple division. Mrs. stated that she knew what was reflected in her son's file and that it was "not what we see". [Transcript Volume 1 p. 124] Admitting that she knew what was reflected on the standardized testing, she stated that she was not really concerned about that and was concerned with her child's psychological well-being, which she thinks is "an important part of who he is and should be -- it should be a component in school as well." [Transcript Volume 1 p. 124] Mrs. testified as to the different incidences of bullying, abuse and teasing that were the subject of E-mails reflected in the exhibits in the case.

The father, , testified on behalf of his son and offered much of the same evidence and concern as his wife, the mother . He did note with particularity in regard to academic progress, Exhibit 92, which establishes that during February and March when the bullying and teasing was going on that 's grades by the school system's own admission had decreased slightly in each area and that was "observed to have his effort and focus to be in direct correlation with his decrease in scores." [Transcript Volume 1 p. 158] Most of the rest of Mr. 's testimony was, in effect, argument about the propriety of how the various bullying and sniper incident matters were handled and their effect upon . Mr. did testify that another child in 's class was named "who tormented day after day after day". [Transcript Volume 1 p. 162] He argued about the steps or lack of those taken to secure the setting of the children in the lunchroom. He testified and argued that no child should have to endure what his son endured, that it was wrong and that the school system allowed his "son to be bullied, abused and humiliated". [Transcript Volume 1 p. 162] Mr. testified that his son did not receive educational benefit and that "the environment he was in made it impossible to progress academically or socially." [Transcript Volume 1 p. 166]

On behalf of the school system the principal of Elementary School, , was the first to offer evidence. Mr. offered little testimony of benefit being uncooperative and evasive. Much of his testimony was inconsistent with previous testimony or

with exhibits. He did testify as to Exhibits 72, 88 and 89. He offered evidence as to why he had not complied with the Hearing Officer's subpoena in regards to notes stating that in his judgment the personal notes that he made were not of any consequence. Later Mr. [redacted] produced notes made at an IED meeting and those notes were notes made at a meeting not indicated as the same meeting that he testified about not producing notes for on page 186 of the Transcript. Mr. [redacted]'s testimony that there was a consensus as to what would be best for [redacted] in terms of his placement for the next year was, at absolute best, conclus-ionary and with little testified to basis. Mr. [redacted] made the judgment in regards to [redacted]'s placement for the next school year on the same basis that he made the judgment that he did not have to comply with my subpoena for notes. Mr. [redacted] was clearly impeached and contra-dicted by the evidence in regard to his knowledge of other bullying incidents of [redacted]. He testified that in a hypothetical situation that which clearly related to this student that a child being teased is emotionally safe in his school because of his confidence that the teacher will take care of the situation. In regard to the sniper incident and his investigation, Mr. [redacted] admitted that he never tried to find out if anyone had access to a gun by any means. As to that incident and his investigation he stated that he only took notes when the incident was serious and where there was an outright threat of malicious bodily harm. Lastly, the principal admits that he knew of the pending placement of this child at the private [redacted] Academy.

[redacted]'s fourth grade teacher at [redacted] Elementary, testified and in regard to his academic strengths and weaknesses offered that [redacted] was very strong in reading, social studies, science and things where he knows facts. She testified that math was a weaker area for him and also in the third grade, especially when the concepts got more abstract. She offered that writing was also something [redacted] struggled with but made great gains in during the fourth grade. She believed that [redacted] progressed in all areas throughout the year. His grades went up in all areas on his report card except for math and he was able to make progress in all areas and was working at a fourth grade level. She testified that [redacted] had passed all of his [redacted] essentials, which are a fourth grade assessment. She said he did beautifully on those. She testified that [redacted] "passed his fourth grading writing predictor test, which predicts how he will do on his fifth grade SOL writing test." [Transcript Volume 1 p. 225] These tests were administered to all fourth grade students. Ms. [redacted] explained Exhibit 88 which she stated is "the language arts essentials, which are the [redacted] version cut of the SOL's." [Transcript Volume 1 p. 225] They are basically everything that a child is taught in fourth grade for language arts which objectives are applicable to all students in the fourth grade. Likewise, as to the mathematics version of the essentials for [redacted] fourth grade students, Exhibit 89, Ms. [redacted] testified with regard to herself and the special education teacher, one [redacted], who put the X marks in those tests

indicating that [redacted] had mastered those areas. The teacher testified that the X's in the right-hand column of Exhibits 88 and 89 indicate what [redacted] had learned in the fourth grade. She said that those objectives on Exhibits 88 and 89 that did not have an X shown simply indicated that we, she and the special education teacher, weren't able to say he had mastered that objective, but he had made progress in all areas. [Transcript Volume 1 p. 227] Ms. [redacted] testified that Exhibit 92, which was [redacted]'s report card, showed absolutely that he was working on grade level.

Ms. [redacted] testified in regard to each incident of teasing, threats or bullying that she was aware of and testified that she considered them very serious. She checked very often with [redacted] after lunch as to any issue of teasing. The teacher testified as to how she handled each and every incident, how she made inquiries and what she did with regard to the most serious incident, that being the sniper incident. Ms. [redacted] even noticed that there was an incident of teasing and belittlement toward [redacted] that occurred before February and, therefore, was even before the parents had any such information. Ms. [redacted] testified that the IED in question would have provided [redacted] with educational benefit in the school year 2004-2005 in [redacted]. [Transcript Volume 1 p. 247]

In rebuttal testimony [redacted]'s mother testified that the bullying was upsetting enough to [redacted] that he didn't want to go to school. She offered testimony that [redacted] on or about February 18th had mentioned having trouble at lunch once or twice before the incident of that day. Ms. [redacted], his teacher, had not notified her of those instances at lunch and as testified to by Ms. [redacted] she did not notify any one of the playground incident.

FINDING OF FACTS AND CONCLUSIONS OF LAW **(DECISION)**

Based upon all of the evidence presented and, in particular, the exhibits, upon the applicable statutes, regulations and case law, and the arguments presented by the parties I make the following conclusions of law.

1. [redacted] is handicapped having specific learning disabilities, Asperger's syndrome and comes within the purview of IDEA.
2. [redacted] requires special education services in order to derive benefit from his education.
3. [redacted] is responsible for educating this student and providing him with a free, appropriate public education ("FAPE").

FAPE

The case law regarding [redacted]'s responsibility for the cost of private placement is that the educational authority may be held responsible if it did not provide a free and appropriate public education and a private placement thereafter if educationally necessary

and appropriate. In determining whether the parents are entitled to have pay for 's private placement at Academy I must first determine if the education provided to him in the fourth grade and the problems associated therewith and whether his most recent IED is appropriate and from that whether the school system in has fulfilled its obligation to provide with the required education. My inquiry is two-fold. I must first decide as to whether the procedural requirements of the law in developing and implementing the IED were complied with and secondly, whether the IED is reasonably calculated to enable the child to receive educational benefit. *Board of Educ. v. Rowley*, 458 U.S. 176, 206, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). has complied with the procedural requirements of IDEA. As such I also find that the parental notice requirements were satisfied by .

The law requires each school district to provide an IED for each disabled child. That IED is the primary vehicle for delivery of an appropriate education to students with disabilities. It is developed through cooperation between the school personnel and parents. The IED must state, as this one did, the student's current educational status, annual goals for his education, the special education services and other supplementary aids and services to be provided and the extent to which the student will be participating in main-stream classes. *G v. Fort Bragg Dependent Schools*, 324 F.3d 240, 243 (4th Cir. 2003).

Whether or not an IED is appropriate for the purposes of IDEA is a question of fact. *DiBuo v. Bd. of Ed. of Worcester County*, 309 F.3d 184, 188 n.8 (4th Cir. 2002). As *Rowley* has defined the IED must be reasonably calculated to enable the child to receive educational benefits. Whether one agrees with it or not, the law establishes a minimum "baseline" of educational benefits that the county must offer students with disabilities. The Act does not require that the school division provide a disabled child with the best possible education. It is sufficient that the specialized instruction and related services are sufficient to confer some educational benefit upon the handicapped child. Maximizing each handicapped child's potential is not required. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

Of the greatest importance to this case is how is such educational benefit to be measured. A single substantive standard has not been set forth by the law. However, the law indicates certain indicators and benchmarks that are relevant in this case: passing marks, advancement from grade to grade, progress without regression, actual progress in class and grade equivalent test scores. *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Without getting into the thorny legal issue of which side has the burden of proof, I find the evidence to be overwhelming that received educational benefit, both from his last

year in the fourth grade in the [redacted] Public Schools and that his September, 2004 IED was clearly designed to offer the appropriate educational benefit under the law. [redacted] received not only passing but also many good marks. He advanced to the next grade. There was no evidence of regression. His fourth grade teacher testified convincingly as to the actual progress in her class. His grade equivalent scores on the various tests referred to as Exhibits 88 and 89 were grade equivalent. No evidence was offered by the parents, the private school teacher or the psychologist that there was no educational benefit received or that the IED in question was not designed to supply the required educational benefit. Their concern was generally that without bullying, teasing and threats occurring that [redacted] would feel emotionally safe and would do better in school. That, however, is not the test under the law of educational benefit measurement. Although I find from the evidence that [redacted] was subject to what I shall term as harassment, teasing, bullying and threatening conduct from other students because of his qualifying educational disability and I find that it had at least some effect upon his social and emotional adjustment and stability and therefore by inference must have had some effect upon his ability to learn I cannot therefrom conclude that [redacted] has failed in its statutory duty to this student. As stated above the exhibits, and in particular the evidence of the teacher, establishes that I believe clearly and beyond any preponderance of the evidence that [redacted] has complied with the law.

Mrs. [redacted]'s closing argument on behalf of her son, I believe, fairly states the case and the reasons as enumerated above that I have found the questioned IED to be appropriate. Mrs. [redacted] recognizes that her child didn't feel safe; that he was, in fact, being bullied; that he had received what was called a death threat; that [redacted] spells and writes on a second grade level and doesn't know his multiplication facts and can't do simple division. None of that is adequate to the parents. Their argument recognizes the arbitrary failure of the principal to comply with a lawful subpoena for documents. It recognizes other conduct of the principal as seen by the parents, that cannot be adequate. In essence, Mrs. [redacted] argues that her cause on behalf of her son is based upon his present attendance in school where he feels safe, supported by a staff that understands Asperger's syndrome, and specializes, as she argues, in the education thereabout. Mrs. [redacted] makes no argument that the evidence demonstrated the failure of [redacted] to provide educational benefit. That goes to the heart of the case.

Accordingly, I find:

4. [redacted]'s education for the fourth grade was appropriate and [redacted] provided him with a free and appropriate education.

5. [redacted] provided the student with an Individual Education Plan for the school year of 2004-2005 reasonably calculated to enable him to receive educational benefit.

THE PRIVATE PLACEMENT

Having found that _____ provided _____ a free and appropriate public education under the law, I make no decision with regard to the question of the appropriateness of the parents' private placement.

IDENTIFICATION OF PREVAILING PARTIES

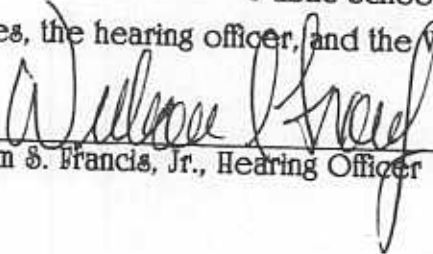
Having found that _____ provided _____ a free and appropriate public education, I identify _____ as the prevailing party herein.

APPEAL INFORMATION

This ruling shall be final and binding upon the parties unless the decision is appealed by either party to a state circuit court or a United States District Court within one year of the date of this ruling.

IMPLEMENTATION PLAN

Public Schools is responsible to submit an implementation plan to the parties, the hearing officer, and the Virginia Department of Education within 45 calendar days.



William S. Francis, Jr., Hearing Officer

12/9/04

Date