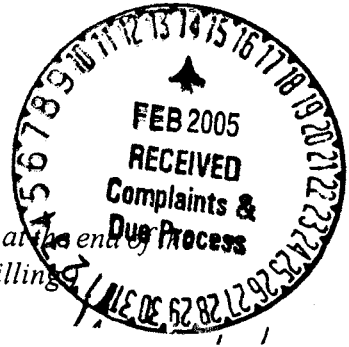


CASE CLOSURE SUMMARY REPORT



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

School Division

Name of Parents

Name of Child

February 8, 2005
Date of Decision or Dismissal

John Callahan
Counsel Representing LEA

None
Counsel Representing Parent/Child

Parents
Party Initiating Hearing

Prevaling Party

Hearing Officer's Determination of Issue(s):

Parents' Complaint of failure to provide a FAPE dismissed.

Hearing Officer's Orders and Outcome of Hearing:

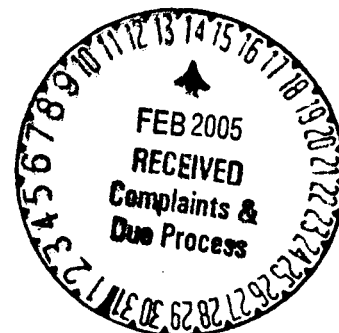
Parents ordered to take immediate steps to enroll disabled child in school that can provide a FAPE.

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.

Joseph B Kennedy
Printed Name of Hearing Officer

Joseph B Kennedy
Signature 2/8/05

MEMORANDUM DECISION



Complainants, Pro Se

v.

By John F. Cafferky, Esq.
Counsel for Respondent, Public Schools .

FINDINGS OF FACT

I

_____ , the son of _____ , is an adolescent in his second year of secondary school at _____ , a private secondary school in Rockville, Maryland. He appears by his parents, pro se who assert that contrary to the provisions of his IEP and IDEA he was denied an "appropriate public school education". In the Fall of 1998, Dennis's parents placed him at _____ at their personal expense.

In 2000, at his parent's request, _____ Community Policy and Management Team (CPMT) and _____ changed _____'s placement from a private to a public placement at _____ at public expense. Exhs.23- 28. This change in placement was based on a finding, in the Fall of 2000, that _____ was eligible for Special Education as a student with Multiple Disabilities. These disabilities result in severe educational demands as _____ is not able to function in any age appropriate manner due to his chronic complicated seizure disorder. Exhs 1, 3. _____ also has significant language disabilities because of his physical disabilities; the fact that his mother tongue is Russian (his mother speaks only Russian); and he was reared in Russia until he was 10 years old. *Ibid.* Over time _____, now a 16 year old, has engaged in aggressive behavior such as "Hitting, Kicking, Pushing, Grabbing another individual, and Throwing objects." Exh. 13.

On May 11, 2004, _____ initiated a Behavior Reduction Plan for managing _____ aggressive and noncompliant behavior. Two levels of behavior were described for management: the Green Level on which _____ would remain as long as he did not engage in aggressive behaviors, as described; and the Red Level if _____ engaged in aggressive behavior, as described. If he misbehaved _____ would be directed to a cubicle. Exh. 93c. Once he became compliant, _____ would be allowed to rejoin the class and return to the Green Level. *Ibid.* Exh 13.

On February 19, 2004, _____'s Neurologist, _____ M.D. Director of the Mid-Atlantic Epilepsy Center advised that " _____ has severe epilepsy and mental retardation. He is a native Russian speaker. He speaks only Russian. He is unable to learn English because of his mental

retardation. When he is deprived of a Russian speaking environment he cannot communicate, becomes severely distressed {which results} in worsening of his seizures". Parents Exh. 20.

II

At [redacted] [redacted] has participated in a functional curriculum, as well as daily living skills, and some vocational preparation. [redacted]'s classes are very small, with only six to eight students. According to Ms. [redacted], Assistant Director of [redacted] for the past three years, [redacted] has been receiving one-to-one intensive support. In [redacted]'s class there are eight students and six staff: a head teacher, five assistant teachers, and a specialist in behavior modification Tr. 537-538. During his three full years at [redacted] [redacted] made slow but measured progress. He seemed to be acquiring the ability to understand English. The areas of most progress were with independence skills such as being able to come to school in the morning, put his back pack away, go to his desk and pick out an activity. His self-help skills were quite well developed. [redacted]'s at home development showed he was getting better at self-feeding and self-help skills.

[redacted]'s developing interest in machinery was marked as he learned how to load up the soda machine, a skill at which he got very adapt. He also liked working with office equipment, and his computer skills were emerging. With some parameters, [redacted] was getting to the point where he could go to the library and check out a book. Tr. 554-555 [redacted] progress reports for these three years reflect [redacted] progress. Exhs. 46-52.

III

[redacted] a Russian immigrant who expects to qualify for citizenship in the near future was always very aggressive about his child's education. His attitude came to a head during the 2003-2004 school year. Tr. 555. By early 2004 Ms. [redacted] related that, despite his acceptance of all of [redacted]'s IEP's,

There were letters and calls from [redacted], finding problems, identifying problems with the program, and disagreeing with the fact that we did not have a Russian speaking full-time one-to-one for [redacted] Tr. 559-560.

On February 25, 2004, the Director of [redacted], advised [redacted] that :

"Based on the letter from Dr. [redacted] (Parents Ex.20), I am writing to inform you that [redacted] is not an appropriate placement for [redacted] If you feel [redacted] must be in a Russian speaking environment to ensure that his medical condition does not worsen, [redacted] cannot guarantee that [redacted] cannot agree that we can provide a Russian speaking staff. The fact that we have been able to employ several Russian speaking assistants is luck, and out of good fortune, but it cannot be guaranteed for the future. Additionally we have pro-

vided a language bridge for [redacted] but we do not have, or will have, an exclusive dedicated aide who is Russian speaking. I urge you to contact the [redacted] Public Schools Special Education Office and request an IEP meeting to discuss [redacted] needs and a change of placement...As you well know,...teaching is in English and we do not offer foreign languages, or more specifically a Russian speaking environment.” Exh. 80; Parents’ Exh. 29

[redacted] response to Ms. [redacted]’s letter charged her with implicit “discrimination” and “demanded that [redacted] fulfill its obligations toward [redacted] under the existing legal contract with [redacted]; discontinue arbitrary experiments, forcing [redacted] to learn a foreign language [English] when he is physically unable to do so,” and “concentrate on the implementation of his current IEP using optimal tools available, including 1:1 bilingual Russian-English assistance 100% of the time [redacted] spends at school”. Parents Exh. 27

IV

The Individual Education Plans accepted by [redacted]’s parents since at least 2001 provided him with “intensive staffing”. Ms. [redacted] testified that “one-on-one intensive staffing” means that “if there are six students and four students have one-on-one staffing, there will be enough people to meet that need. . . Its not a named person, it’s the requisite number of people to meet that need. . . The way the staffing worked in this class. . . was on a rotation model. So at any point in the day [redacted] would be working with [any one of] four different teachers.” Ms. [redacted] explained that the reason for rotating the staff members was so that “a student did not become dependent on just one teacher.” Continuing Ms. [redacted] testified that “in his [redacted] case exposure to teachers who did not speak Russian was important, although certainly the language bridge was available to him if he did not understand what the lesson might be.” Ex. 28; Tr. 542-43; 544-45. The 2004-05 school year was the third year of using the model of rotating assistants. Tr. 545; 558-559.

During [redacted]’s three years [redacted] was fortunate to find a series of Assistant Teachers who were bilingual in English and Russian. As Ms. [redacted] made clear, however, “It was not indicated that the one-on-one teacher need be a Russian speaking person.” Tr. 542. In an October 2003 letter [redacted] was advised by [redacted]; High School Director, that “As notes from past years document,...100% Russian/English services for [redacted] have not been either recommended or provided at [redacted], has shown an interest and ability to use English to make requests and comments. He has solicited help from English speaking staff to provide English words for objects and comments. We feel that while the Russian-speaking assistant is available to translate and facilitate, her constant presence as the 1:1 aide for [redacted] would inhibit his use of both his abilities to relate to others via verbal and non-verbal means and his sense of the necessity to do so.” Exh. 75. Tr. 546.

Ms. [redacted] confirmed that “We didn’t feel that a dedicated Russian speaker needed to be with [redacted] all of the time.” Tr. 546. Continuing Ms. [redacted] testified there was an

educational reason why a dedicated Russian speaker should not to be with [redacted] all the time. This was that "... it certainly would not enhance his development in acquiring English. And that's been something the [redacted]s were interested in... he is living in an English speaking country. For him to fully participate in the activities, not only of the school, but of the community, it behooves him to have an understanding of English." Tr. 549.

V

During the years [redacted] was at [redacted], it became apparent to both the staff of [redacted] and the [redacted] professionals involved in [redacted] case, that for him a behavior plan was essential. Ms. [redacted] testified that during the time [redacted] was at [redacted] he was prone to engage in challenging behaviors that the staff had to deal with. Tr. 555-56. As Ms. [redacted] testified: "[redacted] definitely had some noncompliant and some aggressive behaviors. And one of the reasons he was placed in the basic intensive class is that we felt those behaviors were limiting him from making the progress he might otherwise make. So there was a focus on behavior reduction, based on positive reinforcement. And the particular behaviors we were targeting were hitting, kicking, and some noncompliant behaviors where he would have refused to follow a certain direction." Tr. 555-56 These behaviors were further described in a "Functional Behavior Assessment" prepared by [redacted], Exh. 70; Tr. 556-57. As a result of his behavior problems during each school year, not just 2004-05, [redacted] had an individual behavior plan. Tr. 557-58. As Ms. [redacted] explained "if a student is demonstrating aggressive behaviors, such as hitting, kicking, noncompliance, that student is not going to be able to participate successfully in the learning program." Tr. 559-60.

VI

During the hearing [redacted] repeatedly referred to [redacted] and its staff by many harsh and accusatory epithets, such as "incompetent", "abusive", "discriminatory", and "unethical", among others. [redacted], Tr. 602-605, FCPS Exhs. 77-79. As Ms. [redacted] testified: "It concerned us. It concerned the administration, really, because it was demoralizing to our staff, to feel that there was nothing positive that they were doing...the feeling was that the staff, from [redacted] the [redacted] point of view just couldn't do anything right." Tr. 405-407.

VII

By the Spring of 2004, the [redacted] staff and administration were at the point where they felt that [redacted] objections and demands were incompatible with the educational program that the school could provide. On May 11, 2004, [redacted] special education teacher, Ms. [redacted] (who has a Master's Degree in Special Education) and the [redacted] Behavior Specialist Ms. [redacted], developed a behavior plan for [redacted] Tr. 569-570; [redacted] Exh. 13. The plan included a number of different provisions for enhancing [redacted]'s appropriate behavior. In a case where [redacted] became physically aggressive, such as hitting or kicking another student or staff member he would be placed in an open cubicle, called a "cubby", until he could calm

down and focus without disturbing other students. Though [redacted] described the cubby as an "isolation" chamber or cell, it is nothing of the sort. It is simply a tabletop partially enclosed with a fabric about five feet high. [redacted] Pictoral Exhs. 97A, 97B, 97C.; Tr, 582. It has no door and a student cannot be isolated, restrained, or locked in a cubby. Tr. 584. It is by all accounts a "time out" venue. Tr. 582-584. Ms. [redacted] Contract Services Specialist, testified that there is nothing unusual or punitive about a cubby, rather it is an effective part of a behavior plan. Tr.333-340.

VIII

In preparation for the upcoming IEP meeting in May 2004, [redacted] staff prepared a "Plan for [redacted] for 2004-2005." [redacted] Ex. 84; Tr. 571. [redacted] saw this plan as the prerequisite to continuing to accept [redacted] :

Q. Were these things, the parameters and the program description that's outlined here in this Plan for [redacted] were these things that the [redacted] staff felt were important and necessary components of [redacted] educational program for the coming year?

A. Absolutely. And particularly, this was done because these had been the areas of concern for a number of years, these particular issues. That's why they were pulled out this way.

Q. So did you want to make it clear to [redacted] what thought was as to what it could offer [redacted] ?

A. Correct. [redacted] Tr. 571-72.

As Ms. [redacted] explained, [redacted]'s Behavior Reduction Plan is referred to and was made a part of [redacted]'s 2004-05 IEP. Tr. 568. Ms. [redacted] also pointed out some of the numerous references to a "behavior plan" which are contained in [redacted]'s 2004-05 IEP Tr.577-80).

At the IEP meeting on June 11, 2004, [redacted] and his wife reviewed and accepted [redacted]'s Behavior Reduction Plan as part of [redacted]'s IEP for 2004-05.. [redacted] Exh. 28 at 1; 18-19, [redacted] Tr. 576-580. They also agreed to some of the specific points to which they had previously objected. See Parental Letter For Inclusion in the 2004-2005 IEP for [redacted] Ibid. deSibour 580-582.

In their Post-Hearing Brief, the [redacted] deny that they ever agreed to the Behavior Reduction Plan attached to and made a part of the [redacted]'s 2004-05 IEP. Parents Post-Hearing Brief p.3. They do not deny that they signed the 04-05 IEP but claim that some unidentified "school rules" required that they specifically sign not only the IEP but also the 04-05 addendum thereto. Ibid.

The witnesses to the signing testified that when the parties reached agreement on the IEP and the Behavior Reduction Plan (BRP) on June 11, 2004, suddenly declared he and his wife had to leave without signing the IEP or the BRP but agreed to get back to the school's representatives if he had any objections. Tr. 374-376, 381-382; S.

Tr.574. From the time of the June 2004 IEP meeting--when read and made no objection to either the IEP or the BRP-- and the beginning of the 04-05 school year 3 months later. gave no indication that the BRP was unacceptable. deSibour, Tr 574-75; Tr. 384-85. Indeed the first that knew that was objecting to the BRP was not until early October 2004. Leutbecker 376-377; Exh. 13, dated October 13, 2004.

The breaking point between the parents and the school involved leaving and returning to the taxicab in which he was transported each day from his home to . The wanted , Russian speaking assistant teacher to meet every day and escort him from the cab to his school room and return him to the cab to go home. Until 2004 this had not been a condition of 's attendance at . Nevertheless the school tried to accommodate the 's demand. Tr. 592-594. never "forced" to wait for long periods in the taxicab except when his father, who accompanied him, insisted on waiting for the Russian speaking teacher. Tr. 599-600; Parents Exhibit 126A; Tr. 602.

On October 8, 2004, Ms. wrote to in a final attempt to reach some resolution. Ibid. Nevertheless on October 29, 2004, the parents again refused to have leave the taxicab unless and until their preferred aide came out to accompany to his classroom. Ibid. At that point, decided it could no longer work with , and that therefore could no longer remain at . Tr. 608-609. As counsel for stated: "... the reason why came to the conclusion that it could not continue to serve was not behavior. It was the demands that was putting on, and the accusations, and things like that." Tr. 297, 11-13; 444, 3-19,. Accordingly, on November 10, 2004, the Director of Ms terminated enrollment at effective December 10, 2004. Exh. 93.

DECISION

Preliminary to the due process hearing and before making his factual findings, this Hearing Officer twice ruled that was required to provide with a "stay-put" placement. In light of my finding that it was improper parental interference with services to that was the proximate cause of termination of those services, I must reconsider my prior rulings. In that regard counsel for has brought to my attention, the fact that the stay-put provision is among the procedural safeguards prescribed by 20 U.S.C. 1415. As the introductory language to that section of IDEA shows it applies only to a "local education agency". 20 U.S.C. 1415(a). In this case that is not ..

At least two reported cases have addressed the situation in which a private school or facility providing special education services to a student concluded that it could not or would

not continue to do so. In *LUNCEFORD v. DISTRICT OF COLUMBIA BOARD OF EDUCATION*, 745 F. 2d 1577 (D.C. Cir., 1984), a hospital program in which a student had been receiving educational services concluded he should be discharged. The student attempted to have the hospital enjoined from ending educational services relying on the “stay-put” provision of IDEA. The D.C. Circuit reversed the District Court’s injunction, ruling that the hospital was a “private party” to which “stay-put” did not apply. 745 F. 2d at 1581. More recently, in *WAGNER v. COMMUNITY SERVICES*, 335 F. 3d 297 (4th Cir. 2003), the relationship between parents and a private provider of autism services deteriorated to the point that the private provider refused to continue. The court did not hold – or even suggest – that the private provider could be required to continue providing services pursuant to the “stay-put” provision. Rather the Court said that the initial inquiry should be whether a placement was available that was “functionally available”, pursuant to 20 U.S.C. 1415(j)(2)(B)(iii).

Similarly here, _____ is a private party which - given the demands of _____ has determined that it cannot and will not continue with _____ as a student. Under these conditions IDEA’s “stay-put” provision is inapplicable.

When a learning disabled student’s home school becomes unavailable a school system complies with IDEA by providing comparable services at a similar school. *KNIGHT V. DISTRICT OF COLUMBIA*, 877 F. 2d 1025, 1028 (D.C. Cir.1989)(the district court’s choice of public school over private school on a comparative basis does not justify a change in placement from that school to an arguably more beneficial private school program so long as the public school provided “some educational benefit” within the meaning of *ROWLEY*; *AW v. FAIRFAX COUNTY SCHOOL BOARD*, 372 F.3d 674 (4th Cir. 2004) (a student’s then current “educational placement is based on instructional setting or level of service and is not location specific.”)

Here _____ placement continues to be a private day placement, which the school system has offered and continues to offer at _____ The child’s teachers at _____ testified without contradiction or rebuttal that _____ will provide a program equivalent to _____ and predicated on the same IEP.

On July 29, 2004, the Fourth Circuit held that parents such as _____ who request a due process hearing to challenge the decision of a school division have the burden of proof. *WEAST v Schaffer*, Case No. 03-1030 (4th Cir. 2004). The court specifically found no reason to depart from the general rule that the party initiating the action has the burden of proof. _____ and made no distinction between alleged procedural and substantive violations. In fact, since only those procedural violations which cause a substantive deprivation of FAPE can result in a finding against the school system, the Parents necessarily have the burden of proof with respect to both procedural and substantive claims.

_____ raised the issue of whether the program at _____ and the prospective program at _____ provided and will provide _____ with an “appropriate” program of special education, as defined and applied in *BOARD OF EDUCATION v. ROWLEY*, 458 U.S.

197 (1982) and ROWLEY v. ARLINGTON COUNTY SCHOOL BOARD, 806 F. Supp. 1253 (E.D. Va. 1992), aff'd, 39 F. 3d 1176 (4th Cir. 1994). Although the school system strives to provide the best possible educational benefits to all students, the actual legal standard of "appropriateness" is more finite. Thus an "appropriate" educational standard is one that is REASONABLY CALCULATED TO OFFER A CHILD SOME EDUCATIONAL BENEFIT. ROWLEY, 458 U.S. at 203; DOYLE, 806 F. Supp. at 1259. The evidence shows that the past programs at _____ as well as the prospective program at _____ meet and surpass that standard.

As measured by the foregoing ROWLEY standard, _____'s Assistant Director Ms. _____ testified that:

I think he [_____] benefited from the program. I think you can see progress if you look over his history of the time there, and the progress reports. This is a seriously handicapped child. And yet he definitely made progress, and was moving in the right direction.

Q. Was the _____ School implementing the services that were called for on his IEP's, including the one-on-one intensive staffing?

A. Yes, we were. Tr. 607-08.

If _____, or any other comparable school, can work with _____ it can provide an appropriate secondary school education for _____ Testimony of Dr. _____, Coordinator of Contract Services, _____ Schools. Tr. 214; testimony of _____, Contract Services Specialist at Tr. 395. 410.

_____ chose not to testify under oath at the due process hearing. He did, however, engage in lengthy soliloquies and sharp criticisms of the _____ personnel whom he subpoenaed. At the termination of the second day of hearing at 4:30 p.m, a time set by the hearing officer to end _____ lengthy speeches and repetitious questions of Ms. _____ both parties agreed to the termination of the proceedings. Tr. 646

With one discrete exception, _____ declined to take an oath to tell the truth and to subject himself to cross examination as required by the rules of procedure for due process hearings. 8 VAC 20-80-76(F)(1)(B). Despite numerous warnings that none of his unsworn comments can be accepted as testimony he declined, with one noted exception, to testify under oath. Tr. 68, 72 226, 319, 443.

Moreover _____ has never observed _____ school, having cancelled his scheduled visit there. Tr. 396. He has visited _____ class at _____ only once this year, and turned down an invitation to review videotapes which _____ had made of _____ in-class performance. Tr. 600-01.

The U.S. Court of Appeals for the Fourth Circuit has underscored that hearing officers and the courts must have respect for the professional judgments of those school system professionals whose job it is to provide special education day in and day out. See cases cited at page 25 of FCPS brief. These cases emphasize that hearing officers and the reviewing courts "have always been and should continue to be reluctant to second-guess professional educators." MM v. SCHOOL DISTRICT OF GREENVILLE COUNTY, 303 F. 3d 523, 533 (4th Cir. 2002). And in AB v LAWSON, 354 Fed .3d 315, 331 (4th Cir. 2004) the circuit court admonished that "IDEA requires great deference to the views of the school system rather than those of the most well meaning parents." The testimony of the witnesses for [redacted] showed they have decades of experience in special education. [redacted] Br. at 26. In addition, those witnesses were personally familiar with the program planned for [redacted] at [redacted]. Ibid.

Procedural violations are grounds for finding denial of a FAPE only when the violation results in a loss of educational opportunity. The record here shows no procedural violation that threatened [redacted] educational opportunity, See, BURKE COUNTY v. DENTON, 895 F. 2d at 973, 982 4th Cir. 1990); and DOYLE at 806 Fed. Supp. at 1253. The parents claim that [redacted] should have been accompanied at every point in his school day by a bilingual Russian/English Speaking Assistant is without support in the record. [redacted] who has a Masters Degree and Doctorate in Special Education and a dozen years experience in teaching, including teaching students with cognitive disabilities and seizure disorders similar to [redacted] explained quite cogently why it was important to have more than one staff member involved in [redacted] education and why [redacted] objection that [redacted] should have a single Russian/English speaking aide throughout the day is without merit. Tr. 103, 188-189.

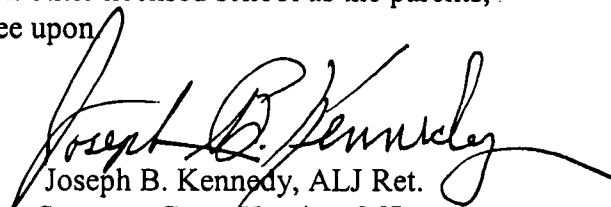
Finally the evidence demonstrates that [redacted] continues to need a behavior control plan to address his challenging physical behavior in the classroom. Unless those behaviors are under control [redacted] cannot learn. Contrary to [redacted] contention, a behavior plan for [redacted] is neither punitive nor negative. Rather it allows him to redirect and focus his behavior on learning instead of fighting.

ORDER

The premises considered, it is ORDERED:

1. That parents' complaint be, and hereby is denied and dismissed.
2. That pursuant to the compulsory education laws of [redacted] the parents of [redacted] immediately take steps to enroll and begin his attendance at [redacted] School, [redacted] Virginia, or such other licensed school as the parents, [redacted] Schools, and such school shall agree upon [redacted]

So Ordered this 8th Day of February 2005.


Joseph B. Kennedy, ALJ Ret.
Supreme Court Hearing Officer

RIGHT OF APPEAL

This decision shall become final and binding unless it is appealed by a party within two years of its issuance. Virginia Code 80.01-248. An appeal may be filed in either a State Circuit Court or a Federal District Court without regard to the amount in controversy. RR v. FAIRFAX COUNTY SCHOOL BOARD, 338 Fed. 3d 325 (4th Cir. 2003).

IMPLEMENTATION PLAN

The LEA is reminded of its obligation under 8VAC 20-80-76(I)(16) to develop and submit an implementation plan to the parents, the hearing officer, and the SEA within 45 days the rendering of this decision. 8 VAC 20-80-76 O-;4.5.

MAILED TO:

Complainants

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