

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

STEFAN JAYNES, ET. AL.

PLAINTIFFS,

v.

NEWPORT NEWS PUBLIC SCHOOLS,

DEFENDANTS.

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

Statement of the Proceedings

A special education due process hearing was held on December 9, 1998 and December 10, 1998. This is a bifurcated hearing. The parents are seeking reimbursement for their child's past educational costs through August, 1998 and the implementation of an appropriate educational program for their son for this present 1998-1999 academic year. The hearing was bifurcated to allow presentation of evidence in regard to the reimbursement request. The parties are engaged in settlement discussions related to the present academic year. The Hearing Officer will retain jurisdiction over the present academic year until the matter is heard or resolved. There were several extensions of time granted prior to the aforesaid hearing on the motions of both parties. There could be no prejudice to the rights of the child, Stefan Jaynes, since the hearing pertains to retrospective issues, not to his current placement and future education.

The two days of testimony concerned reimbursement. Both parties submitted proposed findings of fact and conclusions of law.

Findings of Fact

1. Stefan Jaynes was born on November 24, 1990 to Brian and Julianna Jaynes. He and his parents reside in the City of Newport News, Virginia.
2. Dr. J. Matthew Frank, a pediatric neurologist, took a history and determined that Stefan developed normal language skills in his first two years. (Parents Exh 2, T. Vol. 1, page 60).
3. In February, 1993, after Stefan's second birthday, he began losing speech and language skills in rapid progression. (T. Vol 1, page 59-60).
4. Stefan was seen by his pediatrician, Dr. Stiff, who diagnosed autism. (T. Vol. 1, page 61)

Recd 6/14/99

6/11/99

5. The nature of autism is set forth in the testimony of Speech Language therapist Melonie Melton:

Autism is a severe disability that -- typically the characteristics are difficulties with social interaction, difficulty making relationships with people, including parents. There can be delays in all areas ranging from profound delays to some mild delays in some areas, but the most significant impairment usually is in speech and language, in the area of speech and language. They can sometimes be nonverbal and it can affect their receptive and expressive language skills profoundly. One thing that sets them apart from other children with speech and language delays is that they typically have a disorder to their language rather than a delay, meaning all skills are about the same. They typically have a disorder in their language development. They also have a disorder in an area of language that we call pragmatic language development. This is a child's understanding or a person's understanding of the underlying rules of communication. In other words, understanding that you can say something or use a symbol and it gets something for you and you can go back and forth. (T. Vol. 1, page 23-24)

6. On September 29, 1993, Dr. Frank recommended that the family investigate the Peninsula Area Cooperative Education Services (PACES) program in Newport News (now known as New Horizons Regional Education Center). (Parent's Exh. 2)

7. Dr. Frank also reported that:

We are at a point in Stefan's illness that intensive input may turn things around. Whether this process can be completely reversed is very much up in the air. Given our past experience and the literature would suggest that intensive early intervention offers the most hope for successful remediation. (Parent's Exh. 2)

8. Ms. Jaynes testified to Dr. Frank's advice:

He said that I should immediately, immediately as soon as possible get early intervention as fast as possible because there's a limited window between the ages of-- as soon as you find out until about the age of five that the brain has plasticity where it can absorb and learn and be changed, in effect, towards a better direction instead of regression. There's a window of opportunity and that window of opportunity is greatest between the age of discovery as early as possible. Some children are discovered at one; some at one-and-a-half. It usually occurs between the 24th and the 36th month of life that this exhibits itself. He says as soon as you find out you must immediately, immediately do something fast, now, right now. Let's get him in speech. Let's get him in OT. Let's get him with a psychologist. Let's go. He said you have no time to lose

at all. So I immediately got Mrs. Melton and Mrs. Colburn, the psychologist, and started contacting -- I went to try to go to a playschool type of place where he could be with other children and do little drawings and whatever they do, little structures and things. They said he was too out of hand, too autistic for them to handle. They weren't equipped or educated enough to handle that type of disability being as difficult a disability as it is. (T. Vol. 1, page 62-63)

9. Dr. Frank told Ms. Jaynes to call the PACES program because it "is designed for autism. Basically that's all they do is autism." (T. Vol. 1, page 63, 64) The parents called PACES "... on October 8th and were told that first they need a letter from Dr. Frank which explains Stefan's condition before they would admit him." (T. Vol. 1, page 64)

10. PACES referred Ms. Jaynes "To Watkins Elementary School and they suggested that the fact was that I had to have a referral from Watkins to even begin the process of being admitted to Paces or New Horizons." She had Dr. Frank write "a letter first to tell them that he was in need of special education . . ." After that, she "went on to try to get him into Watkins to then hopefully have him moved to Paces after they found that he would be eligible for the Paces program, which Dr. Frank had kept insisting that he get into. I told Dr. Frank I had to go through these channels to get him into this special Paces program." (T. Vol. 1, page 66-67)

11. Parent's Exhibit 4 is a copy of Dr. Dorothy Roseboro's October 8, 1993 handwritten notes, including "maybe autistic." The referral for special education services was made and received by Newport News Public Schools (NNPS) on October 8, 1993. (Dr. Roseboro was Supervisor of Pre-School Programs.)

12. Melonie Melton, Speech Language therapist with the Children's Hospital of the King's Daughters, conducted an evaluation of Stefan on October 25, 1993. (Parent's Exh. 8)

13. NNPS did not conduct any evaluations of Stefan until December 15, 1993, sixty-eight days after the referral. (Parent's Exh. 13, 14, 15)

14. At that time, Ms. Jaynes signed a "rights" form that was related to permission to evaluate their son. The form explained rights related to an evaluation, the right to refuse consent to evaluate. This form was not a written procedural safeguards form or explanation. (T. Vol. 1, page 68)

15. On January 10, 1994, a "Review of Assessment Components" (Parent's Exh. 17) notes that all of the reports were "completed," although the Sociocultural Assessment report (Parent's Exh. 13) was not dictated until three days later, January 13, 1994.

16. Stefan received ongoing intensive behavioral therapy from Dr. Colburn. He also continued to have therapy with Ms. Melton since her October 25, 1993 evaluation for two sessions per week at a cost of between \$75.00 to \$100.00 per session. (T. Vol. 1, page 31-34)

17. On February 18, 1994, one hundred and thirty-two days after the referral, Stefan was found eligible for special education services and speech services. (Parent's Exh. 19),

18. An Individualized Education Program (IEP) was signed and completed on February 18, 1994 and signed by six public school staff on February 18, 1994. (Parent's Exh. 24)

19. The IEP included no date as to when services would begin, it simply stated that the services would begin on "4/ /94." The day of the month was left blank.

20. An IEP shall be implemented within thirty days after the child is found eligible for services. The eligibility determination should have been made within 65 working days after the October 8, 1993 referral. The eligibility committee should have met no later than the week of Monday, January 10, 1994.

21. An IEP should have been in place by February, 1994.

22. This IEP was typed on February 18, 1994 by Dr. Joan Spratley, a speech pathologist home-bound teacher and administrator of NNPS. (T. Vol. 2, page 63) She was not aware of any regulatory requirements in regard to when the child's IEP should be implemented. (T. Vol. 2, page 92)

23. When Dr. Spratley was questioned by the Hearing Officer about her assertion that it was not necessary to implement an IEP right away, she changed her position:

Q That's what's supposed to happen on the next day? It's supposed to be implemented right away?

A Yes.

Q And yet you put down that this IEP wouldn't be implemented for at least six weeks after February 18, didn't you?

A That's correct. (T. Vol. 2, page 77)

24. At the time of the eligibility and IEP meeting, Dr. Spratley (T. Vol. 2, pages 68, 73, 109-110) was aware of Dr. Frank's letters, his recommendation that Stefan be placed at PACES, and the need and urgency for intense immediate early intervention services.

25. Ms. Mary S. Swenson, NNPS school psychologist, testified that she reviewed Dr. Frank's letter "before the evaluation" that she conducted on December 15, 1993 and was aware of his letter and recommendations at the time of the February 18, 1994 eligibility and IEP meeting. (T. Vol. 2, pages 13-14, 49)

26. Neither Mr. or Ms. Jaynes was present at the eligibility and IEP meetings that were held on February 18, 1994. She did not know that her son had been found eligible for services until she received a letter from NNPS dated March 4, 1994. (T. Vol. 1, page 69-71)

27. NNPS predetermined the IEP and placement in Programs Educating Exceptional Preschoolers (PEEP), not PACES, without parental participation in the child's IEP. (T. Vol. 2, pages 20, 74)

28. PEEP is a Newport News Public Schools program. If Newport News Public Schools places a child into PACES, then Newport News Public Schools must pay the child's tuition to PACES. PACES is not a program owned and operated by Newport News Public Schools. It is a regional public school consortium. (T. Vol. 2, page 47)

29. On March 4, 1994, Dr. Roseboro, the NNPS supervisor of preschool programs, sent a letter to Ms. Jaynes advising that Stefan was found eligible for "preschool special education with speech as a related service. Before services can begin for your son, we will need to schedule a meeting with you to develop the Individualized Educational Plan (IEP)." (Parent's Exh. 21)

30. NNPS did not enclose a copy of the February 18, 1994 IEP that had already been signed by the school officials.

31. On March 18, 1994, Dr. Frank requested that NNPS initiate an evaluation of Stefan for Occupational Therapy (OT) services (Parent's Exh. 23). Ms. Jaynes delivered the request to the school either that day or the next day. (T. Vol. 1, page 74-75) It is recorded as being received on March 31, 1994.

32. More than one year later, on April 20, 1995, the parents received a letter about the need for an Occupational Therapy evaluation. (Parent's Exh. 45) The letter was dated April 13, 1994, but was postmarked a year later, on April 19, 1995 and received on April 20, 1995. It notes that "Stefan was assigned to be evaluated on 2/1/95," ten months after the letter was purportedly written.

33. Newport News Public Schools never initiated or completed an Occupational Therapy evaluation.

34. After the October 8, 1993 referral and before the March 31, 1994 IEP meeting, Ms. Jaynes had had several discussions with Dr. Roseboro about Stefan attending the PACES program for children with autism. (T. Vol. 1, page 74)

35. On cross-examination, school psychologist Swenson corroborated Mrs. Jaynes' testimony. (T. Vol. 2, page 16-17)

36. The IEP that was completed on February 18, 1994 stated that Stefan would not be educated at PACES, but would be placed in the public school day program, in "Special Ed - PEEP" for 3 days per week for four and a half hours, and speech once a week for thirty minutes. (Parents' Exhibit 24)

37. This IEP contained no "Present Levels of Performance."

38. The IEP contained no criteria or evaluation data to determine how the goals and objectives would be assessed and met.

39. On March 31, 1994, Ms. Jaynes met with Ms. Roseboro to sign the February 18, 1994 IEP.

40. This meeting occurred 174 days after the October 8, 1993 referral. The IEP was not implemented immediately.

41. On May 5, 1994 Ms. Jaynes wrote to Dr. Mehaffey, the Director of Special Education and advised that she had called to ask when her son will begin to receive services. (Parents' Exh. 26) However, Dr. Mehaffey was on vacation and would not see the letter for two weeks. (T. Vol. 1, page 75-76)

42. On May 24 or May 25, 1994 Dr. Spratley met with the parents and offered to provide one-and one-half hours of home bound or home based services, either once or twice a week in violation of the IEP. (T. Vol. 2, page 105-107)

43. The parents objected to Dr. Spratley's offer. (T. Vol. 1, page 124-125)

44. At that point, Ms. Roseboro inserted "5/26/94" over the "4/ /94" beginning date of the IEP and Stefan began attending school. This was 230 days after the initial October 8, 1993 referral.

45. Stefan received no speech or language services from Newport News Public Schools since the referral.

46. The parents repeatedly requested extended school year services for Stefan. Their request was repeatedly denied by Newport News Public Schools. (T. Vol. 1, page 79)

47. Stefan attended public school in Ms. Paster's self-contained class for about two weeks. He did not receive any extended school year or summer services from Newport News Public Schools. His parents continued to provide educational services for their son at their own expense.

48. On July 11, 1994 Dr. Frank again wrote about the need for occupational therapy "on a twice-weekly basis for the next three months . . ." (Parent's Exh. 31) Services were not provided by Newport News Public Schools.

49. Stefan returned to Ms. Paster's self-contained class in the fall of 1995. He was the only child with autism in his class. (T. Vol. 2, page 158) Other students included two children with hearing impairments, one with a chromosomal defect, one "classically developmentally-delayed child," one "a little more" classically developmentally-delayed, and another "as more like mentally retarded." (T. Vol. 2, page 125)

50. On October 10, 1994 an IEP meeting was held by Ms. Paster. Several of the objectives on this IEP were identical to the objectives on the February, 18, 1994 IEP. Several of the February 18 and October 10 objectives were "NI", i.e., "not introduced" (Parent's Exh. 34) (T. Vol. 2, page 150-152)

51. According to the October 10, 1994 IEP, speech language services were reduced from twice a week to once a week. The February 18, 1994 IEP listed services which were not provided until September, 1994. Services were reduced without an evaluation that would justify the reduction of services.

52. Although Stefan should have received eight sessions of speech therapy in September, 1994, he received two sessions. After the October 10, 1994 IEP, Stefan was to receive speech therapy once a week, i.e., at least four times a month. He received speech therapy twice a month through January, 1995. (T. Vol. 2, page 154-157) (School Board Exh. 10)

53. After Ms. Jaynes participated in the October 10, 1994 IEP meeting, the IEP was altered without her knowledge. The alteration is evident in a comparison of the last page of Parent's Exhibit 34 to the almost identical next to last page of that exhibit.

54. The original document contained no justification for denying PACES. The least restrictive environment section was left blank. Mrs. Jaynes signature is on that page. Later that page was altered by inserting a "LRE Justification" of self-contained and the word "PACES" adjacent to the line denoting "private day school for disabled" so that it would appear that PACES was considered and rejected as appropriate for Stefan.

55. At the hearing, Ms. Paster admitted to altering the IEP after the meeting, but denied that she inserted "PACES" into the IEP. (T. Vol. 2, page 170-171)

56. Ms. Paster's testimony is vague and not credible.

57. Stefan was in the PEEP program from September, 1994 through January, 1995. (T. Vol. 2, page 113-115)

58. On February 1, 1995 the parents spoke with Ms. Paster and advised that they were about to initiate intense educational services for their son at home.

59. On February 15, 1995, Ms. Jaynes wrote to Dr. Spratley and requested extended school year services. Dr. Spratley did not respond to their request. (Parents' Exh. 43)

60. Newport News Public Schools did not offer to convene an IEP or provide services at any time thereafter, until the parents retained legal counsel.

61. On June 12, 1995, Mr. and Mrs. Jaynes provided Newport News Public Schools with a detailed letter about their concerns. (Parents' Exh. 46)

62. There was no explanation for the failure of Newport News Public Schools to implement fully Stefan's IEP.

63. Stefan has been receiving intense behavioral therapy forty hours a week since February, 1995.

64. Stefan has benefited from the therapy. (T. Vol. 1, pages 37-39, T. Vol. 2, pages 46, 48, 54, Parents' Exh. 44)

65. Until Stefan's return to a partial day public school program at New Horizons, in the fall of 1998, Newport News Public Schools did not provide any education or offer an adequate IEP to Stefan. (T. Vol. 2, page 89)

66. Newport News Public Schools maintained a pattern and practice in this case of failing to follow the procedures set forth in the Individuals with Disabilities Education Act.

67. Newport News Public Schools did not adequately notify Mr. and Mrs. Jaynes of their due process rights in this case (T. Vol. 1, pages 80-83, Board Exh. 2). Mrs. Jaynes' testimony is credible. Newport News Public Schools special education administrator admitted that she failed to advise the Jaynes' of their due process rights. (T. Vol 2, pages 83-85).

68. Stefan Jaynes suffered a loss of an educational opportunity as a result of the procedural violations.

69. Newport News Public Schools seriously infringed upon the parents' participation in the IEP process.

70. The parents incurred expenses for therapy and legal services related to their child's education from October 8, 1993 through August, 1998 in the amount of \$117,979.78.

71. The parents incurred transportation costs related to securing an education for their child. The amount of such costs is held in abeyance dependent upon subsequent

resolution of other issues pending in this matter.

Conclusions of Law

1. **Statute of Limitations:** *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, Effective January 1994, Virginia Department of Education, provide a one-year statute of limitations for filing suit in court, after exhaustion of administrative remedies. Reg. §3.4,A.11.b. However, no time limit is placed on the right of the parent to request a due process hearing. Reg. §3.4,A.5.a. However, the U.S. District Court for the Eastern District of Virginia has ruled that the Virginia one-year statute of limitations applies to this type case, and the decision was recently affirmed on appeal. *Manning v. Fairfax County School Board*, 23 IDELR 639 (E.D. Va., 1995). *Affirmed*, No. 96-1107, Fourth Circuit, decided May 3, 1999. However, the facts in this case are distinguishable as discussed hereinafter.

2. **Estoppel:** NNPS exceeded time limits in the procedures required by Federal and State law and regulations in developing and delivering a Free and Appropriate Public Education to Stefan Jaynes. See Findings of Facts Numbers 11, 17-24, 29-33, 39-42, 44. This is a tragic case of a lost opportunity to save Stefan Jaynes language ability; whether it could have been saved or not can never be known with certainty, but the opportunity stated by Dr. Frank was lost by the delay of NNPS. See Findings of Fact Numbers 6-9. There is sufficient evidence that application of proper therapy would have arrested the loss of language skills. The school system cannot be heard to say that Stefan's parents sought a due process hearing too late.

3. **Tolling:** There is credible evidence, which the Hearing Officer accepted, that the parents, without the benefit of legal advice, were not provided the notice of their due process rights as required by IDEA, 20 U.S.C. Ch.33. Sect. 1415(b) and 34 C.F.R. §300.505. See Findings of Fact Numbers 26, 29, 30. This tolls any statute of limitations that may be found by an appellate court to apply to the request for a due process hearing. *O'Toole v. Olate Sch. Unified Sh. Dis. No. 223*, 25 IDELR 1061, 1065 (D. Ct. KS, 1997)

4. The February 10, 1994 and October 10, 1994 IEPs by Newport News Public Schools were not properly implemented.

5. The February 10, 1994 and October 10, 1994 IEPs by Newport News Public Schools did not include appropriate measurable goals and are in violation of Appendix C.

6. The parents were denied effective participation in the IEP meetings. The IEP's were fatally defective, being incomplete and later altered.

7. Services listed in the IEP were not provided, objectives were not initiated.

8. The Newport News Public Schools predetermined that Stefan would be placed into one of their pre-existing programs, i.e., PEEP, without considering a full continuum of

placements, as required by 34 C.F.R. Section 300.551.

9. The IEPs were not designed to meet Stefan's unique needs or to provide him with educational benefit. The IEPs were not reasonably calculated to provide Stefan with educational benefit. *Board of Education v. Rowley*, 458 U.S 176 (1982).

10. After Newport News Public Schools failed to provide Stefan with a free appropriate public education, his parents were entitled to place Stefan into a private program. The Applied Behavioral Analysis program has been appropriate for Stefan.. The parents should be reimbursed for their son's education. *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

11. NNPS has waived any objections to the amount of reimbursement, having only challenged the Jaynes' entitlement to reimbursement, but not the amount submitted by the parents and admitted into evidence.

12. The parents are the prevailing parties in this portion of the bifurcated hearing.

DISCUSSION OF LAW

The Individuals with Disabilities Education Act (IDEA), requires that children with disabilities be offered a free appropriate education (FAPE). A child is deprived of a free appropriate public education under either of two sets of circumstances: first, if the school system has violated the IDEA's procedural requirements to such an extent that the violations detrimentally impact upon the child's right to a free, appropriate public education or, second, if the IEP that is developed by the school is not reasonably calculated to enable the child to receive educational benefit. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U. S. 176, 206-7 (1982); *Hudson v. Wilson*, 828 F.2d. 1059 (4th Cir. 1987).

In *Board of Education of Hendrick Hudson Cent. School. District v. Rowley* (458 U. S. 176, 206-07, 1981-82 EHRL 553:656, 670 (1982), the Supreme Court interpreted the term "free appropriate public education." The Court emphasized the importance of procedural safeguards and procedures in developing IEPs and noted that the following analysis must be made:

First, has the state [or local education agency] complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Board of Education of Hendrick Hudson Cent. School. District v. Rowley*, 458 U. S. 176, 206-07, 1981-82 EHRL 553:656, 670 (1982).

Tuition Reimbursement, In General

In the *Town of Burlington v. Department of Education for the Commonwealth of Massachusetts*, 471 U. S. 359, 105 S. Ct. 1996, 2002 (1985), the U. S. Supreme Court focused on issues relating to tuition reimbursement. *Burlington* was a unanimous decision issued thirty-four days after oral argument.

In *Burlington*, (Chief) Justice Rehnquist defined the IEP concept and process. He wrote that the free appropriate education mandated by the Act is designed for the specific needs of the handicapped child through the Individualized Education Program (IEP) which is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.”

In the IEP, instruction must be specially designed to meet the child’s unique needs so that the child will learn. Failing that, if the child learns in another environment, the parents are entitled to be reimbursed for securing and paying for that other school environment that was able to teach the child to read, write and do arithmetic.

The Fourth Circuit re-visited this issue in *Florence County School District Four v. Shannon Carter*, 950 F. 2d 156, 18 IDELR 350 (4th Cir. 1991). In *Carter*, the school district argued that under the *Rowley* standard, Shannon was benefiting from her public school program. The Fourth Circuit used the school district’s IEP and test scores to address issues relating to educational benefit. They concluded that the school did not provide Shannon with an appropriate education.

As interpreted by *Burlington*, and affirmed in *Carter*, the Act imposes two prerequisites to reimbursement:

the program proposed by the state failed to provide the child with a free appropriate public education, and

the private school in which the child is enrolled succeeded in providing an appropriate education, i.e., an education that is reasonably calculated to enable the child to receive educational benefits. (*Carter*, at IDELR 354).

Failure to Consider a Continuum of Placements

In making placement decisions, the school IEP team must consider a continuum of placements. The Fourth Circuit held that deciding a child’s educational placement before deciding what the child needs is a violation of the parents’ due process rights. *Spielberg v. Henrico County Public Schools*, 853 F. 2d 256, 1988-1989 EHLR 441:178 (4th Cir. 1988)

In *Spielberg*, the public school system sought to move a child from a private residential school to an already established program in one of its own public schools. The Fourth Circuit held that deciding upon a disabled child’s placement before developing the IEP

constitutes a denial of FAPE. (At 180)

Failure to Adequately Involve Parents

In *Hall v. Vance*, the Fourth Circuit held that the school district's failure to advise parents of their rights, including the possibility of public funding for James' education was a violation of the IDEA and was sufficient to find a denial of FAPE. (*Hall v. Vance County Board Of Educ.*, 774 F.2d 629, 1985-86 EHRL 557:155 (4th Cir. 1985).

In *Board of Education v. Dienelt*, 843 F.2d 813, 1987-88 EHRL 559:461 (4th Cir. 1988), the defendant school district identified Paul Dienelt as a learning disabled child and provided special education services to him. However, the services provided were inadequate and the child did not progress academically. Paul's parents consulted with educational experts who made suggestions about Paul's educational program and how it should be modified. After the school refused to provide the requested services, the parents sought a due process hearing and placed Paul into Oakland School.

In *Dienelt*, the Court ruled that the school failed to include the parents in their decision-making process. The court awarded his parents with reimbursement for tuition and expenses incurred in obtaining a free appropriate education for their son at Oakland School. In affirming the District Court decision, the Fourth Circuit wrote:

. . . the public schools did not conduct a placement advisory committee meeting or otherwise **adequately involve the Dienelts in the preparation of Paul's proposed IEP**. As a result, the board utterly failed to determine the special educational needs of Paul Dienelt or to provide him with an adequate IEP. (p. 463) *Education of the County of Cabell v. Paul Dienelt*, 1986-87 EHLR 558:305 (S.D. WV 1987), see also 843 F. 2d. 813, 1987-1988 EHLR 559:461 (4th Cir. 1988)

IEPs and Appendix C

Volume 34 of the Code of Federal Regulations Section 300.346 "Content of individualized education program" states:

- (a) **General**
The IEP for each child must include--
 - (1) A statement of the child's present levels of educational performance;
 - (2) A statement of annual goals, including short-term instructional objectives;
 - (3) A statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs;
 - (4) The projected dates for initiation of services and the anticipated

- duration of the services; and
- (5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved. (Emphasis added.)

In discussing Individualized Education Programs (IEPs), Appendix C emphasizes the importance of using “Appropriate objective criteria and evaluation procedures and schedules for determining, at least on an annual basis, whether the short term instructional objective are being achieved.” (Sec. 300.346(a)(5)).

Question 36: What should be included in the statement of the child’s present levels of educational performance?

Answer: . . . the following are some points that should be taken into account in writing this part of the IEP:

- . . . b. The statement should be written in objective measurable terms . . . (italics added).
- . . . c. There should be a direct relationship between the present levels of educational performance and other components of the IEP.

Stefan’s Present Levels of Educational Performance were left blank in his initial IEP.

Stefan’s parents made the decision to use intense therapy with their son after they talked with Dr. Frank and Mark Williamson and conducted their own research.

A three judge panel in Pennsylvania discussed Lovaas, ABA therapy in a case that is similar to Stefan’s. *Martin and Melinda K. v. Delaware County Intermediate Unit # 25*, 1 ECLPR 240, Pennsylvania Department of Education (June 2, 1992), (appealed and affirmed 831 F. Supp. 1206, 20 IDELR 363, 1 ECLPR 330, (E.D. PA 1993)) In the Pennsylvania case, the parents had requested reimbursement for their son’s Lovaas therapy. They had a due process hearing and lost. On appeal to the three judge review panel, they prevailed. The panel discussed methodology and, like the District Court, provided a clear explanation about the TEACCH program and the Lovaas program.

The TEACCH program, even under the best of circumstances, contemplates the student’s involvement in special education throughout his educational career, i.e. until age eighteen or longer. The Lovaas program, on the other hand, is designed to promote self-sufficiency on the part of the student so that he can be fully integrated into the regular education program at an early age.

While it is not ordinarily our role to choose between two educational methodologies, we are compelled to find one methodology inappropriate and another appropriate so long as the second of these methodologies alone holds

the promise of self sufficiency and integration into the regular curriculum. This is particularly true where the student possesses traits that make him a good candidate for integration, and where the student has already demonstrated substantial progress in the program oriented toward integration.

**LOSS OF EDUCATIONAL OPPORTUNITY
CLOSING OF THE NEUROLOGICAL WINDOW
POSSIBILITY OF PERMANENT DAMAGE TO STEFAN**

In a case involving a child similar to Stefan, Judge Spencer wrote:

Finally, the evidence provided by expert witnesses indicates that for children who suffer from moderate to severe childhood autism, there is a small, but vital, window of opportunity in which they can effectively learn. Such period is generally between the ages of five and eight years old. Therefore, jointly considering the area of Danny's curriculum which needs continuous attention and his vocational needs, the Court concludes that it is extremely important that at this critical stage of development, Danny receive uninterrupted speech language therapy. The provision of such services, or the lack thereof, will have a significant impact on Danny's vocational opportunities in the future. Thus, it is evident that to provide Daniel Lawyer with an appropriate free education, which will allow him to benefit educationally therefrom, it is necessary for Chesterfield County Schools to provide Danny with extended year services, including speech language therapy. *Lawyer v. Chesterfield County Sch. Bd.*, 19 IDELR 904, (E. D., Va. 1993)

Stefan Jaynes, in a tragic violation of law, failed to receive appropriate educational services from Newport News Public Schools for several years. How much permanent damage he suffered between the October 8, 1993 referral and February, 1995 initiation of direct forty hours a week therapy may be impossible to determine.

DECISION

In 1993, two year old Stefan Jaynes suddenly began losing the ability to communicate. When he was diagnosed with autism, his parents learned that the stakes were high. If Stefan received intensive early intervention services immediately, he might be able to attend school and lead a more normal life.

Although the staff of Newport News Public Schools knew that Stefan needed immediate early intervention services, they balked. Through every step of the special education process, from eligibility to development of the child's first IEP, they missed deadlines. When Newport News held meetings to develop an IEP for Stefan, they made no attempt to involve his parents or other experts who could tell them what the child needed. They placed Stefan in an inappropriate placement, then altered the IEP. The mishandling of

this case by Newport News Public Schools is inexcusable and tragic.

These actions and delays were costly to Stefan and his parents. Stefan was damaged by the acts and omissions of Newport News Public Schools staff.

Mr. and Mrs. Jaynes are awarded reimbursement for the costs, legal and educational, incurred in seeking to provide an education for their son, in the sum of \$117,979.78.

The parties have not yet resolved the appropriateness and expenses of Stefan's present educational program and the Hearing Officer shall retain jurisdiction over any outstanding issues related to the present program.

APPEAL INFORMATION

An appeal of this decision by either party must be instituted within thirty (30) administrative days following the date below by request made to the Virginia Department of Education.


HOWARD E. COPELAND
Hearing Officer

Date: June 11, 1999