Ex. 1 to parent

VIRGINIA:
DEPARTMENT OF EDUCATION (SPECIAL EDUCATION)

HEARING OFFICER DECISION

MICHAEL "GLENN" WHITE, by his parents

v.

VIRGINIA DEPARTMENT OF EDUCATION

AND

VIRGINIA BOARD OF EDUCATION

For the parents:
Peter W. D. Wright, Esquire
Attorney at Law

For the Department of Education:
Joan W, Murphy, Esquire
Assistant Attorney General

Hearing Officer
Raymond E. Davis
VSB 05381

Recd 2/19/00

2/7/00

Glossary of Terms Used

LEA – Local Educational Authority
IEP – Individualized Educational Plan
IDEA – Individuals with Disabilities Education Act
FAPE – Free Appropriate Public Education
SEA – State Education Authority

Special Education has many abbreviations in its law, regulations and court decisions. As a matter of convenience and reference, I have listed a few.

VIRIGINIA:

DEPARTMENT OF EDUCATION
DUE PROCESS HEARING

IN RE: MICHAEL "GLENN" WHITE

Pursuant to an appointment by letter dated December 20, 1999, from Michelle J. Hathcock, Coordinator, Due Process for the Virginia Department of Education, from the approved hearing officer's list in the Office of the Executive Secretary of the Virginia Supreme Court; and pursuant to Virginia Code Sections 22.1-213 et seq., 9-6.14: 14-1 et seq., and 34 CFR part 300, et seq., an impartial due process hearing was held before undersigned Hearing Officer on the 17 day of January, 2000, at the Main Street Auditorium of the Pocahontas Building, 900 East Main Street, Richmond, Virginia 23219.

After oral argument and the submission of exhibits, no witnesses were called and no oral evidence was taken. The case was submitted on briefs, motions and argument.

FINDINGS OF FACT

1. Michael "Glenn" White is a fourteen year old boy who has been enrolled in the New Community School since 1996. Before entering the New Community School, Glenn attended Henrico County Public Schools for six years, from Kindergarten through Fifth Grade.

2. Glenn was identified very early as a youngster who had significant speech language problems. Glenn began receiving special education services in 1991 when he was in the First Grade in Henrico County Public Schools and continued them through the Fifth Grade.

3. Glenn is not retarded. He has an average IQ and his reasoning skills are significantly above average. He also has dyslexia.

4. Glenn was unilaterally withdrawn by the principal of his fifth grade school, from his prescribed educational program and placed, without any re-evaluation or revision of the then current IEP, into less intensive, full sized, regular education classes.

5. For the 1996-1997 school session the parents, Steve and Jan White, unilaterally placed Glenn in a private program at the New Community School.

6. On May 30, 1997, Steve and Jan White requested a special education due process hearing against Henrico County Public Schools on behalf of their son. They were seeking reimbursement for their son's education at The New Community School and other remuneration.

7. That on April 15, 1998, the Due Process Hearing Officer found irregularities in the total process but denied the parents request for relief and found Henrico County did not deny a free and appropriate public education (FAPE). (See Exhibit H0-1).

8. The parents appealed the Due Process Hearing Officer's decision.

9. On July 10, 1998, the State Level Review Officer reviewed the earlier decision, after taking further evidence over the objections of Henrico County, finding that Henrico County had not provided FAPE and ordered reimbursement of past 1996-1997 and future for the invalidity of the 1997-1998 IEP. (See Exhibit H0-2).

10. After the Review Officer issued his decision, Henrico timely appealed to the Circuit Court of Henrico County. Pending the appeal, Henrico County Public Schools failed to implement the decision of the Review Officer. The Virginia Department of Education was made aware that the School Board was refusing to implement the decision of the Review Officer but took no action against the County.

11. On May 25, 1999, Mr. And Mrs. White wrote the Virginia Board of Education and the Virginia Department of Education, and advised that they were very concerned and financially burdened because Henrico County appealed the decision of the State Level Review Officer, less than one week before Glenn started the 1998-1999 school year. This meant that they had to pay tuition and additional attorney fees while making an average income and feared that they would be unable to continue to pay these expenses pending an extensive appeal process. (See Exhibit P-5).

12. On August 9, 1999, the Virginia Department of Education ordered Henrico County to "Submit payment to the private placement in accordance with the review officer's decision, thereby providing for Glenn's tuition during the pendency of the appeal in accordance with the requirements of the newly enacted legislation of June 4, 1997, and its implementing regulations of May 11, 1999" and to provide documentation "which verifies payment in accordance with the reviewing officer's order". (See Exhibit P-4).

13. Henrico County refused to implement the Order. On November 15, 1999, the SEA re-asserted their position as stated in their August 9, 1999 letter. (See Exhibit P-2).

14. In early December, Dr. Jo Lynne DeMary, a former Henrico County Administrator, was appointed Acting Superintendent of the Virginia Department of Education. On December 2, 1999, the Virginia Department of Education reversed their decision, saying that the "Department of Education will defer to the decision of the Court". Counsel before me stated that the Department did so "on advice of counsel" but the decision had been made by the prior superintendent. (Tr., pp.70-71).

15. The parents, by counsel, requested a Due Process Hearing to require the Virginia Department of Education to implement its enforcement pursuant to its Letter of Findings on August 9, 1999 and its restatement of that position on November 15, 1999.

16. Pursuant to the rules that govern special education in Virginia the undersigned was appointed as Due Process Hearing Officer for that purpose by letter received on December 27, 1999.

17. After consultation with counsel, both parties filed arguments, briefs and motions. A hearing was held on January 17, 2000 to hear counsel's argument and accept exhibits. No testimony was taken.

18. At that hearing, the parties stipulated that:

(a) The requirements of notice to the parents were satisfied.
(b) That Glenn White has a disability.
(c) That Glenn White needs special education and related services.

As an aside, I find that the proposed Individual Educational Plan submitted as State-1 in this hearing is not an IEP at all but a promise to develop one conditioned on the parents selecting an alternative plan which is appropriate. I do not feel that this is a serious effort to do anything other that notify the parents that the LEA is appealing the SLRO's decision with which the LEA disagrees and will not proceed further under the current placement.

NOTE: The transcript erroneously reflects that Jo Lynne DeMary attended the January 7, 2000 hearing. In fact, Judith A. Douglas, Director, Special Programs, Virginia Department of Education attended for the Commonwealth.

THRESHHOLD ISSUES

While this case presents a myriad of issues and sub-issues, some interwoven and others stand alone, a basic issue is raised as to the jurisdiction of the Hearing Officer in this case to proceed at all. Included in that argument were questions that go to the constitutionality of the process of the Commonwealth's hearing officer system and its implementation for special education and usage with regard to differences between State and Federal statutory law, case law and procedures. This Hearing Officer believes that he clearly does not have jurisdiction to address the constitutionality and breadth of most of these issues.

The Commonwealth has been inventive in mixing and matching State and Federal law and procedures when one or the other suits its aims. Nor can this Hearing Officer address the issue raised concerning the U.S. Department of Education alleged promulgation of CFR 300.514 (c) in violation of the IDEA by extending the regulation beyond the underlying statutory authority. I would note, however, that under federal administrative law and court procedures there are several avenues, administrative and legal, for an affected party to protest and challenge new regulations. There is nothing in this record to show that the Commonwealth challenged CFR 300.514 (c) nor has any case been cited to this Hearing Officer as evidence that the Commonwealth has legally challenged the promulgation and implementation of this particular regulation. Silence in the federal regulatory scheme implies (albeit with possible apprehension and reservations) consent and a failure to challenge, administratively or legally, generally reduces the options for a party to complain at a later date.

With regard to the availability of due process on a question of an alleged failure to implement an alternative placement issue, under current Virginia regulations due process is available for disagreement over "...educational placement of the child...". Sec. 3.4, A.2., SEP Regulations for Children with Disabilities in Virginia. While the issue of complaint to the United States Department of Education was raised at the hearing pursuant to 34 CFR Section 300.661 et seq.; counsel for the Commonwealth conceded that the pre-1999 regulations concerning complaints to the State can not be appealed to the U.S Department of Education and that the appeals mechanism for any complaint letters has been stricken from the new regulations. (See Tr. pp. 56-58). This would appear to leave the complainants without remedy except by due process. In either event, I believe, and so find, that due process is available for complaints with regard to placement to the State Department (SEA).

Additionally, under Virginia law and regulations, the State Department of Education, which has access to internal and other counsel, appointed the undersigned hearing officer to hear this matter pursuant to those laws and regulations. It appears to this hearing officer that it is inconsistent application of those laws and regulations to appoint a hearing officer pursuant to them and then deny jurisdiction at the hearing. To be consistent, the Department should have refused to grant due process to the parents if that was their legal position and, to not raise that issue until the due process has been invoked and a hearing officer appointed, is a waiver of their objection and I so find.

REMAINING ISSUES

Preliminary Discussion:

Counsel for both sides have asked for certain relief and filed certain motions, all of which will be addressed herein. There is also an appeal, properly effected, pending in the Circuit Court of Henrico County pursuant to applicable State law and regulation, of a previous special education due process case involving the complainants here and the Henrico County Public Schools (LEA) which this Hearing Officer has no intention of relitigating. This case is being considered on the narrow issue of the effect, or not, of the child's placement at a private institution being a "stay put" requirement under the Individuals with Disabilities Education Act (IDEA), 20 USC §1400 et seq. and the regulations promulgated thereunder 34 Code of Federal Regulations (CFR) Part 300, et seq. and the legal consequences thereof, if any.

Issues:

1. Does the State Level Reviewing Officer's opinion constitute a binding, "stay put" placement under IDEA and its regulations and, if so, is there any requirement for the Virginia State Department of Education to take any action to enforce or implement it?; and

2. Is Henrico County Public Schools a necessary party to this proceeding?

1. The State Level Reviewing Officer's (SLRO) opinion is included in this record as HO-2. In that opinion SLRO Frazier found, inter alia, that the LEA had not provided a Free and

Appropriate Public Education (FAPE) and that the child would remain in his current placement at the New Community School. The IDEA Amendments of 1997 at 20 U.S.C. Chapter 33, § 1214(j), provides that: "...during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child...".

The current IDEA implementing regulations provide that, should a SLRO rule in favor of a child's parents regarding a change in placement, the current placement of the child, for purposes of the stay-put provision, shall be the new placement. 34 C.F.R. §300.514 (c). Specifically §300.514(c) states as follows: "If the decision of the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section".

Paragraph (c) of §300.514 is based upon long standing judicial interpretations of IDEA's pendency provision that when a SLRO's decision is in agreement with the parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals. See Burlington School Committee v. Dept. of Educ., 471 U.S. 359, 371 (1985); Susquentia School District v. Raelees S., 96 F.3d 78 (1996) Board of Educ. of Oak Park and River Forest High Sch. V Ill. St. Bd. Of Educ., 28 IDELR 716, Manchester Sch. Dist. V. Williamson, 17 EHLR 1.

Courts have taken the position that Congress could not have intended the stay-put provision to prevent a child from receiving an appropriate education pending an appeal process. They reasoned that this would run counter to the intent of the statute which was to protect children during the pendency of an appeal. The Court in Board of Educ. of Oak Park and River Forest High Sch., (supra) in a case with similar facts as this case, reinforced the notion that the stay-put provisions require compliance with the hearing officer's determination in favor of the parents during the pendency of an appeal. This Court holds that, under Burlington (supra) once a final state education administrative decision rules that the parent's placement is the appropriate placement, it becomes the "then current educational placement" within the meaning of §1415(c)(3).

To hold otherwise would mean that parents who could not afford a private placement would be forced to maintain their child in a public placement that an administrative decision held to be inappropriate. This would contravene the purposes of the stay-put provision which is to "ensure that the educational needs of the child are met during the pendency of any proceedings conducted pursuant to the IDEA". Sch Dist.No. 218, 103 F 3d at 546.

Other courts have reasoned that once a determination is made favoring the parents, the parents should not be made to suffer during a drawn out appeals process. In Manchester Sch. Dist. V. Williamson (supra), the Court reasoned that: "It is hard to imagine that Congress intended the stay put provision to keep a student from moving out of an educational program

which has been found inappropriate for the period of time required for federal appellate review. It is not unusual for a year to pass before the courts of appeals to issue a decision. And it took seven years for Honig v. Doe, supra (484 U.S. 305 (1988), to reach the United States Supreme Court. Id At 603. The Court rejects the School District's assertion that the implementation of an appropriate IEP must await the exhaustion of a lengthy process".

It is clear, therefore, that pending an appeal by the school division, the "current placement" of a child shall be the placement set by the hearing officer. In this instance, the SLRO rendered a decision in favor of Glenn's parents. In so ruling, the SLRO found TNCS to be the appropriate placement for Glenn.

Another area of contention in the case was the question of the affective date of the new regulations and whether or not they applied to this case. In any event, the implementing regulations of IDEA at 34 C.F.R. parts 300 became effective in May of 1999 and applicable to Virginia on July 1, 1999. As a result, these regulations apply conclusively to all matters occurring after July 1, 1999. The SLRO determination here and appeal occurred prior to July 1, 1999.

To support any retroactive application of the new regulations the Commonwealth relies on Landgraf v. USI Film Products, et.al., 511 US 244 (1994). The logic applied in that case to statutory or regulatory application is not convincing. Here the aggrieved conduct is on-going and this decision addresses only the period of time subsequent to a final promulgation and effective date of the regulations, unchallenged by the Commonwealth (See Threshold Issues, supra). Landgraf addresses an attempt to utilize new legal amendments being applied to activities and services which occurred prior to its passage and which are, as such, not modifiable but cast in stone. This is not our case here. Here the concern and overriding consideration is FAPE for the child and compliance with the laws and regulations in the best interest of the child pursuant to a statutory and regulatory scheme designed to remedy historical neglect of the needs of handicapped students. Its intent, in the view of this Hearing Officer, is to be given liberal construction to further those ends. I so hold. "Retroactive provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary". Landgraf, supra, at 267-268.

In Virginia it is a recognized principal that legislation that is remedial or procedural in nature shall be applied retroactively. Commonwealth v. Rafferty, 241 VA 319 (1991). This is so because remedial or procedural laws do not create rights but merely operate in furtherance of already existing rights. See Walker v. Dallas, Inc., 209 VA 32, 35, 161 S.E. 2d722, 724 (1968). It is evident that the stay-put provisions of §300.514 do not provide the parties with any new substantive right but works to underscore an already existing understanding of the term "current placement". As a result, the timing of the SLRO decision and the appeal is unimportant. The IDEA regulations of 1999 apply upon final promulgation.

In any event, this Hearing Officer will not apply the 1999 IDEA regulation to the years prior to its final promulgation date and applicability to Virginia (July 1, 1999). Nor will this Hearing

Officer here usurp the jurisdiction of the Circuit Court of Henrico County in the matters before it. My ruling shall only impact the time frame from applicability of the new regulation to Virginia forward.

Included in this issue is whether or not the SEA is responsible for enforcing the application of 34 C.F.R. §300.514 (c) and related regulations. My conclusion based on federal case law is that they are.

Under IDEA (and its predecessor act) the State Department of Education is the primary agency responsible for the education of children under disabilities. 20 U.S.C. §1412 (a) (11). The federal courts, the experts in the legal interpretation of IDEA, have been addressing State responsibility and liability since 1982. (See Jose P. v. Ambach, et.al., 669 F2d 865 (2nd Cir. 1982); Blazejewski v. Board of Education 560 F Supp. 701 (W.D NY, 1983). In 1985, the United States Supreme Court spoke to the issue in a review of the Burlington case (Town of Burlington v. Department of Education of Massachusetts 136 F 2d 773 (1st Cir 1984). In affirming the First Circuit decision, the Court noted in deciding a placement issue that then regulatory section 34 C.F.R. 1415(r)(3) calls for a agreement by either the SEA or the LEA. Subsequent to Burlington, another federal court in Hawaii addressed a hearing officer's decision would constitute state agreement to a particular placement. Department of Education v. Mr. and Mrs. S 632 F. Supp 1268 (D. Hawaii, 1986). In another case with a related issue the Fourth Circuit hinted at a remedy and a viable claim against the State Department of Education for failure to implement or enforce a due process decision. (See Robinson v. Pinderhughes 810 F 2d 1270 (4th Cir, 1987).

Additional federal cases support the view that the SEA has at least joint responsibility with the LEA for the enforcement of IDEA and its regulations. Clovis United School District v. California Office of Administrative Hearings 903 F 2d 635 (9th Cir, 1990). A Pennsylvania court held that if an LEA is failing to fulfill their mandate under IDEA and state law, the state is required to step in and provide such assistance directly pursuant to 20 U.S.C. 1414 (d). Cordero v. Pennsylvania Department of Education 795 F Supp. 1352 (M.D. PA 1992). In Cordero, the judge spoke to the state's role under IDEA and the state has an overarching responsibility to ensure that the rights created by law are protected without regard to the action of the LEA. NOTE: The SEA is a named defendant in this litigation. In Connecticut a federal judge opined that the SEA should be a party to special education due process hearings noting that ultimately financial responsibility is on the State Board of Education. K.P v. Juzwic, 891 F. Supp. 703 (D. CT 1995).

In a landmark decision, our own Fourth Circuit spoke to the issue of the SEA as a defendant and to its potential liabilities in special education litigation. Gadsby by Gadsby v. Grasmick, 109 F. 3d 940 (4th Cir. 1997). In Gadsby, the Fourth Circuit held that a State Department of Education can be a defendant in a special education case that began with a dispute between the parents and the LEA finding that the state department would be held liable for a private school placement. The Court held that the SEA had ultimate responsibility under 34.C.F.R. 1414 (d) (1) and direct payment of money headed for the LEA would have to be used to pay for services to handicapped persons. Although the SEA's primary responsibility is supervisory, it can not escape ultimate responsibility for the failure to comply with IDEA and its regulations pursuant to

20 U.S.C. § 1412 (6). The Court stated: "Therefore, it seems clear that an SEA may be held responsible if it fails to comply with its duty to assure that IDEA's substantive requirements are implemented". The Court continued... "Our conclusion that an SEA may be held liable under IDEA where the state fails to provide a free appropriate public education to a child with a disability is buttressed by the legislative history of § 1412 (6). This legislative history indicates that § 1412 (6) was included in the statute to "assure a single line of responsibility with regard to the education of handicapped children". Gadsby, 25 IDELR 621 at 628.

As to reimbursement liability, the Fourth Circuit was equally clear: "There is nothing in either the language or the structure of IDEA that limits the districts court's authority to award reimbursement cost against the SEA, the LEA, or both in any particular case. By contrast, both the language and the structure of IDEA suggest that either or both entities may be held liable for the failure to provide a free appropriate public education, as the district court deems appropriate after considering all relevant factors. Gadsby, supra at 629. These pronouncements seem an unusually clear pronouncement by our governing federal circuit court on the issue at hand.

Several other federal courts have rendered similar decisions subsequent to Gadsby and citing Gadsby with approval. (See St. Tammary Parish School Board v. State of Louisiana 142 F.3d 776 (5th Cir. 1998); K.Y. v. Maine Township High School District No 207, 28 IDELR 23 (N.D. IL1998).

Therefore, it appears to this Hearing Officer that the Commonwealth, if it fails to act herein, does so at its own peril. The Fourth Circuit has spoken to the key areas herein clearly. The trend of federal court decisions, IDEA amendments and regulatory actions since 1983 to present support the parents' position in this matter.

2. Henrico County is not a required party herein by virtue of the Fourth Circuit's decision in Gadsby, supra, as the Court made clear that litigation for enforcement of a free appropriate public education may be pursued against the SEA, the LEA, or both. Here the parents have opted to pursue the SEA for enforcement of IDEA and its implementing regulation. I so hold in accordance with Gadsby.

CONCLUSIONS OF LAW

Based on all of the foregoing, I find that:

1. The Hearing Officer herein has jurisdiction of these matters by law or by waiver, and the Commonwealth's motions to stay or terminate these proceedings is denied.

2. The regulation set forth in 34 C.F.R. 514 (c) and related regulations are properly promulgated and apply in Virginia effective July 1, 1999.

3. The decision in Gadsby and related cases is determinative of the rights, remedies and responsibilities of the parties hereto as set forth above in detail and allows the parents to proceed with the procedures and laws applied herein.

4. That by virtue of Gadsby and related cases, the SEA is responsible for supplying a free and appropriate public education to the child.

5. That by virtue of Gadsby and related cases, the SEA is ultimately responsible for the ensurance that IDEA and its related regulations are complied with and enforced.

6. That by virtue of Gadsby and related cases, the SEA may be liable for reimbursement costs to the parents in its own right, in order to comply with IDEA and its related regulations.

7. That the LEA is not a necessary party to this proceeding pursuant to Gadsby and the Commonwealth's motion to include the LEA is denied.

8. That some of the relief requested by the parents is beyond the authority that this Hearing Officer has pursuant to state law and regulation; to wit: a finding that defendants have recklessly disregarded the civil rights of the parents ; that the parents have suffered damages as a result thereof; that the defendants have violated the civil rights of the child and parents; and that the parents are entitled to attorneys fees.

9. That the parents have substantially prevailed herein.

10. That all other motions and requests inconsistent with this decision are denied.

11. That the decision made by the hearing officer is final and binding on all parties herein, unless the party aggrieved by the findings and decision of the hearing officer appeals to the state for administrative review within 30 administrative working days of the date of the hearing decision.

ORDER

Therefore, in light of all of the foregoing, it is hereby ORDERED that the Virginia State Department of Education shall reimburse, or cause to be reimbursed, the parents of Glenn White for the tuition expense (upon the parents presentation of proof of cost) at the New Community School for the school year of 1999-2000 and shall pay, or cause to be paid, the tuition for any future school year that Glenn White attends that school, until such time as the appropriate Virginia or federal court makes a final determination of the rights and responsibilities of the parties in White v. Henrico County Public Schools, currently pending with the Circuit Court of Henrico County, Virginia.

Respectfully submitted,

Raymond E. Davis
Hearing Officer
VSB 05381

February 7, 2000

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed, first class postage prepaid, to the following, this _____ day of February, 2000.

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