IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL "GLENN" WHITE, a minor by and through his parents, and next friends, STEVEN W. WHITE and JANET A. WHITE, Plaintiffs,	)	**COMPLAINT and**
vs.	)	**PETITION**
VIRGINIA BOARD OF EDUCATION; and KIRK A. SCHROEDER, President of the Virginia Board of Education; and JO LYNNE DEMARY, Superintendent, Virginia Department of Education; and JUDITH A. DOUGLAS, Director, Special Programs, Division of Accountability Services, Virginia Department of Education; and H. DOUGLAS COX, Director, Office of Special Education and Student Services, Virginia Department of Education. Defendants.	)	**FOR ATTORNEY'S FEES**
	)	**Case No. _____**

PRELIMINARY STATEMENT

1. On May 30, 1997, Steven and Janet White, parents of Glenn White, requested a special education due process hearing against a public school system, i.e., a Local Education Agency (LEA) on behalf of their son. They were seeking reimbursement for their son's special education at The New Community School. Their request was denied by a special education due process hearing officer. On appeal, a State Level Review Officer (SLRO) heard additional evidence, reversed the decision of the Hearing Officer, and awarded retroactive, present and future tuition reimbursement to the plaintiffs. The LEA refused to implement the ORDER of the SLRO and

noted an appeal in state court. While an appeal is pending, the LEA is required to implement the decision of a SLRO. Since the LEA refused to obey the ORDER of the SLRO, the plaintiffs complained to the Virginia Department of Education and the Virginia Board of Education, a State Education Agency (SEA). The SEA directed the LEA to comply with the ORDER of the SLRO.

2. The LEA refused to obey the ORDER of the SEA.

3. The SEA reversed themselves and did not require the LEA to comply with the ORDER of the SLRO. The SEA is ultimately responsible for implementing the ORDER of the SLRO.

4. The plaintiffs questioned the SEA about the reversal of their earlier position. In violation of law, the SEA refused to provide any explanation.

5. Thereafter, the plaintiffs requested a special education due process hearing against the SEA for their refusal to enforce the ORDER of the SLRO. The plaintiffs sought tuition reimbursement from the SEA and additional monetary damages against the defendants because of their deliberate violation of law and reckless disregard for the rights of the plaintiffs.

6. The Hearing Officer awarded the plaintiffs a portion of the requested relief and found that the parents have substantially prevailed herein. (Exh. A, page 11)

7. This action is a request for an award of compensatory damages and punitive damages against the defendants. It is also a request for an award of interim attorney's fees incurred for the administrative proceeding below, and an award of attorneys fees, with a multiplier, and costs for this action.

JURISDICTION AND VENUE

8. Jurisdiction is conferred upon this Court by 28 U.S. C. § 1331, 1343(3) and (4), 42 U.S.C. § 1983, 42 U.S.C. § 1988, the Individuals with Disabilities Education Act (IDEA), (20

U.S.C. § 1400 *et. seq.*), Section 504 of the Rehabilitation Act of 1973 (42 U.S.C. § 794 *et. seq.*), the Americans with Disabilities Act, (ADA), (42 U.S.C. § 12101 *et. seq.*), and the Due Process and Equal Protection Clauses of the United States Constitution.

9. This Court has pendant jurisdiction to adjudicate any state claims which arise out of the same facts as the federal claims asserted herein.

10. Venue is properly laid in the United States District Court for the Eastern District of Virginia, as authorized by 28 U.S.C. § 1391 and 1392.

PARTIES

11. Michael "Glenn" White is a minor, born on April 20, 1985. He resides with his parents, Steven White and Janet White. They are responsible for his care, custody and control. Glenn and his parents, at all times relating to this matter, have resided in Henrico County, located in the Commonwealth of Virginia. Glenn is a child with a disability who is eligible for and receives services under the Individual with Disabilities Education Act.

12. Glenn White is also a qualified individual with a disability within the meaning of all applicable statutes including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Americans With Disabilities Act, 42 U.S.C. § 12131.

13. Defendant Virginia Board of Education is governed by the laws of the Commonwealth of Virginia, the laws of the United States, and the Constitution of the United States in carrying out these duties and responsibilities. The Virginia Board is responsible for the operation and policies and practices of the Virginia Department of Education, which is a State Education Agency that is a recipient of federal financial assistance for the purposes of the Individuals with Disabilities Education Act.

14. Defendant Virginia Board of Education is ultimately responsible for providing Glenn with a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act.

15. Defendant Kirk A. Schroeder is the President of the Virginia Board of Education. The Board of Education is responsible for the policies and practices of the Virginia Department of Education.

16. Defendant Jo Lynne DeMary is Superintendent of the Virginia Department of Education. She is responsible for the day-to-day supervision of the Virginia Department of Education.

17. Defendant Judith A. Douglas is the Director of Special Programs, Division of Accountability Services. She is responsible for ensuring that LEA's implement and obey decisions of special education hearing officers and review officers.

18. Defendant H. Douglas Cox as Director, Office of Special Education and Student Services, is responsible for implementing the Individuals with Disabilities Education Act special education programs in the Virginia Department of Education.

19. At all times relevant herein, Defendants, individually, separately, and jointly acted under color of state law. Each of the defendants had actual and personal knowledge of the facts of this dispute and the pervasive pattern, practice, and policy that resulted in the Virginia Board of Education and Virginia Department of Education's refusal to obey and enforce the Individuals with Disabilities Education Act.

STATEMENT OF FACTS

20. Fifteen year old Glenn White has been enrolled in The New Community School (TNCS) since the sixth grade. He is now entering the tenth grade for the 2000 - 2001 school year

at TNCS. Before entering TNCS, Glenn attended Henrico County Public Schools for six years, from Kindergarten through Fifth Grade.

21. When Glenn was in the First Grade, he received individualized special education testing. Based on these results, he was found eligible for special education under the predecessor to the Individuals with Disabilities Education Act (IDEA) and began receiving remedial special education services in 1991.

22. In March, 1994, Glenn was retested. Although he was receiving special education in his areas of a reading deficit, he had regressed significantly. His Letter Word Identification Reading Subtest Score dropped from the 13th to the 5th percentile, yet Glenn scored at the 98th and 99th percentile levels in Broad Mathematics and Social Studies.

23. In the Spring of 1996, as Glenn completed Fifth Grade, his parents were alarmed by his inability to read, write or spell. They observed that their son's reading and writing skills were "non existent." Glenn was unable to read simple traffic signs such as "No Left Turn," or "Stop."

24. Testing at that time showed that Glenn's reading and spelling skills had fallen even lower, to the 1st percentile level. After five years of special education, Glenn could not read or write. The program he received was not appropriate and caused regression and damage to Glenn.

25. In September, 1996, Glenn's parents enrolled him into TNCS, a private school that provides intensive educational remediation for bright children who have dyslexia.

26. On May 30, 1997, pursuant to the IDEA, Glenn's parents sought reimbursement from Henrico County Public Schools for their son's education at TNCS. By a letter requesting a due process hearing, they sought reimbursement for the tuition.

27. On June 12, 1997, the Individuals with Disabilities Education Act was re-authorized and amended.

28. On October 22, 1997, the U. S. Department of Education published the new proposed special education regulations in the Federal Registrar. These proposed regulations tracked existing caselaw. Specifically, 34 C.F.R. § 300.514(c) stated that:

> If the decision of a hearing officer in a due process hearing or a 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. (Authority: 20 U.S.C. 1415(j))

29. On November 18, 1997, the evidentiary portion of the Glenn's special education due process hearing was concluded.

30. On April 15, 1998, the special education hearing officer issued his decision. Although he found that many of the factual allegations raised by the parents were correct, he failed to award tuition reimbursement to the plaintiffs.

31. The case was appealed to a State Level Review Officer (SLRO).

32. On July 10, 1998, the State Level Review Officer issued his Decision and ORDER (Exh. B). He found that:

> The child herein, Michael Glenn White, was born April 20, 1985 and is presently a young man of the age of thirteen years who has been receiving Special Education for the past six years (kindergarten through the Fifth Grade). He is not retarded. He has an average IQ and his reasoning skills are significantly above average. Glenn, as he is known, also has dyslexia. (Page 4)
>
> . . .
>
> The facts here are and were not in dispute, that Michael Glenn White has been receiving Special Education from the Henrico County Public Schools for the first through the fifth grades. Notwithstanding that his education through the fifth grade had been and was then governed by an (IEP) calling for Glenn to receive individualized intense remediation to teach him basic reading skills, he was, without the consent of his parents or any modification of his IEP, 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 in

> a so called "Collaborative" program in which a special education teacher merely collaborated with his regular education classroom teacher. (Page 5)
>
> . . .
>
> The Henrico County Public Schools has failed to provide for a Free Appropriate Public Education of Michael Glenn White for the school year 1996-1997. The education offered for Michael Glenn White for 1996-1997 was inappropriate. The IEP for Michael Glenn White for the 1996-1997 school year was invalid and did not provide for a free appropriate public education. The IEP for Michael Glenn White for the 1997-1998 school year was invalid and did not provide for a free appropriate public education. Therefore, Michael Glenn White is entitled to reimbursement for tuition and costs attendant to his enrollment at New Community School for the year 1996-97 as a result of the inappropriateness of the education by Henrico County Public Schools that year and for the year l997-98 and in the future for the invalidity of the 1997-98 IEP and the failure of the Henrico County Public Schools to provide for Free Appropriate Public Education for Michael Glenn White then as well as its inability to do so in the future. (Page 10-11)

33. In violation of existing caselaw and proposed regulatory law, the LEA school district refused to implement the decision of the SLRO.

34. On August 10, 1998, the LEA advised the Virginia Department of Education that they would not implement the decision of the SLRO because they filed an appeal with the Circuit Court of Henrico County, Virginia on that same day.

35. The State Department of Education and the Virginia Board of Education have never required a school district (LEA) to implement a decision of a Review Officer if a school district indicates an intent to appeal. The defendant did not require the LEA to implement the decision of the SLRO.

36. On March 12, 2000, the U. S. Department of Education published the final special education regulations pursuant to the June, 1997 amended Individuals with Disabilities Education Act.

37. In 34 C.F.R. § 300.514(c), the adopted regulation (Exh. C) states that:

> Child's status during proceedings.
>
> (c) If the decision of a 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.

38. The U. S. Department of Education's commentary and explanation (Exh. D) to Regulation § 300.514(c) of the special education regulations in the Federal Register at page 12615 (Vol. 64, No. 48 of the March 12, 1999 issue) states:

> Paragraph (c) is based on **longstanding judicial interpretation** of the Act's pendency provision that when a State hearing officer's or State review official's decision is in agreement with parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposed of determining the child's current placement **during subsequent appeals**. See *e.g., Burlington School Committee v. Dept. of Educ*. 471 U.S. 359, 371 (1985) *Susquenita School District v. Raelee S*., 96 F.3d 78, 84 (3rd Cir. 12996); *Clovis Unified v. Office of Administrative Hearing*, 903 F.2d 635, 641 (9th Cur, 1990). Paragraph (c) of this section incorporates this interpretation. However, this provision does not limit either party's right to seek appropriate judicial review under 300.512, it only shifts responsibility for maintaining the parent's proposed placement to the public agency **while an appeal** is pending in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is appropriate. (Emphasis added.)

39. On May 25, 1999, Mr. and Mrs. White wrote to the Virginia Board of Education and the Virginia Department of Education, (Exh. E) and advised that:

> We are now 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 1998-99 school year. This meant that we again had to pay tuition and additional attorney fees . . . We make an average income and find that we are unable to continue to pay these expenses . . . (Page 2)

> We have been so financially burdened that we have even sold the piano that my great-grandmother and great-grandfather gave me when I was eight. We are in such financial trouble now that we are worried we will never get financially sound again. Our mortgage payments are behind, we cannot make our payments to our attorney or the hospitals and this will affect our credit rating for years if not forever. We feel the legal system has failed us and Glenn. We were entitled to reimbursement and thought that we would get some relief last summer when the State Level Review Officer made his decision. It has now been nine months and Henrico County has done nothing but appeal the decision. They have not paid what they were ordered to pay. We do not have any resources left and are not sure how we will make any additional tuition payments. We are unable to pay for the additional attorney fees that result from Henrico County's noncompliance of the

decision and that of the Federal Regulations. In addition we are at risk of losing our home if we do not get some immediate relief. (Page 3)

40. On August 9, 1999, in accordance with 34 C.F.R. § 300.514(c) Brenda Briggs of the Virginia Department of Education issued a comprehensive, well reasoned directive to the LEA. (Exh. F) She directed the school district to "Submit payment to the private placement in accordance with the review officer's decision, thereby providing for Michael's (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." (Exh. F, page 8)

41. This letter was the first time in the history of special education law, practice and procedure in Virginia that the Virginia Department of Education ordered a school district to implement the decision of a SLRO.

42. The Order from the SEA included the following statements:

A summary of our office's analysis of the issues concludes that:

That the stay-put provision outlined in Section 1415(j) of the IDEA Amendment of 1997 and 34 C.F.R. § 300.514 applies in this case.

That the stay put provision requires Michael to remain in his current placement pending the appeal by HCPS.

That Michael's current placement is The New Community School.

That HCPS is responsible for maintaining Michael's placement at The New Community School.

That HCPS is responsible for Michael's tuition during the pendency of their appeal which shall include reimbursement for the 1998-1999 school year. (Page 7)

43. The LEA refused to obey this Order.

44. On November 15, 1999, the SEA re-affirmed the position taken in their August 9, 1999 letter.

45. Less than three weeks later, the Superintendent of Public Instruction resigned. Jo Lynne DeMary, a former Henrico County Public Schools educator, was appointed Acting Superintendent. Later, Dr. DeMary was appointed Superintendent.

46. On December 2, 1999, Judith A. Douglas, on behalf of the Virginia Department of Education and Virginia Board of Education, issued a letter reversing the agency's August 9, 1999 ORDER. (Exh. G)

47. On December 2, 1999 the defendants returned to their pattern and practice of refusing to require school districts, (i.e., local education agencies, LEA's) to implement adverse decisions and ORDERS of SLRO's.

48. The LEA, Henrico County Public Schools, was not required to obey the ORDER of the SLRO.

49. The defendants offered no explanation for their abrupt reversal.

50. Janet White contacted Judith Douglas to ask why the Department had reversed themselves, i.e., had returned to their former practices and policy in direct violation of 34 C.F.R. § 300.514(c). Ms. White received no explanation for the Department's abrupt reversal.

51. The Individuals with Disabilities Education Act requires that the Virginia Department of Education provide written notice whenever such agency "refuses to initiate or change; the . . . educational placement of the child, in accordance with subsection (c) or the provision of a free appropriate public education to the child. The content of such notice shall include an explanation of why the agency proposes or refuses to take the action; other options that were considered, and the reasons why those options were rejected. [20 U.S.C. § 1415(b)(3) and § 1415(c)] The defendants have refused to provide this written notice.

52. The Virginia Board and Department of Education and the individual defendants were ultimately responsible for implementing the state Review Officer's ORDER, but refused to implement the ORDER.

53. The defendant, H. Douglas Cox, is responsible for supervising and administering the Individuals with Disabilities Education Act in Virginia. Dr. Cox refused to implement the decision of the SLRO or cause the Virginia Department of Education to pay Glenn's tuition to TNCS.

54. On December 18, 1999, the plaintiffs, though their counsel, (Exh. H) requested a special education due process hearing against the Virginia Board of Education and the Virginia Department of Education because of their refusal and violation of 34 C.F.R. § 300.514(c).

55. Briefs were ordered by special education due process hearing officer Raymond E. Davis.

56. On January 17, 2000, oral argument was held. The defendants argued that Virginia is a Commonwealth and, unlike individual States, a "Commonwealth" does not have authority over local school districts. The defendants asserted that:

> The Virginia constitution vests primary authority for education in local school boards.
> . . .
> But in Virginia, by the constitution, Article 8 of the constitution, the authority for running the local public schools and providing a free education is the responsibility of the local school divisions. Excuse me. (Exh. I, transcript of January 17, 2000 Oral Argument, page 50)

57. The defendants also argued that the established caselaw and regulation were invalid.

> . . . I submit that the new federal regulation (34 C.F.R. § 300.514) exceeds the statutory authority granted to the United States Department of Education under the IDEA.
> . . .
> U. S. Department of Education's promulgation of Section 300.514(c) exceeded the statutory authority by providing an alternative process by which to establish a stay-put placement that is not found in the IDEA and contradicts the governing statute. Therefore,

> the regulation should not be applied to this case and the parents' request for funding of the stay-put placement should be denied. (Exh. I, pages 50-52)

58. The defendants also asserted that the Hearing Officer did not have jurisdiction to hear the case and that the plaintiffs sole remedy was to file a complaint against the Virginia Department of Education with the U. S. Department of Education. (Exh. I, page 45)

59. On January 17, 2000, after the oral argument, plaintiff's counsel telephoned Rhoda Weiss, Policy Analyst at the U. S. Department of Education and discussed with her Virginia's argument that, as a "Commonwealth" they could not enforce a regulation that was illegally promulgated by the U. S. Department of Education. She requested a copy of the transcript and pleadings by Express Mail.

60. Also on January 17, 2000, the day of the oral argument, the Virginia Department of Education issued Virginia's new proposed special education regulations. The regulations included identical language as the Section 514(c) regulation that the "Commonwealth" argued "contradicts the governing statute."

61. On January 25, 2000 the National Council of Disability published the IDEA Compliance Report, entitled "Back to School on Civil Rights." The National Council on Disability is an independent federal agency. (29 U.S.C. § 780) (Portions of the Report, Exh. J) It reported that:

> Almost a quarter of a century following passage of the Individuals with Disabilities Act (IDEA), students with disabilities and their families still commonly face obstacles to securing the free appropriate education (FAPE) that the law promises. The impact of noncompliance with IDEA is difficult to overestimate . . . The stress of working with a recalcitrant school system that [does] not want to work with a parent to educate a disabled child can be tremendous." (Exh. J, page 57)
>
> Parents have a reasonable expectation that the federal and state agencies charged with monitoring and enforcement will do their jobs. (Page 60)

> As a result of 25 years of non-enforcement by the Federal Government, parents are still a main enforcement vehicle for ensuring compliance with IDEA." (Finding #II.1B) (Page 70)

62. The National Council on Disability reported that the Commonwealth of Virginia was "Noncompliant" in monitoring local education agencies. Of thirty-three subcategories assessed, Virginia was "Compliant" in only three categories. (Exh. J, page 327)

63. The Council recommended that:

> The Department of Justice should exercise greater leadership in IDEA enforcement by initiating litigation against noncompliant states, publicizing its actions, and collaborating with stakeholders on their legal stance and its implications. The Department of Justice should take the initiative to identify key cases involving noncompliance with important provisions of IDEA, such as LRE, and aggressively litigate to put noncompliant states on notice that the law is now being enforced. In doing so, DOJ should actively seek the input of key stakeholders on their legal positions vis-a-vis these cases and the policy implications. (page 202)

64. On February 4, 2000, after the oral argument was received, the transcript and pleadings and complaint letter were express mailed to Rhonda Weiss at the U. S. Department of Education. The complaint letter was subsequently filed with the U. S. Department of Education against the Virginia Department of Education. (Exh. K)

65. In the complaint letter, plaintiff's counsel advised the U.S. Department of Education that:

> VADOE (Virginia Department of Education) is responsible for ensuring that LEAs comply with the law. Henrico County Public Schools has refused to comply with the Review Officer's decision **and** refused to comply with VADOE's August 19, 1999 Order. Henrico will not comply with the law unless or until there are **clear and certain consequences for their failure to comply** with the law. VADOE has imposed no clear and certain consequences on Henrico for their ongoing, persistent failure to comply with the law.
>
> The U. S. Department of Education is responsible for ensuring that VADOE enforces the law. VADOE will not enforce the law unless or until there are **clear and certain consequences** for their ongoing, persistent failure to correct noncompliance and enforce the law.

The Individuals with Disabilities Act explicitly authorizes the Department of Education to refer non-compliant states to the U. S. Department of Justice. 20 U.S.C. § 1416(b).

As a remedy, we respectfully request that the U. S. Department of Education immediately refer this case to the U. S. Department of Justice so they can investigate and enforce the Individuals with Disabilities Act.

66. On February 7, 2000 special education hearing officer Raymond E. Davis issued his ruling in favor of the plaintiffs. (Exh. A) In his decision he found that:

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. (Page 5)

67. The Hearing Officer discussed the stay put rule of 34 C.F.R. § 300.514(c):

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); Susquenita School District V. Raelee 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(e)(3). (Page 7)

68. The Hearing Officer explained that a State Education Agency can be a sole defendant in a special education due process hearing:

> 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. (Page 9-10)
>
> 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. (Page 10)

69. The plaintiffs had asked the Hearing Officer to find that, because the State had recklessly disregarded and violated the civil rights of the parties, they were entitled to an award of damages. The Hearing Officer responded that:

> 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. (Page 10)

70. The Hearing Officer held that "the parents have substantially prevailed herein" and, in his closing paragraph stated:

> 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. (Page 11)

71. On February 24, 2000, plaintiff's counsel telephoned the U. S. Department of Education to advise them that the Hearing Officer had ruled in favor of the parents and to inquire about the status of the February 4, 2000 complaint letter. The Department had not looked at the February 4 letter, transcript and attachments.

72. On February 25, 2000, the Office of General Counsel of the U. S. Department of Education telephoned plaintiff's counsel in regard to the February 24 telephone call. A letter (Exh. L) sent by plaintiff's counsel to the Office of General Counsel stated that:

> I appreciated your telephone call this morning in response to my telephone discussion yesterday with Rhonda Weiss.
>
> . . .
>
> Per her instructions, I sent my February 4 letter and enclosures directly to Rhonda by Express Mail. I was disappointed to learn that she had not found time to read my letter, especially since I had explained that strict timelines govern ongoing cases.
>
> Yesterday, I advised Rhonda that this case is destined for Federal Court. The Virginia Department of Education will be one party. If the U. S. Department of Education persists in refusing to enforce the law, then the Department can also expect to become a party. Apparently, my statement to this effect triggered your call to me.
>
> As you are aware, I talked to Rhonda about these issues during the first week of February. I told her about the Virginia Department of Education's policy and practice of refusing to require the implementation of a decision of a Review Officer if the school district expresses an intent to appeal.

73. The letter from plaintiff's counsel to counsel for the Department of Education closed with the statement that:

> During yesterday's telephone call, after realizing that nothing had happened nor was anything slated to happen, I conveyed to her, as I did to you today, that the U. S.

> Department of Education can be with us or against us. The Department's refusal to enforce the law places them against us.
>
> Given the ongoing, continuing scenario of "25 years of non-enforcement by the Federal Government," (NCD Report) I expect to join the U. S. Department of Education with the Virginia Department and Board of Education (as co-defendants.)
>
> Private citizens should not have to sue their government to force the government to do what the law requires. When the federal government refuses to require states to obey the law, it should come as no surprise when states refuse to require local school districts to obey the law.

74. On that day, by separate telephonic and written communication, plaintiff's counsel made an independent referral to the U. S. Department of Justice.

75. On March 22, 2000, the plaintiffs, Steven White and Jan White hand delivered a letter to the offices of defendants Schroeder and DeMary. (Exh. M) The thirty day administrative timeline for the defendants to appeal the Hearing Officer's decision had passed. The plaintiffs made this request:

> Please make arrangements to pay the amount due of $l5,200 immediately to The New Community School. The Order to pay was issued a month and a half ago.
>
> Henrico County had refused to obey the earlier Order of the State Level Review Officer and refused to obey your August 9,1999 Order.
>
> We assume that the State Department of Education and State Board of Education will not refuse to obey an Order of a state Hearing Officer.

76. The pending complaint letters (Exh. K and L) to the U. S. Department of Education were eliciting some action. The U. S. Department of Education staff had verbal discussions with Virginia Department of Education staff. On March 27, 2000, the U. S. Department of Education wrote a letter to the Virginia Department of Education (Exh. N) which stated that:

> It has recently come to our attention that counsel for the Virginia Department of Education (VDOE) on January 17, 2000 argued in an administrative hearing in a case entitled "Michael 'Glenn' White v. Virginia Department of Education," that the IDEA

> regulatory provision in 34 CFR § 300.514(c) exceeds and contradicts the statutory authority. . . It is our understanding that in this case the VDOE now is refusing to comply with this regulation. (Page 1)
>
> . . . (W)e believe that 34 C.F.R. § 300.514(c) is a valid, appropriate exercise of the Department's regulatory authority, and that the regulation was legally promulgated. As such, compliance with this regulation is required of all States that participate in Part B of the IDEA. I ask you please to clarify VDOE's position so that we will know how to proceed. If VDOE will not comply with 34 C.F.R. § 300.514(c), we will have no choice but to institute appropriate enforcement action, which may include a referral to the U. S. Department of Justice to initiate a lawsuit against the State. (Page 2)

77. On April 3, 2000, the defendants complied with Hearing Officer Davis's ORDER of February 7, 2000 and paid Glenn White's tuition to The New Community School for the 1999-2000 school year.

78. On April 20, 2000, the Virginia Department of Education faxed an April 12, 2000 letter to the U. S. Department of Education affirming that they had paid Glenn's tuition. (Exh. O)

79. On May 24, 2000, a copy of the Virginia Department of Education's letter to the U. S. Department of Education was furnished to counsel for the plaintiffs.

80. Whether the federal regulation is valid and whether the defendants will enforce that regulation in the future no longer appears to be an issue. The defendants, by their actions, appear to concede that the regulation [34 C.F.R. § 300.514(c)] is valid and will be enforced by the "Commonwealth."

81. Three issues remain for resolution by this Court: interim attorneys fees; damages; and a final award of attorneys fees.

COUNT ONE - ATTORNEYS FEES PURSUANT TO IDEA

82. In order to force the defendants to comply with the Individuals with Disabilities Education Act, the parents had to retain an attorney.

83. In their efforts to force the defendants to comply with the law, the plaintiffs have incurred attorneys fees in the amount of $13,419.00 (Exh. P).

84. The plaintiffs substantially prevailed in the special education due process proceeding and received an enforceable order and award from the hearing officer.

85. The plaintiffs have exhausted their administrative remedies.

86. The Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(3) authorizes an award of attorneys fees, without a multiplier.

RELIEF - COUNT ONE

87. **WHEREFORE** the plaintiffs request an award of $13,419.00 attorneys fees and costs.

COUNT TWO
DAMAGES

88. Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 87 as if fully set forth herein.

89. One primary purpose of the Individuals with Disabilities Education Act is "to ensure that the rights of children with disabilities and parents of such children are protected; . . ." [20 U.S.C. § 1400(d)(1)(B)] To receive federal funds, states must assure that they provide a free appropriate public education to all handicapped students within the state. 20 U.S.C. §1412.

90. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504), and the regulations promulgated thereunder, 34 C.F.R. Part 104, prohibit discrimination against persons with disabilities. Section 504 prohibits the exclusion from the participation in, or being denied the benefits of, or being subjected to discrimination under any program or activity receiving Federal financial assistance.

91. Title II of the ADA, 42 U.S.C. § 12131 et. seq. and the regulations promulgated thereunder, 28 C.F.R. Part 35, governing state and local governmental entities, protects persons from discrimination on the basis of disability by public entities. The ADA prohibits the exclusion from participation in, or being denied the benefits of the services, programs, or activities of the public entity, or being subjected to discrimination by such entity.

92. Each of these defendants have violated plaintiff's rights under Section 504 of the Rehabilitation Act and the ADA and the regulations promulgated thereunder by denying plaintiff the benefits of the services, programs, and activities to which he is otherwise entitled from the local education agency and the state education agency.

93. The actions of defendants, as described above, were deliberate, intentional, and embarked upon with the knowledge of, or conscious disregard of, the harm that would be inflicted on the plaintiffs. As a result of said intentional conduct, plaintiffs are entitled to punitive damages in an amount sufficient to punish defendants and to deter others from like conduct.

94. In the Fourth Circuit, damages for educational malpractice are not normally available as a private cause of action under the Individuals with Disabilities Education Act.

95. Damages may be available if the plaintiffs have either been "subjected to discrimination" or excluded from a program or denied benefits "solely by reason of" their disability."

96. These plaintiffs, a child a with a disability and the parents of a child with a disability, were subjected to purposeful discrimination by exclusion from the education mandated by the Hearing Officer. They were deliberately denied the benefits of his ORDER. Said denial and exclusion were based upon bad faith in the selective application of IDEA and gross misjudgment in the failure to enforce the law.

97. The defendants, under color of statute, ordinance, regulation, custom, or usage, subjected plaintiffs to the deprivation of rights, privileges, or immunities secured by the Constitution and laws.

98. The plaintiffs had a clearly established right to expect that the defendants would require the local education agency to comply with and implement the ORDER of the SLRO, or, in the alternative, that the defendants would implement said ORDER and provide the required relief. These were clearly established rights of which the defendants were familiar and deliberately violated. The defendants had personal notice of the facts and Exhibit E and Exhibit H were personally delivered to and / or read by each defendant. The deliberate and purposeful violation of known rights is a waiver of any potential or implied "qualified immunity."

99. The parents have sustained additional damages occasioned by the Virginia Department of Education's failure to enforce the Order of the Review Officer since July, 1998.

100. The refusal to enforce an Order of a state level Review Officer was done in a deliberate and reckless disregard for the rights of the plaintiffs, justifying an award of punitive damages against the defendants.

101. An award of punitive damages is necessary to deter future misconduct and willful and deliberate disobedience of the law.

RELIEF - COUNT TWO

102. **WHEREFORE**, the plaintiffs request that this Court, after hearing argument as to the availability and extent of permissible damages, and, after receiving evidence, assess both compensatory and punitive damages against the defendants, individually, jointly, and severally as the Court may determine appropriate.

COUNT THREE
ATTORNEY'S FEES: MULTIPLIER

103. Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 102 as if fully set forth herein.

104. Prior to this special education proceeding, the defendants had never implemented or required that an LEA implement a decision of a special education Review Officer if the school district expressed an intent to appeal an adverse decision. On information and belief, no other State has adopted such a policy and practice.

105. On information and belief, the Virginia Department and Virginia Board of Education did not intend to obey and implement the decision of Hearing Officer Raymond E. Davis.

106. The threat of intervention by the United States Department of Justice and the United States Department of Education coupled with the ORDER of Hearing Officer Davis, caused the defendants to reverse a twenty-five year pattern, policy and practice of refusing to require school districts to comply with adverse decisions.

107. The plaintiff's are entitled to an award of their attorneys fees and costs.

108. A multiplier to the award of attorneys fees is appropriate.

RELIEF - COUNT THREE

109. **WHEREFORE**, the plaintiffs, by counsel request that, at the conclusion of this case and damage proceedings, that an additional award of attorney's fees, with a multiplier, be granted.

MICHAEL "GLENN" WHITE, et. al.
By Counsel

_____p.q.
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June 20, 2000

CERTIFICATE

I, Peter W. D. Wright, hereby certify that I mailed a copy of this complaint (without attached exhibits) to Joan Murphy, counsel for the Virginia Board of Education, on this 20th day of June, 2000.

_____
Peter W. D. Wright