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December 18, 1999

Dr. Jo Lynne DeMary, Acting Superintendent
Virginia Department of Education
P. O. Box 2120
Richmond, Virginia 23218

Kirk Schroder, President
Virginia Board of Education
707 East Main Street
Richmond, Virginia 23219

**Re: Michael "Glenn" White
v.
Virginia Department of Education
and
Virginia Board of Education**

Dear Dr. DeMary and Mr. Schroder:

This is a request for a special education due process hearing against the Department of Education and Board of Education of the Commonwealth of Virginia.

Please TAKE NOTICE that strict timelines exist. It is your responsibility to appoint a special education due process hearing officer within five days and to ensure that a Final Decision is issued within forty-five days.

The basis for this request for a Due Process Hearing is as follows:

**May 30, 1997
Parents Request Due Process Against Henrico County**

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, Michael "Glenn" White. They were seeking reimbursement for their son's education at The New Community School.

In the letter,¹ counsel for the Whites advised:

¹ Attached as Exhibit A

Glenn is a twelve year old boy who has been enrolled in the Sixth Grade at The New Community School during this past academic year. Before entering The New Community School, Glenn attended Henrico County Public Schools for six years, from Kindergarten through Fifth Grade.

Glenn was identified very early as a youngster who had significant speech language problems. As you know, speech-language problems signal that the child is at risk for learning disabilities. As Glenn continued in school, it was clear that he was far below the average youngster in the acquisition of reading and writing skills. Glenn began receiving special education services in 1991, when he was in First Grade.

In March, 1994, Glenn was retested. Despite the fact that he was receiving special education in his areas of deficit, he had regressed significantly in areas where we have reported scores. . . .

Between 1991 and 1994, in the areas of Reading and Written Language, Glenn's scores declined steadily. For example his Letter Word Identification Score dropped from the 13th to the 5th percentile (SS = 76). Yet, Glenn also scored at the 99th+ percentile level in Social Studies (SS = 139) and at the 98th percentile level in Broad Mathematics (SS = 131), and Mathematics Reasoning (SS = 132). In these areas, he functioned at the "very superior" level. Thus, by 1994, Glenn's scores ranged from the "very superior" or "superior" levels in Math, Science and Social Studies to "low" or "low average" in Reading and Written Language.

By Spring, 1996, when Glenn finishing Fifth Grade, his parents were alarmed at his inability to read, write or spell. They observed that their son's reading and writing skills were "non existent." These parents based their analysis on facts like Glenn could not read simple traffic signs -- like "No Left Turn," or "Stop".

The last IEP developed for Glenn by Henrico County Public Schools included three annual goals: to "improve overall Reading skills," "improve overall Written Language skills," and "to improve overall work habits." Glenn's progress toward these goals would be evaluated by "daily work," "quizzes," and "teacher observation." This IEP did not include any means to objectively measure Glenn's progress or lack of progress. Next to the Short Term Objectives, statements like the following were written: "improvement noted," "big improvement noted" "really trying" "doing great," or "doing better."

. . .

In the Spring of 1996, Glenn was tested at The New Community School. This objective testing showed that his reading and spelling skills had fallen even lower, to the 1st percentile level. His reading comprehension and phonetic analysis were at the 4th percentile level. On other tests, his spelling and sight reading skills were measured at the 2nd percentile level. Unfortunately for Glenn, this testing showed that his parents' dismal assessment of his reading and language skills was accurate. He was not "making progress." After five years of special education, Glenn could not read or write.

. . .

In Dictation, he was functioning at the 2.0 grade level (SS = 62). In Broad Reading he was at the 2.7 grade level (SS = 70). In Broad Written Language, he was functioning at the 2.3 grade level (SS = 61). At this time, Glenn had attended Henrico Public Schools for six years and received special education for five years. During these years, he had not acquired even the most rudimentary skills in reading, spelling or written language. Glenn's failure to acquire these basic skills was not due to any lack of ability.

A special education hearing officer found that many of the factual allegations were correct, but failed to award tuition reimbursement to the Whites. The case was appealed to a state level Review Officer.

July 10, 1998
ORDER - by State Level Review Officer
Parents and Child Prevail

On July 10, 1998 state level Review Officer Frazier found² 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.

...

It is notable, that the results of this change in placement were described by direct testimony of Glenn's former teacher, Mrs. Batalio in her testimony before the Hearing Officer, apparently without impacting his decision. "I increased Glenn's time because I knew that Glenn needed a little extra before he was ready to go to middle school, and I wanted to make sure he got that," and in response to the question "Why . . ." she added "Because he was not reading (emphasis added) and not making the progress with the amount of time on his two-hour IEP, and I felt that if gave him that extra time and worked with him and went that extra mile for him that he would be able to learn more and make more progress prior to getting to the end of the year in June and then starting into middle school for the next year (Transcript of the Due Process Hearing before the Hearing Officer below, at page 236). . . Clearly the unilateral program change by the principal without resort to the IEP or the IEP committee, and clearly without the parents consent constituted a major change of placement and in an inappropriate manner and more than just a technical violation of the IEP, and was in clear violation of IDEA.

The Due Process Hearing Officer clearly evinced an awareness that Henrico County Public Schools had failed in its IDEA requirement to provide Michael Glenn White with a Free Appropriate Public Education and recognized that notwithstanding the credibility of the Henrico County Public Schools' witnesses, the Henrico County Public Schools had failed to provide Michael Glenn White with a Free Appropriate Public Education. This became more evident with the June 1996 IEP and was significantly compounded by the principal's unilateral change of Michael Glenn White's placement by her unilateral action in removing him from a Resource setting and into a Collaborative setting. . . (Review Officer Decision, page 5-7)

...

In his conclusion, the State Level Review Officer reported that:

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

² Attached as Exhibit B

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 1997-98 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. (Review Officer Decision, page 10-11)

After the Review Officer issued his decision, Henrico appealed to the Circuit Court of Henrico County.³ Henrico County Public Schools refused 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 and yet took no action against the County.

May 25, 1999
ORDER Not Implemented, Parents Ask State for Help

On May 25, 1999, Mr. and Mrs. White wrote to you, Mr. Schroder, and to Dr. Stapleton, former Superintendent of the Virginia Department of Education, and advised⁴ 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 . . .

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.

August 9, 1999
State Orders Henrico to Comply with the Law
and with
Review Order

Approximately two and a half months later, 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 Michael'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"

³ The case is presently in the briefing stage and the appeal process will probably take several years.

⁴ Attached as Exhibit C

and to provide documentation “which verifies payment in accordance with the reviewing officer’s order.”⁵

This letter from the Virginia Department of Education provides an overview of the facts in this case. The letter also includes a comprehensive discussion of the law that requires immediate implementation of the Review Officer’s Order that was issued nearly one and a half years earlier:

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

1. That the stay-put provision outlined in Section 1214(j) of the IDEA Amendment of 1997 and 34 C.F.R. § 300.514 applies in this case.
2. That the stay put provision requires Michael to remain in his current placement pending the appeal by HCPSA.
3. That Michael’s current placement is The New Community School.
4. That HCPS is responsible for maintaining Michael’s placement at The New Community School.
5. That HCPS is responsible for Michael’s tuition during the pendency of their appeal which shall include reimbursement for the 1998-1999 school year.

Previously, when local school districts appealed decisions of state level Review Officers, the Virginia Department of Education refused to require school districts to comply with the Orders of their Review Officers. That position was contrary to established case law and offered parents and child a hollow victory that was often accompanied by financial ruin.

In the past, the Virginia Department of Education has consistently failed to support parents when local school districts violated the law. When the Department of Education determined that a local school district violated the law, the Department of Education would advise the school district not to violate the law again, but failed to offer or ensure that the parents and child received relief. Virginia’s policy has been to provide assistance to localities in regard to the implementation of IDEA, but not to accept responsibility for the implementation and enforcement of IDEA.

After the Individuals with Disabilities Education Act was amended in 1997 and the Fourth Circuit issued the decision in *Grasmick*, it became clear that the Virginia Department of Education is responsible for supervising local school districts and ensuring that they comply with the law.

For these reasons, the Department’s August 9, 1999 letter was a refreshing change from past practices. According to this letter, the state Department of Education would obey the law and would require the local school district to obey the law.

⁵ Attached as Exhibit D

Glenn's parents were ecstatic when the Virginia Department of Education told Henrico County to obey the law.

Henrico County refused to obey the law and continued to file letters and objections. On November 15, 1999, your Department re-asserted your position as stated in your August 9, 1999 letter.

In early December, Superintendent Paul Stapleton resigned "effective immediately." Dr. Jo Lynne DeMary, a former Henrico County school administrator, was appointed Acting Superintendent of the Virginia Department of Education.

On December 2, 1999, the Virginia Department of Education suddenly reversed their position, saying that the "Department of Education will defer to the decision of the Court." The Department offered no explanation for this sudden reversal.

Mrs. White contacted the Virginia Department of Education and asked why the Department abandoned their position. She did not receive any explanation for the Department's sudden reversal.

Glenn's "current educational placement" and financial responsibility for his tuition is not related to any "decision of the Court." Because Henrico defaulted and refuses to obey the law, the state Department of Education is responsible for implementing the state Review Officer's Order.

At some point in the future, the Henrico County Circuit Court will rule on Henrico's appeal. The decision of the Circuit Court is expected to be appealed. Assuming we prevail, we are entitled to reimbursement from your department, the ultimate agency in charge. Henrico will appeal the Circuit Court's ruling. Assuming Henrico prevails, we will appeal. Your agency remains responsible for Glenn's tuition. The law is clear about your responsibility.

As relief in this case, we will request that the hearing officer award Glenn's parents the tuition (approximately \$55,000.00) that was awarded by the Review Officer on July 10, 1998, and interest on the award from the date of the Review Officer's decision. The parents have sustained additional damages occasioned by the Virginia Department of Education's failure to enforce the Order of the Review Officer so we will seek additional monetary damages against the Virginia Department and Board of Education and / or specific individuals employed by the Board and Department. Furthermore, because of the deliberate and reckless disregard for the rights of the Whites and deliberate violation of law, we will also seek an award of punitive damages against the Virginia Department and Board of Education and / or specific individuals. We also seek an award of attorney's fees. We will ask that an Order be entered requiring the Virginia Department of Education and the Virginia Board of Education to comply with "Section 1214(j) of the IDEA Amendment of 1997 and 34 C.F.R. § 300.514."

To expedite the process of this special education due process hearing, please be advised that witnesses we may call are as follows:

1. Parents and child
2. Jo Lynne DeMary
3. Richard Layman
4. Thomas Short
5. Brenda Briggs
6. Judy Douglas
7. Any witnesses on the Virginia Department of Education's list of possible witnesses.

Exhibits that we will use are the attachments to this letter.

I request that you advise me immediately of the name of the due process hearing officer and that you provide the hearing officer with a copy of this letter and attachments so the issues in this case are clear.

If you have any questions, please advise. Thanks.

Sincerely,

Peter W. D. Wright

Enc.

cc: Mr. and Mrs. White
Dr. Judy Douglas