

VCASE 2007 SPECIAL EDUCATION LAW UPDATE

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I. AUTISM/PRIVATE PLACEMENT CASES

County School Board of Henrico County, Virginia, v. R.T., 433 F. Supp.2d 657 (E.D. Va. 2006) and 433 F. Supp. 692 (2006).

History of Case: R.T. is a student with autism and is approximately nine years of age currently. The student was educated in a preschool program in Henrico but the mother was not satisfied with the student's progress. The mother asked that the student transfer to a program for children with autism at Twin Hickory Elementary School and the request was granted for the 2002-2003 school year. The mother became familiar with the ABA approach in the summer of 2002 and began implementing the program in her home.

The program at Twin Hickory was based on the TEACCH model. The parents started applying to the Faison School in the summer of 2002 because the school used the ABA model. The student stopped attending school in Henrico in November 2002 and was immediately enrolled in the Faison School. A due process hearing was initiated at the end of the school year. The hearing was held over three days and the hearing officer found in favor of the parents on December 19, 2003. The student remained at Faison for the rest of the 2003-2004 school year. The school division did not appeal the adverse hearing decision until about a year later. Although the appeal was timely, the court was very bothered by the delay in appealing. The student remained at the Faison School until March 2006 when the parents gave consent, after some negotiations, to reenroll the student in the public school. The district court held that there was a "window of opportunity" to teach students with autism some linguistic skills and that the window closes between the ages of six and eight. The court further held that, although it made no ruling that TEACCH was not appropriate in general, TEACCH was only effective for teaching some skills but not effective for teaching children with autism social skills and

language. On the other hand, ABA was widely researched and with six hours daily of year-round instruction could allow a student to reach normal grade level. The court also rejected arguments that the student was making as much progress as he could, based on his limited cognitive ability. The testimony at the court hearing revealed that the student was making good educational progress at the Faison School.

In a subsequent decision in this case issued on June 14, 2006, the court further held that the school division had to pay the costs of the placement at Faison School for the subsequent years following the hearing officer's decision and until the return of the student to the public schools in March 2006.

The case was ultimately resolved and therefore not appealed.

Implications of Decision: It is important to offer a comprehensive instructional program that can be supported through expert testimony and that is research-based. Staff should be trained and confident about their abilities to educate children with autism. This confidence will encourage courts to give deference, as is required, to the opinions of public school educators. Collection of data supporting the fact that progress is being made is critical. It is important to focus on the student's cognitive abilities so that it can be shown that the progress which is being made is commensurate with ability and that the progress is of an amount which would be anticipated. It is typically necessary to win the administrative hearing in order to win an appeal. Remind school staff to report to the administration any parent dissatisfaction and to give administrators an opportunity to correct any deficiencies rather than siding with the parents.

J.P. v. County School Board of Hanover County, Virginia, 447 F. Supp.2d 553 (E.D. Va. 2006).

History of Case: A due process hearing was initiated on behalf of a twelve year old student with autism. The student had attended public school in Hanover from January 2001 until May 2003 at which time his parents placed him in a private school, Spiritos School, so that he could receive services using applied behavioral analysis ("ABA"). The student attended Spiritos during the 2003-2004 school year. The parents were seeking reentry to the public schools for the 2004-2005 school year. Hanover developed an IEP which called for a public school placement, and by agreement to resolve a due process hearing, agreed to provide some ABA services. Other supports provided by Hanover included a one-to-one aide, a self-contained placement and the use of some discrete trials when determined appropriate by the staff. The parents did not believe that J.P. had made adequate progress in the public school program and believed that he needed intensive ABA services in a private program. The school division believed that the student had made adequate progress, did not require ABA services and should remain in the public schools.

In the Fall of 2005 the student entered the Dominion School, a private school using the ABA approach and focusing on the education of students with autism. The school had just opened that year and only had three students, including J.P. The parents initiated a due process hearing seeking reimbursement and the hearing was held after the student had been in the program for two weeks. The hearing officer found in favor of the school division, upholding the appropriateness of the 2005-2006 IEP.

The parents appealed to federal district court and the court took additional evidence which included evidence from the Dominion School personnel that the student had made good progress over the course of the school year. The district court reversed and found in favor of the parents. The court held that the hearing officer's decision was not entitled to any deference because the hearing officer only summarized testimony and did not make factual findings even though there was conflicting evidence. The court was also troubled by the rulings of the hearing officer that all witnesses were credible and the assigning of the burden of proof to the school board even though the U.S. Supreme Court had held that the burden of proof was on the party who initiated the case. The court then ordered reimbursement for the Dominion School because the public school had not implemented the IEP with regard to the provision of some discrete trial and data collection. It was determined that the student was not making adequate progress based on the parents' assessment of progress under the IEP. The court made its own charts of progress based on testing and progress toward meeting goals. The court rejected the testimony of the school division's witnesses and relied on the testimony of private medical evaluators who had not testified at the hearing or in court. Finally, the court held that there was no need to discuss whether the public school program was the least restrictive environment because the student had not made educational benefit there. This case is on appeal to the Fourth Circuit.

In a second opinion issued on March 15, 2007, the court ordered the school division to pay attorney's fees and costs of \$182,971.57 and reimbursement for the Dominion School in the amount of \$33,187.90.

Implications of Decision: Cases involving children with autism and in which parents are seeking reimbursement for past or future placements in private ABA programs continue to be brought with great frequency. In order to prevail against these claims, public schools must offer comprehensive educational programs and create clear and convincing documentation of educational progress made by the students in the public school programs. Staff must be trained to have confidence in their skills and in their capabilities to teach children with autism so that they will be convincing in their opinions regarding progress to parents, hearing officers and the courts. Hearing officers may need additional training regarding the handling of hearings and the writing of decisions. Finally, the decision provides important clarification of the fact that parents do not have a right to observe in their child's classroom and that observations may be limited by the school's administration.

Z.W. ex rel. G.W. v. Smith, No. 06-1201, 2006 WL 3797975 (4th Cir. Dec. 21, 2006).

History of Case: A learning disabled student attended Anne Arundel County Public Schools (“AACPS”) through the end of the 1999-2000 school year but encountered academic and emotional problems there. Thus, the parents unilaterally placed the student, at their own expense, in a non-public day school, The Lab School of Washington, for the 2000-2001 school year. Subsequently, the parents and AACPS entered into a settlement agreement by which AACPS agreed to fund the student’s current tuition at The Lab School as well as tuition for the 2001-2002 school year. A dispute arose following the development of the student’s IEP for the 2002-2003 school year. At that meeting, AACPS confirmed that it did not have an appropriate public school placement for the student and agreed to fund his education at a non-public day school. The parents wanted the student to remain at The Lab School. AACPS, however, refused to place the student at The Lab School because the school had not yet received approval from the Maryland State Department of Education (“MSDE”) as a fundable non-public special education school. AACPS instead referred the student for admission to High Road Academy, a non-public special education school in Maryland that was approved by MSDE. The parents disagreed and, at their own expense, continued the student’s education at The Lab School for the 2002-2003 school year.

During the summer of 2003, MSDE approved The Lab School as a fundable non-public special education school. AACPS then agreed to fund the student’s tuition at The Lab School for the 2003-2004 school year. The parents requested a due process hearing on the grounds that AACPS failed to provide the student with FAPE for the 2002-2003 school year, and they sought tuition reimbursement for that year. AACPS prevailed at the hearing and district court levels, each holding that the parents were not entitled to tuition reimbursement. The parents appealed.

The Fourth Circuit held that AACPS’s proposed placement at High Road for the 2002-2003 school year offered the student FAPE and therefore precluded the parents’ request for tuition reimbursement. The court’s decision was based on the following reasons. First, the parents’ argument that The Lab School “is better than” High Road is contrary to the correct standard. An appropriate education does not mean a potential-maximizing education. “FAPE must only be calculated to confer some educational benefit on a disabled child.” A.B. ex rel. D.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004). The court agreed with the hearing officer that High Road satisfied this burden. Second, the parents argued that the hearing officer should have determined that keeping the student at The Lab School was proper since the IDEA favors maintaining the status quo. The court found this argument to be unpersuasive. The cases cited by the parents in support of this proposition only concerned a court’s determination that a student should not be moved during the final year of high school, in the middle of the school year, or when the court lacks any evidence that the proposed placement could not actually meet the student’s needs. These circumstances did not apply to this case. Finally, the parents argued that

there was no legal, policy, or educational rationale for moving the student from The Lab School to High Road for the 2002-2003 school year. The court disagreed. The court agreed with AACPS's position that the district was able to fund the student's education at The Lab School during the 2001-2002 school year only because the funding was pursuant to a settlement agreement, not an IEP team decision. In accordance with the IDEA and case law, school districts cannot place students in unapproved schools.

Implication of Decision: A school division is not required to reimburse parents for private school tuition when it has offered to provide FAPE.

A.K. v. Alexandria City School Board, _ F.3d _, 107 LRP 22828 (4th Cir. 2007).

History of Case: The U.S. Court of Appeals for the Fourth Circuit issued a decision on April 26, 2007, which has profound significance for school divisions when developing IEPs for private school placements. It is possible the decision may be reversed as a request is being made for a rehearing *en banc* before the full Court. The facts of the case are important for an understanding of the Court's reasoning.

A.K. has a number of disabilities, including Aspergers Syndrome and obsessive/compulsive disorder. A.K. was educated in the public schools through the seventh grade when his parents became concerned about his educational program. The parents perceived that their son was the victim of assaults and teasing at school and he did not feel safe. After carefully researching all local private school placements, the parents determined that there was no appropriate private day program in the area and placed A.K. in a private residential program in Massachusetts. This placement was made for the 2003-2004 school year and, as a result of a settlement, Alexandria and the parents shared the cost of the placement that year.

The development of A.K.'s eighth grade IEP for the 2004-2005 school year occurred over a period of eight to ten hours. Despite the lengthy IEP development, only a few minutes of the discussion concerned the placement decision. The IEP team determined that a private day program was appropriate. No particular private school was mentioned although two schools were named as possibilities. During this portion of the IEP meeting, the parents questioned the availability of an appropriate private day school in the area. They did not dispute that a private day school could provide FAPE, and only contested the availability of an appropriate private school in the area. Following the IEP meeting, Alexandria sent out applications to five private schools in the area. Three of the schools turned down A.K. for admission, but two accepted him and invited the student and his parents to visit. The mother visited and determined, after consulting with experts, that the two schools could not meet A.K.'s needs. The parents then requested a due process hearing. The school division presented testimony that either of the two private schools could meet A.K.'s needs. The parents presented two experts who concluded that these two private schools were not appropriate. The hearing officer found for Alexandria as did the federal district court. The Fourth Circuit three judge panel reversed.

The Fourth Circuit held that, in the circumstances of this case where the parents were challenging the appropriateness of the area private schools, it was a substantive violation of the IDEA for the school division to fail to specify the name of the private school in the IEP so that the parents could evaluate the proposed school. The Fourth Circuit cited 20 U.S.C. Section 1414(d)(1)(A)(i)(VII) which states that the IEP must contain “the projected date for the beginning of the services and modifications..., and the anticipated frequency, location, and duration of those services and modifications.” The Fourth Circuit referred to its prior decision in A.W. v. Fairfax County School Board, 372 F.3d 674, 681 (4th Cir. 2004), which held that “educational placement” did not mean a particular class in a particular school. The A.K. Court clarified that the school selection can be an important part of the IEP because it can determine the appropriateness of an education plan and reveals to the parents that the team “...has carefully considered and selected a school that will meet the unique needs of the student.” The failure to identify a particular school, when the parents contest the availability of such a school, may not give the parents sufficient detail to evaluate the proposed IEP. In A.K.’s case, the IEP team never evaluated the appropriateness of the selected private school for implementing the proposed IEP and did not discuss the issue. The Court concluded that where “the parents had tried in vain to find a local private day school that could meet A.K.’s specialized needs, the offer of an unspecified ‘private day school’ was essentially no offer at all.” (Footnote omitted).

Of significance, the Fourth Circuit stated that a change in school location is not automatically a change in placement as long as services are not diminished. The Court remanded the case to the district court to determine if the parent’s private residential placement was appropriate and for a possible award of tuition reimbursement.

Recommendations

This case may not apply to public school placements made through the IEP process. Of course those public placements constitute the majority of IEPs so it is hoped that this decision will not be so far reaching in scope.

It appeared that much of the Court’s concern arose from the parents’ contention that no private day school in the area was appropriate for their son’s education. This belief by the parents made the particular private school selection an important IEP issue. As a result, if parents dispute the availability of a private school to implement the IEP, the IEP team should name the school in the IEP. The parents will then have the right to challenge the school selection in a due process hearing.

The IEP team should develop the IEP for private placements in a two step process. First, the IEP team should develop the IEP which sets out the present level of performance, goals (and objectives where appropriate) and services. The team should write the location as a private school. There should be a second IEP after the school is selected to offer the particular school through the IEP process and to tailor the IEP to that school

setting. A representative of the private school should be invited to attend the second IEP meeting. Of course, if the name of the private school is known in advance of the IEP meeting, the process can be done in one step with the private school representative in attendance.

The Court did hold that a student could be moved from a particular school to another school if the IEP could be implemented in the new school.

As a final note, please caution school administrators to be alert for allegations of bullying, teasing and unsafe school environments, especially as these charges relate to students with disabilities. Those types of charges, if substantiated, can provide support for a private placement. Appropriate discipline should be imposed in order to foster a safe school environment.

II. SUPREME COURT UPDATE

Arlington Central School District Board of Education v. Murphy, 126 S.Ct. 2455 (2006).

History of Case: The parents brought a due process hearing against the school board seeking payment for a private placement. The parents prevailed at the district court level and then sought \$29,350 in fees for the services of an educational consultant. The district court held that only the value of the consultant's time between the hearing request and the ruling in the parent's favor could be considered costs incurred in an action or proceeding brought under the IDEA. Further, the court held that because the consultant was a non-lawyer, the parents could only be compensated for expert consulting and not for time on legal representation. The district court reduced the fee recovery to \$8,650. The United States Court of Appeals for the Second Circuit affirmed. The United States Supreme Court took the case to decide whether prevailing parents could recover fees for services rendered by experts in IDEA actions. The Court found that the text of the IDEA only contemplated an awarding of fees to parents for costs associated with legal representation by an attorney, and prior case law supported the position that expert witness fees and consultant fees are not included in the term "costs" and are not recoverable under the IDEA.

Implications of Decision: The Court determined that the IDEA does not allow for the parents to recover the costs of expert witnesses. This denial of a fee recovery can likely be extended to consultants and advocates. The Court reaffirmed its position that because Congress enacted the IDEA pursuant to the Spending Clause, it may not condition the receipt of federal funds upon federally imposed conditions, unless those conditions are clear and unambiguous to the recipients of the federal funds.

Winkelman v. Parma City School District, 150 Fed. Appx. 406 (6th Cir. 2005).

History of Case: Parents filed a request for a due process hearing in 2003 challenging the IEP offered for their son's kindergarten year. The student has autism. The parents were represented by counsel in both the local administrative hearing and the state review hearing. The parents lost both times as the hearing officers found that the student had been offered FAPE under the proposed IEP which offered a public school placement rather than the private school and home placement sought by the parents. The parents did not have the money to retain an attorney and filed an appeal in federal district court on their behalf and on behalf of their son and without representation by counsel. The district court affirmed the administrative determinations. The parents then filed an appeal to the Sixth Circuit. The School Board responded by filing a motion to dismiss the appeal based on Cavanaugh v. Cardinal Local School District, 409 F.3d 753 (6th Cir. 2005) which had been recently decided. That case held that parents could not represent their children in court under claims brought under the IDEA and could only represent themselves. Because the IDEA claim was determined to be a claim which could only be brought by the child, the appeal could not proceed without representation by an attorney. The parents appealed to the Supreme Court of the United States which granted a writ of certiorari and a stay of the Sixth Circuit's decision until after a decision on the merits. The case was argued on February 27, 2007 but no decision has been issued.

Implications of Decision: This case is significant because of the determination of whether claims made under the IDEA are claims of the parents or claims of the student. If the claim is the parents' to make, then parents may bring their own suits without representation by counsel. If the claims are found to be the child's to make then all proceedings in court must be handled with representation by an attorney. An advocate will not meet the definition of an attorney. If the claim is determined to be the child's, then there are issues about when the statute of limitation will start to run as the statute of limitations is tolled for minors and those under a disability. During the oral argument, the court questioned the meaning of the statutory language that provides that the rights of the parents transfer to the child after the child reaches the age of majority. This language suggests that prior to that time the rights are the parents' rights to assert. If this language is used as the basis for the court's determination, parents will be able to represent their children in court without attorneys. Of concern is whether this result will promote additional litigation in court. If the court holds that parents are not parties and must retain counsel for any court action, then if a school board is the appealing party, the parents must retain counsel in order to defend a case that they had won in the administrative hearings. The decision should be forthcoming soon.

Board of Education of the City School District of the City of New York v. Tom F., 193 Fed. Appx. 26 (2d Cir. 2006).

History of Case: The student had attended a private school since kindergarten. At the annual review for the 1999-2000 school year, the student's IEP team recommended a placement at a public school within the school district. The parents rejected the IEP and continued the private placement. The parents then requested a due process hearing seeking reimbursement for the private school tuition. The parents prevailed at the due process hearing and were awarded tuition reimbursement by the hearing officer. The school board appealed the decision to a state review officer. The state review officer affirmed the hearing officer's decision. The school board then appealed to federal district court. The district court reversed the lower rulings and held that "where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school." Thus, the school board was not responsible for the parent's tuition reimbursement. The parents appealed to the Second Circuit.

The Second Circuit vacated the district court's ruling citing its recent decision in Board of Education of the Hyde Park Central School District v. Frank G. ex rel. Anthony G., 459 F.3d 356 (2d Cir. 2006). In Frank G., the Second Circuit had held that parents of students with disabilities are entitled to reimbursement so long as they give the school district reasonable notice that they reject the proposed IEP and that they plan to enroll their child in a private school at public expense. The school board appealed the decision to the U.S. Supreme Court, and the Supreme Court has granted certiorari. The Supreme Court is expected to hear oral arguments in this case sometime this spring.

Implication of Decision: This case will decide whether a student who receives special education services from a private school is eligible for tuition reimbursement if the student never obtained such services from a public school district. At present there is a split among circuits regarding this issue.

III. PROCEDURAL AND REGULATORY ISSUES

County School Board of York County v. A.L., 194 Fed. Appx. 173 (4th Cir. 2006).

History of Case: Twenty year old student with Down Syndrome, significant cognitive impairment and speech intelligibility issues was offered an IEP by the School Board. The IEP did not provide for a full-time qualified interpreter for the deaf as had been requested by the parents. The student used sign language infrequently to clarify his oral speech even though the student was not deaf. The School Board initiated a hearing to prove that its proposed IEP was appropriate without the interpreter. The local hearing officer found that the student's IEP called for an interpreter because it referred to the "use of basic sign language as appropriate," that the interpreter must be a VQAS Level III

interpreter and that the student must participate in the VAAP assessment even though the student was not age appropriate for the VAAP. Other rulings were made against the School Board but these rulings were reversed in favor of the School Board in its appeal to federal district court. The Fourth Circuit upheld the rulings of the federal district court.

Implications of Decision: Be careful in making references to signing or interpreting in IEPs. Imprecise drafting may result in the need to hire a full time VQAS Level III interpreter. The court held that any interpreting services must be provided by a fully qualified interpreter under state regulation. The fact that the student had no hearing impairment did not change this outcome because of the way the state regulations on this point are written.

M.S. v. Fairfax County School Board, et al.

The next three cases are the progeny of a case that was discussed last year, **M.S. v. Fairfax County School Board, et al., No. 1:05cv1476(JCC), 2006 WL 721372 (E.D. Va. Mar. 20, 2006).**

History of Case: M.S. is a student with cognitive and communication impairments including mental retardation, oral motor apraxia, and mild to moderate autism. After Fairfax County Public Schools (“FCPS”) proposed an IEP for the 2002-2003 school year, the parents rejected the IEP, unilaterally enrolled M.S. in a private program, and requested reimbursement from FCPS. FCPS denied this request and took the position that the private program was not appropriate. In December of 2002, the student’s mother was charged with violating Virginia’s compulsory school attendance statute. The parent was found not guilty of the charge in March of 2003. On June 1, 2004, the parents requested a due process hearing and sought reimbursement for their unilateral placement of M.S. in the private program and to have M.S.’s future educational placement determined. The parents also asserted a retaliation claim under Section 504 of the Rehabilitation Act because of the charges filed against the child’s mother under the compulsory attendance statute.

In January of 2005, a hearing officer found that the school system’s IEP did not provide sufficient one-on-one instruction to M.S. However, the hearing officer denied the parents’ claim for reimbursement for the private program, finding that the private program was not reasonably calculated to give M.S. educational benefits. The hearing officer ordered FCPS to provide M.S. with a program that included private sign-language instruction, private speech and language instruction, and compensatory education. The hearing officer also concluded that the parent’s Section 504 claim was time-barred and unsupported by the evidence.

After the hearing officer’s decision, the parents disputed FCPS’ implementation of the hearing officer’s decision. The parents filed this lawsuit against FCPS, Fairfax County

School Board, several administrators of FCPS in their individual capacity, the Virginia Board of Education, the Virginia Department of Education, and two state officials. There were seven legal counts filed against this variety of defendants, and the claims were brought under multiple provisions of the Americans with Disabilities Act, § 504, § 1983, and the IDEA. The decision discussed last year focused on the defendants' motions to dismiss, where the Court dismissed most of the Plaintiff's claims.

M.S. v. Fairfax County School Board, et al., No. 1:05cv1476(JCC), 2006 WL 1390557 (E.D. Va. May 17, 2006).

The parents filed a "Motion to Reconsider" regarding the claims of retaliation under Section 504 and the ADA that had been dismissed as time-barred. The parent had alleged that the truancy charges were filed in retaliation for her efforts to obtain an appropriate education for M.S.

Motions for Reconsideration are rarely granted. The court denied the Plaintiffs' motion and upheld its decision that the parents' claim of retaliation under Section 504 and the ADA were time-barred. The court reiterated the position that such claims are subject to the one-year statute of limitations described in the Virginia Rights of Persons with Disabilities Act. However, the court did grant the motion for reconsideration of the claim that FCPS retaliated against M.S. by filing truancy charges. The court determined that it had not previously considered whether the truancy charges against the parent could be retaliation against the student. This decision did not find that there was any retaliation, the court simply allowed the claim to go forward.

Implications of Decision: In holding that the student can state a claim for adverse actions taken against his mother in alleged retaliation for his mother's protected activity, the court stated, "Where retaliatory action is taken against the child's parent to dissuade that parent from exercising an IDEA right, it is the child that suffers." Allowing a student to bring a retaliation claim for an alleged action against a parent is significant because it dramatically changes the statute of limitations time line. The one-year statute of limitations that applies to the parent does not begin to run against the student until the student turns eighteen years old.

M.S. v. Fairfax County School Board, et al., No. 1:05cv1476(JCC), 2006 WL 2076766 (E.D. Va. July 24, 2006).

FCPS moved for Summary Judgment. The Plaintiffs made a motion to defer summary judgment on the grounds that they did not have an opportunity to discover information that was essential to their case.

Implications of Decision: The court held that in order to defer summary judgment, the Plaintiffs would have to show the specific facts that they hoped to discover. The Plaintiffs

outlined their request for additional information about the alleged retaliatory motives of FCPS. The Plaintiffs also outlined the how they wanted to expand the administrative record and had a motion in front of a magistrate judge to introduce additional evidence. Despite opposition from FCPS, the court held that it would be better equipped to decide a motion for summary judgment with a substantial and complete record and the court granted the deferment of summary judgment.

M.S. v. Fairfax County School Board, et al., No. 1:05cv1476(JCC), 2006 WL 2376202 (E.D. Va. Aug. 11, 2006).

The Plaintiffs moved to expand the administrative record beyond that which was developed at the administrative hearing and described eight different categories of additional evidence. A magistrate judge granted the Plaintiff's motion to expand the record, but the district court judge overruled the expansion in part.

The court upheld previous precedent that the district court cannot hear "additional" testimony from anyone who did, or could have, testified at the due process hearing. The Plaintiffs were prevented from allowing an expert to testify, summarize, and critique test results and reports that were available during the due process hearing. Plaintiffs were also precluded from submitting complaints and letters of findings from the VDOE and the USDOE. The Plaintiffs were allowed to introduce prior written notices provided after the hearing as well as evidence pertaining to post-hearing IEPs without exhausting the administrative process (which means that they did not have to file for another due process hearing.)

Implications of Decision: In the court's discretion, a party may introduce additional evidence during an appeal of a due process hearing if that evidence was not available, or could not have been provided, during the underlying due process hearing.

School Board of the City of Richmond v. L. Douglas Wilder, et al., Richmond City Circuit Court, CL07-1609-1 (April 6, 2007).

History of Case: The Mayor of the City of Richmond sought to have the school board audited. The school board did not agree to the audit. As a result of the school board's refusal, the city reduced the weekly requests for draws by the school board by half, which, prior to this time, had always been granted. The city's position was that the disbursements implicate city finances and that discretion and care has to be used in management of the city resources. The school board's position was that once funds are appropriated for the schools, the city has no authority to interfere with receipt by the school board of those funds or to impose terms on the school board as a condition of their receipt. The school board went to court and sought preliminary injunctive and mandamus relief (an order compelling the city to disburse the funds to the school board) against the

city. The school board had to show, among other things, that it would suffer irreparable harm unless the court intervened and ordered the city to immediately disburse the funds.

The court ruled in favor of the city. The court held that the school board failed to show that it would suffer irreparable harm on evidence that some of its obligations are paid and some are not. The court reasoned that there was no law requiring the city to disburse funds on a weekly basis. Rather, state law requires the city to provide the full appropriated amount by the end of the present fiscal year. In accordance with Va. Code § 22.1-120, cities “shall settle with school boards for the school funds as of June thirtieth of each year not later than August fifteenth of each year.” Further, state law provided the school board with an alternate remedy. At the end of the fiscal year, Va. Code § 22.1-121 provides that the school board can initiate a proceeding to compel the city to disburse funds if it has not received the full appropriated amount at that time.

Hill v. Laury, et al., No. 3:06cv79, 2006 WL 2631796 (E.D. Va. Sept. 13, 2006).

History of Case: A mentally retarded student alleged that he was assaulted by fellow students at school while the teacher was not present. The student sued, among others, his teacher asserting that the teacher was liable for his injuries and related damages suffered as a result of the attack because the teacher attempted, unsuccessfully, to persuade the student not to report the incident and participated with others in efforts to conceal the assault. In response, the teacher submitted various discovery demands relevant to the allegations, including requests for admissions of various factual matters. The student, however, failed to respond to the requests for admissions within the required timeline, and he did not request an extension of time. The teacher then filed a motion for partial summary judgment, asking the court to dismiss some of the student’s claims.

The court ruled in favor of the teacher. The court held that “the truth of the matter contained in a request for admission is conclusively established if the request remains unanswered and that such conceded issues may constitute the basis for a court’s favorable consideration of a motion for summary judgment.” Thus, because the student failed to answer the teacher’s requests for admission, the court had to consider the requests for admission as admitted by the student. As a result, the student could no longer establish liability on any of his claims against the teacher. The court then granted the teacher’s request for summary judgment. While the court recognized the harshness of this result, the court reasoned that such a result “is necessary to insure the orderly disposition of cases for which parties to a lawsuit must comply with the rules of procedure.”

Implications of Decision: Failure to respond to a request for admissions can effectively deprive a party of the opportunity to contest the merits of a case. Thus, be certain to respond timely to an opposing party’s request for admissions or ask the court for an extension of time in which to respond.

Hill v. James, et al., No. 3:06cv470-HEH, 2006 WL 2796855 (E.D. Va. Sept. 27, 2006).

In addition to suing the teacher and the student who committed the assault, the student also sued the Richmond City School Board, the middle school principal, the high school principal, and the division's special education coordinator (collectively "the defendants"). The student alleged negligent and intentional infliction of emotional distress, gross negligence, willful misconduct, a civil rights claim under § 1983 based on violations of the IDEA, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act ("ADA"). The parents maintained that the student's existing IEP made him more vulnerable to predatory students, and he was being placed in classes where he could be exploited by "behavioral malfesants." The defendants argued that they had immunity and thus could not be sued. The defendants also argued that the student's claim should be dismissed for failure to state a claim for which relief could be granted.

The court dismissed the IDEA element of the civil rights claim because the Fourth Circuit has made clear that tort-like damages are not available under the IDEA and, further, parties cannot sue under § 1983 for an IDEA violation. With regard to the Section 504 and ADA elements, the court noted that the proper question is not whether the student had a viable IEP, but rather whether the defendants discriminated against the student because of his disability. While the student's complaint alleged the existence of a faulty IEP, it contained no facts that suggest discrimination took place. Thus, the court dismissed the Section 504 and ADA elements of the civil rights claim as well. Because the court found no merit to the underlying IDEA, Section 504, and ADA claims, the court determined that the student would not be able to prove any facts to support his § 1983 claim. Accordingly, the court dismissed the § 1983 claim. With regard to the state law claims arising out of negligence and intentional tort claims, the court held that the school board was immune from such liability and thus dismissed these claims against it. The court, however, declined to exercise supplemental jurisdiction over the remaining state law claims against the two principals and the special education coordinator. Those claims were remanded to state court for decision.

Hill v. Laury, et al., No. 3:06cv79, 2006 WL 2927773 (E.D. Va. Oct. 11, 2006).

The student also alleged that the teacher violated the IDEA, and, as a result, the student sought compensatory and punitive damages. The teacher filed a motion to dismiss. The court, following Fourth Circuit precedent, held that compensatory and punitive damages are not allowed under the IDEA. "The Fourth Circuit has consistently held that the IDEA does not authorize courts to grant monetary damages." Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 298 (4th Cir. 2005). Further, the court held that the student failed to exhaust, or even initiate, his administrative remedies before filing this action. The "IDEA requires that an aggrieved party exhaust a state's administrative procedures before bringing an IDEA claim in state or federal court" 20 U.S.C. § 1415(i)(2). Because

the student had failed to exhaust his administrative remedies, the court lacked subject matter jurisdiction to consider the student's IDEA claim. Accordingly, the court granted the teacher's motion to dismiss.

Bacon v. City of Richmond, 475 F.3d 633 (4th Cir. 2007).

History of Case: Disabled school children and their families filed suit against the city and the school board alleging that the school division's facilities were in violation of the Americans with Disabilities Act ("ADA"). The school board entered into a settlement agreement in which it agreed to bring its buildings into compliance within a matter of years. The agreement, however, included a provision that the school board's obligation was contingent upon its receiving funding from the city. The federal district court ruled that because the city provided capital funding to the school board, the city was a necessary party to the agreement. The district court ordered the city to ensure that the school division's schools become ADA-compliant within five years. The case was appealed to the Fourth Circuit.

The Fourth Circuit reversed and held that the city could not be ordered to provide funding for retrofitting of the city's public schools without a finding of fault on the part of the city. The court pointed out that Virginia law vests each school board with exclusive authority over its schools. The power to operate, maintain, and supervise public schools is within the exclusive control of local school boards. In contrast, the city exercised no operational control over the school buildings, school services and activities. The city has no power to make physical changes to school buildings or control the day-to-day operation of school buildings. The court also pointed out that Title II of the ADA "does not contemplate funding liability for an independent public entity that neither controls the challenged services nor discriminated against plaintiffs because of their disability." The court noted that the plaintiffs are not without recourse since the school board has the authority to sue and be sued, to settle claims, and to enter into contractual agreements. Thus, as with any contract, the settlement agreement reached between the parties is enforceable against the school board.

Implication of Decision: School boards are solely responsible for ensuring that its schools are ADA compliant.