

IN THE WEST VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING CASE NO. D11-007

PARTY REQUESTING
(Petitioners)

[REDACTED]
Parents of the Student

STUDENT

[REDACTED]

APPEARING FOR PARENTS

[REDACTED], *pro se*
[REDACTED]

EDUCATIONAL AUTHORITY
(Respondent)

[REDACTED]
[REDACTED]

ATTORNEY FOR EDUCATIONAL
AUTHORITY

[REDACTED]
[REDACTED]
[REDACTED]

TRANSCRIPTION METHOD

Certified Court Reporter

TYPE OF HEARING

Open to the Public

DATE OF HEARING

February 1, 2011

LOCATION OF HEARING

[REDACTED]
[REDACTED]

STUDENT PRESENT

Student did not appear pursuant to parent's
request

WITNESSES CALLED ON BEHALF
OF PETITIONER
Present at Hearing

[REDACTED]
Speech/Language Pathologist
[REDACTED]
[REDACTED]

Telephonic Witness Outside
the Borders of W.Va. at the
Time of his Testimony

[REDACTED]
Principal - [REDACTED]
[REDACTED]

Telephonic Witness

[REDACTED]
Reading Teacher
[REDACTED]

Present at Hearing

[REDACTED]
Occupational Therapist
[REDACTED]

Telephonic Witness

[REDACTED]
Teacher for Home room,
[REDACTED]

**WITNESSES CALLED ON
BEHALF OF THE RESPONDENT
Present at Hearing**

[REDACTED]
Superintendent [REDACTED]
[REDACTED]

Present at Hearing

[REDACTED]
Principal of [REDACTED]
[REDACTED]

**Telephonic Witness Outside
the Borders of W.Va. At the Time
of Her Testimony**

[REDACTED]
Speech Pathologist
[REDACTED]

Telephonic Witness

[REDACTED]
Director of Special Education
[REDACTED]

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I. ISSUE PRESENTED

Whether Student can lawfully be involuntarily removed from the [REDACTED]
[REDACTED], or whether such removal would deprive this student of her right to a
free appropriate public education.

II. PROCEDURAL HISTORY

The request for Due Process Hearing in this matter was received by the West Virginia Department of Education (WVDE) on October 28, 2010, and assigned to this hearing officer the next day.

After business hours on Friday, October 29, 2010, two telephone messages were left on this hearing officer's home telephone by personnel at the WVDE. These messages indicated an urgent need for me to hold a telephone conference with the parties in this matter due to a disagreement between them concerning the Student's school placement during the pendency of this hearing (i.e. "the stay put" provision). On Saturday, October 30, 2010, I returned the telephone call to the WVDE employee. She indicated that the parties wanted a telephone conference regarding "stay put" because a newly written IEP for the Student mandated the Student move to a new school on Monday, November 1, 2010. I requested that she contact the Superintendent of [REDACTED] and request that the Student be permitted to continue to attend school there until the appropriate "stay put" placement could be determined. The WVDE employee verbally indicated that the Resolution session had been waived in this case.

On Monday, November 1, 2010, efforts were made by my office staff to contact the parties and set up a telephone conference that same day. Later that day the Student's father called my office and indicated that an emergency telephone conference regarding "stay put" was not necessary. Also on November 1, 2010, an initial contact letter to the parties was sent from my office, establishing timelines for conduction of all hearing matters. A first telephone conference was set for Friday, November 5, 2010, and the hearing of the matter was set for November 16 and 17, 2010. In that

letter I requested of the parties that "If resolution is waived in writing, please provide me a copy of the waiver as soon as practicable."

On November 3, 2010, a "waiver of resolution meeting" form was received by my office dated October 29, 2010, and signed by Student's father and by the Special Education Director at [REDACTED]

The first telephone conference was held as scheduled on November 5, 2010, with Student's father and the Director of Special Education for [REDACTED] participating. At that conference the hearing issue was identified. Student's father, also requested a continuance of the hearing dates to accommodate a Freedom of Information Act request for records and documents he had made to the WVDE. No objection was raised by [REDACTED] and the parties agreed that Student would continue to attend [REDACTED] during the pendency of the hearing.

I requested Student's father submit his request for continuance to me in writing and indicated his request would be granted when that motion for continuance was received. The new hearing dates were provisionally set for December 14 and 15, 2010. A letter documenting these results was sent to the parties on November 8, 2010. An Order defining "stay put" for this Student, as her pre-hearing request placement at [REDACTED] was also entered. Also on November 5, 2010, [REDACTED] mailed a letter indicating they would be represented by legal counsel at the December 14 - 15, 2010, hearing.

Subsequently, by letter dated November 12, 2010, and received by my office on November 15, 2010, Respondents newly acquired legal counsel requested that a second telephone conference

be set up to consider the merits of a Motion to Dismiss contemporaneously submitted, and that if not granted that an additional continuance be granted because of "existing conflicts."

A telephone conference was scheduled and held on December 1, 2010, which was the earliest date on which both parties would make themselves available. Respondent's new counsel participated for the school, and Student's father, again participated *pro se*. The Motion to Dismiss, filed by the Respondent was considered first. The Respondent's argument was that [REDACTED] [REDACTED] was established pursuant to W.Va. Code §18-17-1, for the exclusive use of students who are deaf and/or blind and that since Student is speech/language impaired, not deaf, "There are no conceivable facts that could be advanced by the parents in a due process hearing that would show an entitlement to be served by the [REDACTED]." Respondent's Motion to Dismiss at pg. 2. The motion for dismissal was denied because the argument advanced by the Respondent was not dispositive of the questions of whether student, in fact, did not belong at its school, and whether the new placement could provide FAPE.

At the same telephone conference on December 1, 2010, the Respondent's request for an additional continuance was also discussed. Respondent's counsel indicated he had other court matters scheduled on December 14 and 15, 2010 and that the earliest dates open to him were February 1 and 2, 2011. Petitioner was in agreement with the requested continuance, so the hearing was rescheduled to those dates. The final decision was scheduled to be issued on or before March 16, 2011, and an Order was entered on December 2, 2010, granting the continuance.

An additional telephone conference was held on January 24, 2011, to confirm the parties' readiness for hearing. No subpoenas were requested at any time.

The hearing was held on the morning of Tuesday, February 1, 2011. A winter storm the night before had coated the local roads with ice making travel dangerous at best, and making many secondary roads impassible within the County and its environs. School was cancelled in the home county schools. Consequently, the parties mutually requested that identified witnesses who could not reach the hearing room should appear telephonically. This request was granted. Two of the witnesses who testified by telephone, (those being the Principal of the County Elementary School where it is proposed that Student should attend, and the Speech Pathologist for the County Schools) were located in the State of Virginia at the time of their testimony and therefore, outside the jurisdiction of the State of West Virginia at that time.

The Respondent school called four (4) witnesses and the Petitioner called five (5) additional witnesses for a total of nine (9). The entire hearing was conducted and concluded on February 1, 2011. The parties were given until February 28, 2011, to complete and file post-hearing briefs. A brief by Respondent dated March 2, 2011 was filed and considered in the creation of this decision. No brief was filed on behalf of the Petitioner. No post-hearing changes were made to the decision deadline of March 16, 2011.

III. FINDINGS OF FACT

1. Student is a female child, nine years old and a second grader, at the time this decision is issued. Respondent's Exhibit 1
She has been enrolled at [REDACTED]
2006. Respondent's Exhibit 7

She was diagnosed in 2006 with apraxia of speech, and she also has a history of recurrent otitis media and chronic rhinorrhea. Respondent's Exhibit 7

An audiogram performed in 2005 suggested a possible mild hearing loss in her right ear. Petitioner's Exhibit C. Audiograms taken more recently in March 2006, September 2006, and March 2010, failed to disclose any significant hearing loss. Petitioner's Exhibits C, D, and E.

2. In the Fall of 2008, the West Virginia Department of Education (hereinafter WVDE) monitored [REDACTED] (hereinafter [REDACTED]). As a consequence of that visit the State Department of Education directed [REDACTED] to exit students who no longer met the eligibility criteria for hearing impairment or visual impairment. Transcript Pg. 11, Lines 17-22. On November 30, 2009, [REDACTED] of the WVDE Office of Assessment, Accountability and Research, instructed the [REDACTED] Superintendent that "Prior to the 2010-2011 school year, the [REDACTED] will transition any student who will be in grades K-4 during the 2010-2011 school year and are deemed as having a primary disability not included in the provisions delineated in West Virginia School Law Section 18-7-2 to their home district;..." This mandated action was characterized as a correction of a legal noncompliance on the part of [REDACTED]. Respondent's Exhibit 3

3. Student's most recent Individualized Educational Program Document (hereinafter "IEP") bears the date of October 21, 2010, on its first four and final pages (i.e., 1-4,

13). Pages that appear in the 5th through 12th places bear the dates of either 4/22/10 or 5/22/10. Respondent's Exhibit 1.

This document is an amalgam of an IEP document created and completed in the Spring of 2010, and later modified in October 2010. The modification in October 2010 was performed for the express purpose of removing Student from [REDACTED] and transitioning her to her home county schools after it was determined that she did not meet eligibility criteria as a [REDACTED] student. Respondent's Exhibit 4 and Tr. Pg. 12, Line 12 to Pg. 13, Line 12.

4. Student has been identified as a student eligible for Special Education under the category of Speech/Language Impairment. Respondent's Motion to Dismiss, dated November 12, 2010.
5. It was not contested that Student is receiving a high quality education at [REDACTED]. Her failure to qualify as a student with a hearing loss is the sole reason she is to be removed from her current enrollment at the [REDACTED]. No other programmatic or functional needs assessment was done. Tr. Pg. 12, Line 12 to Pg. 14, Line 4.
6. Student has multiple impairments and challenges. Notably she has apraxia of speech (verbal apraxia). Respondent's Exhibits 2, 6, 7. Verbal apraxia "is a speech disorder in which a person has trouble saying what he or she wants to say, correctly and consistently." This makes her speech difficult to understand without careful listening. Respondent's Exhibit 7 "Summary." Children with apraxia tend to make inconsistent mistakes when speaking. They have trouble putting sounds and syllables together to form words. Longer and more complex words may be problematic. They

may be able to say a word or a sound one time and have trouble reproducing it later. They may appear to be groping for the right word or sound. Another characteristic of apraxia is difficulty with prosody - the rhythms, stresses and inflections of speech. Children with developmental apraxia of speech do not outgrow it on their own, but require individualized therapy. It is recognized that in severe cases, people with apraxia of speech may need to use means, other than speech, to express themselves effectively. Petitioner's Exhibit A.

7. The National Institutes of Health characterize both Apraxia of Speech and Deafness as Communication Disorders. Petitioner's Exhibit A. Student's Apraxia of speech is caused by motor planning problems. Tr. Pg. 94, Lines 11-19 and Respondent's Exhibit 2
8. Student's communication problems appear to be both receptive and expressive. Receptively student requires that questions be presented to her in multiple ways. She also requires waiting time so that she can process a question and then answer. She requires hands on activities, and a great deal of repetition. With material involving numbers, the use of sign language has been useful to help her with the order of numbers and avoid transpositional errors. Tr. Pgs. 101, Line 18 to Pg. 102, Line 3. Tr. Pg. 102, Line 19 to Pg. 103, Line 18. See also Respondent's Exhibit 1, pg. 6.
9. Student's physician, an Associate Professor of Pediatrics and Neurodevelopmental Disabilities at the University of Virginia, indicates she needs intensive speech therapy 4 or 5 times per week, and also a total communication environment including spoken

words, signs, pictures and assistive technologies. He indicates a small group setting with lots of one on one intervention is best. Respondent's Exhibit 2.

10. Student's IEP Documents of April 22, 2010 and October 21, 2010, incorporate most of this physician's suggestions including a total communication environment for all classroom, extracurricular and non-academic activities. Both IEPs indicate that a total communication environment [i.e., spoken and non-spoken communication modes] are "needed by this student for accurate receptive and expressive communication and learning tasks." It is also indicated that she needs a small group setting and intensive speech therapy. Respondent's Exhibit 1, pg. 6. Petitioner's Ex. F at pg. 4.

11. The latest IEP with cover sheet dated October 21, 2010, indicates internally that all of her services are to be given in a special education environment. Respondent's Exhibit 1 at pgs. 4-5.

This is in direct conflict with the amended placement sheet on the same document, which indicates she will be in General Education Full Time, 96%, and in a Special Educational Setting only 4% of the time. Respondent's Exhibit 1, pg. 2.

12. In addition to her verbal apraxia, Student also has global developmental delays, static encephalopathy, motor apraxia, and neuromotor dysfunction characterized by moderate hypotonia (i.e., poor strength in her core body muscles). This causes functional problems with motor and praxis skills as well as sensory perceptual skills. Exhibit 6 at pg. 1. The significant weakness in her trunk causes postural and gross motor problems. She exhibits gravitational insecurity. Her balance and coordination

need improvement. Exhibit 6, pg. 2. (Report of Physical Therapist). Her Occupational Therapist indicated she has difficulty forming written letters legibly. During an evaluation in April 2010, approximately 70% of her letters were legible leading me to conclude that 30% of her letters are not identifiable. She was noted to have problems with postural control, fine motor dexterity, upper extremity strength and stability, eye to hand coordination, proprioception (i.e. perceiving the placement of her body parts in space), and visual perceptual skills. Exhibit 8 at pg. 3.

She has laxity in her joints and muscles as well as Lordosis in her back. Together these create problems for her in keeping her balance and posture when walking or sitting. Motor planning delays cause her difficulties with any new physical activity.

Tr. Pg. 92, Line 20 to Pg. 94, Line 23.

13. Student's Speech Language Services provider noted Student does not speak in the presence of people she does not know well and in new places. Exhibit 7, pg. 1 and Tr. Pg. 55, Lines 22-24, Tr. Pg. 57, Lines 6-8. The classroom teacher indicated Student had a tendency to exhibit shyness and withdraw in strange environments. Tr. Pg. 97, Lines 4-15, and Pg. 102 Lines 3-6; Tr. Pg. 75, Line 22 to Pg. 76, Line 9.
14. At the [REDACTED], Student is educated in a special education classroom with less than 4 other students. In the proposed county school system regular education setting, she could expect to be in a classroom of approximately 17 to 19 students of various academic abilities. Tr. Pg. 100, Lines 3-9, Tr. Pg. 66, Lines 2-4, Tr. Pg. 75, Lines 5-6. Student's reading teacher indicated that placing Student in a class with 17 to 19 students "definitely would be very detrimental to her." Tr. Pg. 75, Lines 7-12.

15. The IEP from the Spring of 2010 (dated 4/22/10 and 5/22/10) which the Parents approve, and which has been implemented for Student at the WVSDB, is a document containing 13 pages. Eight of those pages from the Spring 2010 IEP were also incorporated into the IEP of 10/21/10. They are pages 4-6, 8-12. The pages are out of numerical order. The pages left out included the Student Information, Part I, and Documentation of Attendance, Part II (pg. 1) and Consideration of Factors for IEP Development/Annual Reviews, Part III (pg. 2). All of these items were redrafted in the 10/21/10 IEP at pgs. 1 and 3. Comparison of Exhibit 1 and Exhibit F. Missing from the IEP of October 21, 2010, is page 3 of the Spring 2010 IEP of 4/22/10, which contained present levels of Academic Achievement and Functional Performance, including a narrative statement of student's academic accomplishments and challenges up to that time. Exhibit F at pg. 3. Corresponding information is nowhere found in the 10-21-10 IEP. Exhibit 1.

Also missing in the 10/21/10 IEP is information corresponding to the material contained on pg. 7 of the 4/22/10 IEP. On that sheet were located the Annual Goals and Objectives for reading, writing, spelling, grammar and mathematics, all of which was to be delivered in a total communication setting, special education environment. There are no goals and objectives for academic subjects in the 10/21/10 IEP. Comparison of Exhibit 1 and Exhibit F, pg. 7.

In spite of the lack of relevant goals and objectives, all academic classes are noted on the 10/21/10 IEP as being delivered in a Special Education Environment. Exhibit 1 at pg. 5 (marked "page 12 of 13") and pg. 6.

According to the services section (Part IV) of the 10/21/10 IEP, Student's reading/language arts, math, science, social studies and developmental reading delivery will require a total of 1500 minutes (25 hours) time per week, all to be given in a Special Education Environment (SEE). This is inconsistent with page 2 of the same document which indicates Student will be out of the general education setting only when receiving her related services of Occupational Therapy, Speech, and Physical Therapy, a total of 4% of the school hours. Exhibit 1 at 2nd and 5th pages.

16. The [REDACTED] was the only educational facility identified at hearing, with the capacity to offer a total communication environment (i.e., spoken word and signing by all educational personnel, with students who also use verbal and non-verbal communication). Tr. Pg. 103, Lines 5-8, 19-22 and Tr. pg. 77, Lines 12-15.

The County School's Speech Therapist indicated that total communication and sign language support were available at the county schools, but also admitted she does not know what is provided as total communication at the deaf school. Tr. Pg. 34, Line 23 - Pg. 35, Line 9. However, this service provider will only work with Student 60 minutes per week. Tr. Pg. 34, Line 11. Giving this witness's testimony the most positive interpretation would only provide Student a total communication environment for a small portion of the school day one time per week. The County School District's Special Education Director indicated the county typically would not use American Sign Language as part of their speech language approach and was not aware of their ability to do so. Tr. Pg. 48, Line 18 - Pg. 49, Line 8.

IV. CONCLUSIONS OF LAW

1. [REDACTED] were originally established in 1870 by the West Virginia Legislature. See W.Va. Code §18-17-1 *et seq.* It is noted that “the schools shall be maintained for the care and education of the deaf youth and the blind youth of the State.” W.Va. Code §18-17-1. The State statute does not expressly exclude children with different disabilities, but it makes mention only of the Blind and the Deaf.
2. At present, all Special Education Services are under the purview of the Individuals with Disabilities Education Act (hereinafter “IDEA”) as re-authorized by the U. S. Congress in 2004, and effective as of July 1, 2005. Therefore it was in force and applicable to all matters and at all times presented in this case. See 20 U.S.C. §1400 *et seq.*
3. The WVDE is the agency charged with the duty to enforce the requirements of the IDEA in the public schools of West Virginia. 20 U.S.C. §1412(a) and see W. Va. 126 C.S.R. 16 §3.1, Introduction. The mandates of the IDEA apply to the State as well to all political subdivisions involved in the education of children with disabilities as well as schools for deaf and /or blind students. 34 C.F.R. §300.2(b)(1), authorized pursuant to 20 U.S.C. §1412.
4. The IDEA requires of the IEP Team, when developing an IEP document, that they consider:
 - “(i) the strengths of the child;
 - (ii) the concerns of the parents for enhancing the education of their child;
 - (iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental and functional needs of the child.”

20 U.S.C. §1414(d)(3)(A) and 34 C.F.R. §300.324

Further under “Special Consideration of Special Factors” it is indicated that “the IEP Team shall: ...consider the communication needs of the child...” 20 U.S.C. §1414(d)(3)(B)(iv).

5. “Each public agency must ensure that ...

4(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. §300.114(a)(2)(ii) authorized by 20 U.S.C. §1412(a)(5)(A). (emphasis added)
6. West Virginia recognizes its obligation to comply with mandates of the IDEA. The Introduction to West Virginia Policy 2419, Regulations for the Education of Students with Exceptionalities, indicates that that document “outlines the policies and procedures districts must follow in meeting the requirements of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004),...” as well as state law requirements. Federal Funding to the districts is dependent on compliance. West Virginia Policy 2419, Regulations for the Education of Students with Exceptionalities, 126 C.S.R. 16 §3.1. Introduction (hereinafter cited in the form of “W.Va. Policy 2419, 126 C.S.R. 16 §3.1”)
7. The IDEA requirement of placement of children in the least restrictive environment does not mean that all children will be in regular education. Rather they are to be

“with age appropriate non-disabled peers to the maximum extent appropriate based on the IEP.” W.Va. Policy 2419, 126 C.S.R. 16 §3.1, Chapter 5, Sec. 2J (emphasis added).

8. The law requires that “Placement decisions are made individually for each student. The services and placement needed by each student must be based on the student’s unique needs that result from...her disability..., not on the student’s category of exceptionality, or the availability of placement options, services, staff or space.” W.Va. Policy 2419, 126 C.S.R. 16 §3.1, Chap. 5, Section 2J(2) (emphasis added).
9. “Placement decisions for a student are made after all sections of the IEP, except the educational environment section, have been completed.” W.Va. Policy 2419, 126 C.S.R. 16 §3.1, Chap. 5, Section 2 J 3 a.
10. An IEP team is required to have “not less than **one general education teacher** of the student, if the student is or may be participating in a general education environment...W.Va. Policy 2419, 126 C.S.R. 16 §3.1, Chap. 5, Section 1D, (emphasis original) and see 20 U.S.C. §1414(d)(1)B(ii) and 34 C.F.R. §321(a)(2). Participation may be through attendance at the IEP Meeting or by provision of a classroom teacher report to the IEP team. W.Va. Policy 2419, 126 C.S.R. 16 §3.1, Chap. 5, Section 1D. In this case, Student’s IEP of October 21, 2010, was formulated without a general education teacher in attendance and no teacher report appears in the document.
11. An IEP document must include a statement of the child’s present levels of performance (PLP) including how the child’s disability affects the child’s

involvement and progress in the general education curriculum. See 20 U.S.C. §1414(d)(1)(A)(1) and 34 C.F.R. §300.320(a)(1)(i). In this case the child's IEP of October 21, 2010 had no PLP regarding her academic achievement, yet it indicated her academic courses would all be delivered in a Special Education Environment.

12. An IEP document must include a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other needs that result from the child's disability. See 20 U.S.C. §1414(d)(1)(A)(2) and 34 C.F.R. §300.320(a)(2). In the IEP of October 21, 2010, no goals or objectives are included for any of her academic subjects (i.e., reading, math, social studies, etc.) while simultaneously indicating those courses are to be delivered in a special education environment.
13. School districts in West Virginia are required to provide: "Appropriate grouping of students with exceptionalities for specialty designed instruction based upon meeting the student's similar social, functional and/or academic needs, as specified in their IEPs and without regard to identified exceptionality..." W.Va. Policy 2419, 126 C.S.R. 16 §3.1, Chap. 6, Section 3 (emphasis added). Here the [REDACTED], at the demand of the WVDE, which is the same agency which promulgated these rules and is charged with enforcing them, has attempted to remove this student from her current educational program based entirely on her category of exceptionality, i.e., that she is not deaf. A more appropriate consideration would be her status as a

communication disordered child being educated with other communication disordered children.

14. The IEP contents are to be created based on the individual educational needs of the child. See 34 C.F.R. 320(a) and 20 U.S.C. §1414(d)(1)(A)
15. A disabled child's placement is determined from the contents of the child's IEP. 34 C.F.R. §116(b) authorized by 20 U.S.C. §1412(a)(5).
16. Children are to attend the school they would attend if they were disabled, unless the IEP of the child requires another arrangement. 34 C.F.R. 300.116(c) authorized by 20 U.S.C. §1412(a)(5). Here the child requires an IEP service uniquely provided at the [REDACTED] which is not amenable to re-creation in the county schools.
17. IEP documents are to be reviewed and updated periodically, but not less than annually. 20 U.S.C. §1414(d)(4)(A)(i), 34 C.F.R. §300.324(b)(i). Student's last complete and valid IEP was completed in April 2010, so a new one will be due in April 2011.
18. Anytime the effect of implementing a State law would be to curtail or frustrate federal law, the State law must give way. "State Law is naturally preempted to the extent of any conflict with a federal statute." Crosby v. National Foreign Trade Council, 530 U.S. 363, 372; 120 S.Ct. 2288, 2294; 147 L.Ed.2d 352, _____ (2000) citing Hines v. Davidowitz, 312 U.S. 52, 66-67; 61 S.Ct. 399, 404; 85 L.Ed. 581 (1941). A Court's primary function when determining whether preemption is appropriate "is to determine whether under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the

full purposes and objectives of Congress.” Crosby v. National Foreign Trade Council, *supra* at 530 U.S. 363, 373, 120 S.Ct. 2294; Hines v. Davidowitz, *supra* at 312 U.S. 52, 67; 61 S.Ct. 399, 404.

V. DISCUSSION

How this Case Arose

The conflicts represented in this case have their genesis in a 2008 monitoring visit by the WVDE to the [REDACTED]. Following that review of their facilities, the [REDACTED] was found by the WVDE to be out of compliance with State law in various ways. Relevant to this matter, the [REDACTED] was found to have children enrolled in grades K-4 who had a primary disability not included under the provisions of W.Va. Code §18-7-2, namely deafness and/or blindness. The [REDACTED] was instructed by the WVDE that all such children must be transitioned out of the [REDACTED] and to their home district schools by the beginning of the 2010-2011 school year. See Respondent’s Ex. 3 and Tr. pg. 11, Lines 10-22.

As part of [REDACTED]’s efforts to comply with the State’s corrective actions, this Student was tested to see if she met the eligibility criteria for identification as a hearing impaired child. Tr. Pg. 11, Line 23 to pg. 12, Line 10. The hearing testing indicated that, at that time, her hearing was essentially normal. Tr. Pg. 12, Lines 12-19 and Respondent’s Ex. 4. Based on this finding, student was determined to be ineligible for enrollment at the [REDACTED]. Tr. Pg. 12, Line 20 to Pg. 13, Line 3. For this reason alone, Student was to be removed from the [REDACTED] and enrolled in the regular public schools in her home county. Respondent’s Ex. 5. Tr. Pg. 13, Lines 15-19.

Legal Argument of the Respondent

No one on either side of this case, has stated, or intimated, that the program offered to Student at the [REDACTED] is in any way inappropriate to her unique needs. Rather it is argued that Student's area of primary disability makes her ineligible to attend [REDACTED]. Indeed, the Superintendent of the [REDACTED] stated that "[Student] has received a high quality education at the [REDACTED]. That is not debated. The issue is that she no longer qualifies under the criteria for acceptance to the [REDACTED] based on her having no hearing loss." Tr. Pg. 13, Line 23 to Pg. 14, Line 4. Student is thus being told to leave an otherwise "high quality" educational program based solely on her category of eligibility.

The argument advanced for this proposed action relies upon the provisions of W.Va. Code §18-17-1 *et seq.*, which established the [REDACTED] in 1870. It is provided, in part, that "The schools shall be maintained for the care and education of the deaf youth and blind youth of the state." W.Va. Code §18-17-1. Further it is indicated that "Deaf youth and/or blind youth residents in the State, between the ages of five and twenty-three, inclusive, shall be enrolled in the schools on application to the Superintendent until the schools are filled. Applicants shall be enrolled in the schools on the basis of need and degree of impairment." W.Va. Code §18-17-2.

The Respondents, in their Motion to Dismiss filed on November 12, 2010, cite W.Va. Code §18-17-1 as well as West Virginia Policy 2419 in support of their proposed ejection of the Student.

Policy 2419 states "If a student meets the criteria for blindness, low vision, deafness, hard of hearing or deaf blindness on the Eligibility Report, the parents or guardians shall be provided information pertaining to the [REDACTED] so they are aware of the options available and may make

an informed decision regarding educational services and programming for their child.” Respondent’s Motion to Dismiss citing Policy 2419.

The Respondent’s conclusion based on these legal precepts, and a hearing test indicating Student has a normal capacity to hear and understand speech, was that “student’s continued enrollment in the [REDACTED] is not appropriate due to the lack of disability in an area of exceptionality that the institution is charged with serving.” Respondent’s Motion to Dismiss, November 12, 201, at pg. 2.

This Student is eligible for special education as a child with a speech language impairment. One issue which, therefore, presents itself by virtue of the parent’s complaint in this matter is whether there is any set of conditions under which a child with a speech-language impairment could be appropriately placed at a special school designed for children with vision and/or hearing impairments?

Appropriateness of Placement

The appropriate placement of all children found eligible for special education and/or related services is determined by the drafting of an Individualized Education Program (IEP) document. After all other sections of the IEP have been completed, the IEP Team then undertakes to determine the Least Restrictive Environment wherein the child could receive her educational services. W.Va. Policy 2419, 126 C.S.R. 16 §3.1, Chap. 5, Section 2J(3).

Placement Options from least restrictive to most restrictive are:

1. General Education Full Time – this is the placement option advocated for student by the educational authorities herein.
2. General Education Part Time

3. Special Education: Separate Class
4. Special Education: Special School. Student's placement at the [REDACTED] falls within this category. There are then four other increasingly restrictive categories beyond this. W.Va. Policy 2419, 126 C.S.R. 16 §3.1, Chap. 5, Section 2JA

A review of this Student's most recent IEP dated October 21, 2010, reveals discontinuities damaging to the School's position. (Respondent's Ex. 1). That document composed of 13 pages bears the date of October 21, 2010, on the first 4 and the last pages. The middle pages in the 5th through 12th position (8 pages total) were lifted whole from the next earlier IEP and bear dates of April 22, 2010 or May 22, 2010. The disparate dates on the various pages would not present any problem if they were consistent with the rest of the IEP. However, they are not. Like the Chimera of Greek mythology, the head and the body of this document do not match.

The October 21, 2010, Placement Determination (Pg. 2 of Respondent's Ex. 1) indicates Student will be in a General Education Environment 96% of the time and in Special Education 4% of the time. The explanation given for why Student will not participate in General Education Full Time is the "need for speech, occupational therapy and physical therapy services." The form this is written on provides that "Present levels of academic achievement and functional performance must explain why full participation is not possible."

Referring to the Present Levels of Performance (PLP) takes us to the 6th and 7th pages of the document. A reading of page 6 reveals a serious problem. It states:

"This student will not participate with non exceptional student's in a regular classroom and/or extracurricular and non-academic activities because full participation in regular setting is limited by regular students'/teachers' inability to fluently communicate in total communication, as needed by this student for accurate receptive and expressive communication and learning tasks."

In other words every single thing in which this student participates within the school setting is required to be in the context of a total communication environment. Further it indicates she needs to be in the presence of other students, as well as teachers who fluently use a total communication approach. A description of her specific speaking difficulties is then included, followed by the statement that “[Student] needs a small group setting with continuing intensive speech therapy.” Respondent’s Ex. 1 at 6th page. A review of the 5th page of this same document, (dated April 22, 2010), is also eye opening. It indicates that reading, language, math, science, social studies, art, physical education, developmental reading and lunch are all to be located in a Special Education Environment (SEE). Not a single class or service is identified as General Education Environment (GEE). Respondent’s Ex. 1, page 5 (marked as pg. 12 of 13). No Goals or Objectives for academic subjects are included anywhere in the document. With the complete disconnect between the 100% Special Education Environment indicated by the information on pages 5 and 6, and the 96% General Education Placement decision contained on page 2, one wonders what the IEP Team was looking at, or considering in formulating its Placement decision. Clearly it was not the provisions of the IEP document. Here the Placement selected is irreconcilable with the identified needs of the child. The only explanation consistent with the evidence is that the October 21, 2010, IEP was created for the purpose of facilitating this Student’s removal to the county school district, not a careful effort to create a program for her needs. See Tr. Pg. 13, Lines 4-12.

Student's Identified Needs

Student's impairments are quite broad. Her Pediatrician indicates she has a static encephalopathy¹; hypotonia²; verbal apraxia³ and dysmorphic⁴ features with a negative genetics workup.”⁵ Respondent's Ex. 2. He indicated children with verbal apraxia like this student, have difficulty saying what they wish to say because of motor planning problems. He recommends the delivery of “intensive speech therapy 4-5 times per week.” As well as “the use of a total communication approach including spoken words, signs, pictures, assistive technologies etc.”, and “small group situations with lots of one on one intervention.”

These recommendations are consistent with information from the National Institutes of Health – National Institute on Deafness and Other Communication Disorders. They state that “In severe cases, people with acquired or developmental apraxia of speech may need to use other ways to express themselves. These might include formal or informal sign language, a language notebook with pictures or written words that the person can show to other people, or an electronic

¹ Encephalopathy - “A brain dysfunction marked by varying degrees of impairment of speech, cognition, orientation and arousal.”

² Hypotonia - “In physiology, having abnormally low tension (e.g., of the muscles...)”

³ Apraxia - “Inability to perform purposive movements although there is no sensory or motor impairment.” “Verbal apraxia - the inability to form words or speech, despite the ability to use oral and facial muscles to make sounds.”

⁴ Dysmorphic - misshapen

Definitions from Tabers Cyclopedic Medical Dictionary; F. A. Davis Company, Philadelphia; Copyright 2005.

⁵ See also Finding of Fact No. 12 regarding other impairments which impact her educational program needs.

communication device such as a portable computer that writes or produces speech. Petitioner's Ex. A under "How is it treated" on pg. 2.

So it appears both from the recommendations of Student's physician, (Petitioner's Ex. A), and from the present levels of performance in her IEP (Respondent's Ex. 1, pg. 5) that Student requires a total communication environment, for all academic subjects and non-academic/extracurricular activities, necessitated by her problems with both receptive and expressive communication. She also requires the presence of fellow students who are able to use and understand sign language or other communication modes used in a total communication setting. Certainly any county school district could provide a sign interpreter, and perhaps even an instructor with signing skills. But an entire school where all staff sign and all students are familiar with signing is unlikely. The hearing evidence presented identified only the [REDACTED] as a facility able to provide a total communication environment.

Can the School for the Deaf Be an Appropriate Placement for a Non-hearing Impaired Child?

The [REDACTED] was created pursuant to W.Va. Code §18-17-1 *et seq.*, and admissions to that institution are governed by W.Va. Code §18-17-2. While that Code Section does not expressly exclude other students, it provides for enrollment only of "Deaf and/or Blind youth residents of the state, between the ages of five and twenty-three inclusive." Certainly it has been the position of the WVDE that the enrollment at the [REDACTED] is exclusive to the Blind and/or Deaf populations. Respondent's Ex. 3.

The question of what is appropriate for this child is, however, to be determined by the contents of her IEP.

That document indicated that she requires a total communication environment for all academic, as well as non-academic/extracurricular settings. It also indicates that for full participation she needs teachers and other students around her who can "fluently communicate in full communication." Respondent's Ex. 1, pg. 6. It is true that the speech language pathologist in the county schools indicated that a total communication environment could be given to student by the LEA. Tr. Pg. 34, Line 23 to Pg. 35, Line 2. But her later admission that she did not know all that the [REDACTED] provided as part of a total communication environment undermines her original opinion. Tr. Pg. 35, Lines 3-7. This Speech-Language instructor is only going to be servicing Student 240 minutes a month (60 minutes per week). Tr. Pg. 33, Lines 15-19 and Respondent's Ex. 1, pg. 4. The IEP indicates that both teachers and students in Student's surroundings be able to use total communication "as needed by this student for accurate receptive and expressive communication and learning tasks." There is a great discrepancy between providing a teacher with signing capabilities 240 minutes per month (1 hour per week) and a total communication school building where all teachers and students are familiar with signing as well as other non-verbal methods of communication. Further the testimony of the County's Special Education Director was that his district did not have such a program. Tr. Pg. 48, Line 18 to Pg. 49, Line 8. At most they would provide a part time sign interpreter. Tr. Pg. 52, Line 1-10 and Pg. 53, Lines 10-15. This is not surprising to me. Where but in an institution for communication impaired children would such an environment ever come to be? The total communication environment at the [REDACTED] [REDACTED] is in existence there for the simple reason that deaf children are all communication

impaired as evidenced by the grouping of deafness with communication disorders at the National Institutes of Health. Petitioner's Ex. A, pg. 1. All instruction at [REDACTED] is presented through voice as well as sign language. Tr. Pg. 77, Lines 4-15. All the children there are presented with voice and signing on a regular basis and therefore are familiar with signing. Consequently, the total communication environment at [REDACTED] is unique and not capable of recreation in a regular school setting. Even if it were practicable, it is beyond my authority to order other students to learn to communicate in modes other than speech. But according to Student's present IEP this is what she would need for the County to provide what is described in the IEP document. So the problem comes down to a conflict between the requirements of this Student's IEP, which appears to require a service available only at [REDACTED], and the provisions of W.Va. Code §18-17-2 which provides only for deaf and/or blind students to attend the schools which are part of [REDACTED]. It is my conclusion that the mandates of the IDEA and WV Policy 2419 supercede the limitations of W.Va. Code §18-17-2 as to this Student, and the unique circumstances presented.

The provisions of IDEA are an overarching framework which applies to all States, their political subdivisions and expressly applies to State agencies and schools such as schools for children with deafness. 34 C.F.R. §300.2 b(1) and b(1)(iii) authorized by 20 U.S.C. §1412.

Federal Funding to the State's educational authorities is dependent upon compliance with its mandates. 34 C.F.R. §300.2(a) and W.Va. Policy 2419, 126 C.S.R. 16 §3.1, Introduction. I can find nothing within the IDEA which permits the States to cordon off certain areas of special education for their autonomous control. Rather, as mentioned above, the IDEA and its provisions concerning

the creation of an IEP and the requirement that placement be based on that document applies at special schools just as it does in all public schools.

The Student herein has a disorder (verbal apraxia) which creates functional communication problems similar to those encountered by deaf children. Petitioner's Ex. A and Respondent's Ex.

2. Her difficulties are with both receptive and expressive communication, creating a need for a total communication environment. Respondent's Ex. 1, pg. 6

The local county schools do not have a total communication setting available. Due to the necessary participation and training of the student body to create one, it is a service that goes beyond what can be ordered by a hearing officer. However, such an environment already exists, intact, at the school she now attends. Evidence at hearing did not reveal any other educational agency in the State with a total communication environment available. Consequently, Student should be permitted to attend the [REDACTED] so long as her IEP mandates a total communication environment is necessary for her.

To rule otherwise would be to permit the State to enforce its legislation in such a way as to effectively obstruct the IDEA in its mandates to create IEPs based on a child's needs, and then to determine placement based on that document.

Such a result would not be legally sustainable. It is well settled that "state law is naturally preempted to the extent of any conflict with a federal statute." Crosby v. National Foreign Trade Council, 530 U.S. 363, 372; 120 S.Ct. 2288, 2294; 147 L.Ed.2d 352, _____ (2000) citing Hines v. Davidowitz, 312 U.S. 52, 66-67; 61 S.Ct. 399, 404; 85 L.Ed. 581 (1941).

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This doctrine of federal preemption will apply where, “in the circumstances of [the] particular case, [the State’s] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Crosby v. National Foreign Trade Council, *supra* at 530 U.S. 363, 372; quoting Hines, *supra* at 61 U.S. 67.

In the factual scenario presented, the effect of West Virginia’s Code §18-17-1 *et seq.*, is to remove this Student from [REDACTED] for the sole reason that she is not a deaf child.

However, the federal mandates of the IDEA (together with the echoing requirements of West Virginia’s Policy 2419, 126 C.S.R. 16 §3.1) require that Student be placed where the needed services of her IEP dictate. Her documented need for a total communication environment is only available at [REDACTED] and could not practicably be reproduced in Student’s home county schools. Consequently, the effect of enforcing the requirements, of W.Va. Code §18-17-1 *et seq.*, as to this child, now, would be to violate her right to a Free Appropriate Public Education and to obstruct the purposes and objectives of the IDEA. In these circumstances the State statute must yield to the requirements of the Federal Act. Therefore, this child should be placed at [REDACTED], in accordance with the service requirements of her IEP.

Other Matters

Additional Evaluations

It has been recognized and documented that Student requires additional evaluations to be performed in the areas of academic achievement and Intelligence (IQ) Testing. Respondent’s Ex. 1, pg. 3. These tests should be completed and the results available for consideration at Student’s next IEP Meeting.

Student's Current IEP

As discussed above, Student's IEP of October 21, 2010, (Respondent's Ex. 1) is fatally defective in several ways. It mandates a special education setting for all of her classes while proclaiming she should be in General Education classes 96% of the time; no Regular Education teacher attended the IEP Meeting where a change of placement was to be considered; and there are no present Levels of Performance or Goals and Objectives given for her academic subjects, while simultaneously mandating a special education environment for those classes. This document does not represent a valid IEP and should not be followed. The IEP immediately preceding it was drafted on April 22, 2010, (Petitioner's Ex. F). The anniversary date for this document is fast approaching. Therefore all necessary preparations should now be undertaken to prepare a new IEP document for use in the 2011-2012 school year as required by 20 U.S.C. §1414(d)(4)(A)(i).

VI. CONCLUSION

For all the above stated reasons it is the conclusion of this hearing officer, that:

– Pursuant to her most recent valid IEP dated April 22, 2010, she requires a total communication environment in which to receive her educational services. A subsequent IEP renewal document dated October 21, 2010, also included that same requirement although that IEP has been ruled invalid on other grounds.

– Such a total communication environment requires that all teachers and her school peers be conversant in verbal as well as non-verbal modes of communication.

– That such an environment is available, at [REDACTED] and is not capable of reproduction in the child's home county school district.

– Consequently, as long as Student’s IEP shall support and document that she requires a total communication environment, she should be permitted to attend [REDACTED] and her mandated removal would violate her right to a Free Appropriate Public Education.

The need for assessments in the areas of academic achievement and Intelligence (IQ) Testing have been recognized, and such testing should be performed and the results made available the next time her IEP is reviewed.

The IEP document of October 21, 2010, is fatally flawed because:

– The Placement decision is completely inconsistent with the programmatic elements described in the document.

– Present Levels of Performance, as well as Goals and Objectives, were not included for all identified areas where Student’s exceptionality negatively impacts her ability to benefit from the IEP.

– No Regular Education teacher participated in the writing of that document.

Consequently, the IEP document preceding it, dated April 22, 2010, should be deemed her last valid IEP, and an annual review of that IEP will be due in April 2011.

VII. DIRECTIVES FOR IMPLEMENTATION

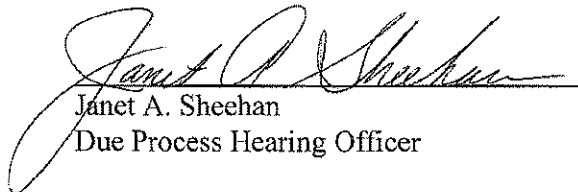
1. Pursuant to the identified needs of this Student for a total communication environment as documented in her IEP s of April 22, 2010 (Petitioner’s Ex. F) and October 21, 2010 (Respondent’s Ex. 1), Student should be permitted to remain in her present educational placement program located at the [REDACTED] ([REDACTED]).

2. Student shall be evaluated in the areas of academic achievement and should also receive Intelligence (IQ) Testing as soon as practicable, so that the reports of these assessments are available to the IEP Team at the next annual IEP review.
3. An annual IEP review for this Student will be due no later than April 22, 2011.

VIII. APPEAL RIGHTS

Any party aggrieved by the findings and decisions made in the hearing has the right to bring a civil action with respect to the due process hearing complaint notice in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days of the issuance of the hearing officer's written decision. West Virginia Policy 2419, Regulations for the Education of Students with Exceptionalities, 126 C.S.R. 16 §3.1, Chapter 11, Section 3N.

SO ORDERED:


Janet A. Sheehan
Due Process Hearing Officer

ENTERED this 15th day of March, 2011.