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STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
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CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

May 6, 1986

ARCH A. MOORE, JR.
Governor

Paul E. Devericks, Sr.
Route 4, Box 35
Apartment 106
Weston, WV 26452

Sharon Mullens, Esquire
Assistant Attorney General
1204 Kanawha Boulevard, E.
Charleston, WV 25301

Stephen Weber, Esquire
Kay, Casto & Chaney
1616 Charleston National Plaza
Charleston, WV 25301

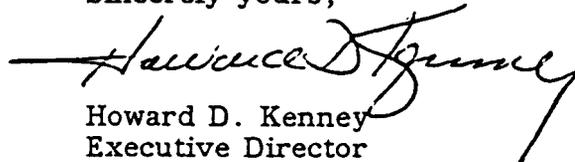
RE: Devericks V Lewis County Board of Education/
PAH 239-82.

Dear Above Parties:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Devericks V Lewis County Board of Education - PAH 239-82.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/kpv
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PAUL E. DEVERICKS, SR.,
PAUL E. DEVERICKS, JR.,
and BARBARA DEVERICKS,

Complainant,

vs.

Docket No. DAH-239-82

LEWIS COUNTY BOARD
OF EDUCATION,

Respondent.

O R D E R

On the 8th day of April, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Christine M. Hedges. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions and amendments set forth below.

The Commission hereby deletes paragraph 14 of the Conclusions of Law, page 11, and substitutes therefor the following paragraphs.

"14. Complainants, Paul E. Devericks, Sr., Paul E. Devericks, Jr. and Barbara Devericks, are each entitled to incidental damages in the amount of Five Thousand Dollars (\$5,000.00). State Human Rights Commission v. Pearlman Realty Agency, 239 S.E.2d 145 (W.Va. 1977)."

"15. In this case no monetary damages are adequate to compensate complainants Paul E. Devericks, Jr. and Barbara

Devericks for the loss of an education. The respondent should be required to provide these complainants with an appropriate education until they are each 24 years of age. This compensatory education should be provided pursuant to individual education plans drawn up each year which insure that the placement is in conformity with the least restrictive environment provisions of the West Virginia Regulations and of 34 C.F.R. §§300.550 - 300.554."

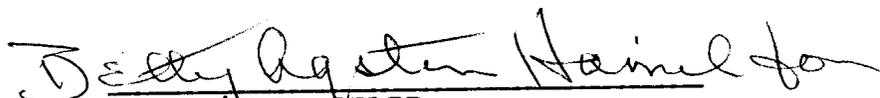
It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order, except as amended by this Order.

The respondent is hereby ORDERED to provide to the Commission proof of compliance with the Commission's Order within thirty-five (35) days of service of said Order by copies of cancelled checks, affidavit or other means calculated to provide such proof.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 21 day of April, 1986.

Respectfully Submitted,



CHAIR/~~VICE-CHAIR~~
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

PAUL E. DEVERICKS, SR., /
PAUL E. DEVERICKS, JR., /
and BARBARA DEVERICKS, /

Complainants, /

vs. /

CASE NO. PAH 239-82

LEWIS COUNTY BOARD OF /
EDUCATION AND BOARD OF /
SPECIAL EDUCATION, /

Respondents. /

Approved
ARJ
2/3/86

RECOMMENDED DECISION

A. Preliminary Matters

The complainants charged the respondent with a violation of the Human Rights Act "on or about November 6, 1981, prior to and continuing" by a complaint signed on November 19, 1981, and filed shortly thereafter with the West Virginia Human Rights Commission. A public hearing was scheduled on June 26, 1985, by notice from the West Virginia Human Rights Commission dated April 12, 1985. An answer denying the allegations of the complaint was filed on July 3, 1985. A motion to intervene by counsel, Gail Falk, as representative of the class in Medley V. Lord, et-al., Civil Action 78-2099 (S.D. W.Va. 1981) was filed on April 29, 1985. A motion to strike and remove Paul E. Devericks, Sr. as complainant and substitute Paul E. Devericks, Jr. and Barbara Devericks was filed by the respondent on July 8, 1985.

A pre-hearing conference was held on July 31, 1985, at which the complainants and counsel for both parties were

present. A pre-hearing conference order dated August 15, 1985, granted counsel Gail Falk's motion to intervene and denied respondent's motion to strike Paul E. Devericks, Sr., as complainant, but ordered that Paul E. Devericks, Jr., and Barbara Devericks, having reached the age of majority, be named complainants and having interests separate from those of Paul E. Devericks, Sr., that the attorney general appoint them separate counsel. An expedited hearing solely on the issue of future relief was scheduled for August 27, 1985, in Lewis County.

On August 27, 1985, a hearing was held and counsel for all parties submitted mutually agreeable proposed plans of education for Barbara Devericks and for Paul E. Devericks, Jr., which provided for special education through the summer of 1986. Said plans were ordered implemented by agreed order dated September 20, 1985.

Also on August 27, 1985, a pre-hearing conference was held and a hearing on the allegations and request for damages for past acts of the respondent was scheduled for October 29, 1985. Counsel for all parties filed pre-hearing memoranda.

A public hearing was held on October 29, 1985, in Weston, Lewis County, West Virginia. Complainant, Paul E. Devericks, Sr., was present in person and represented by Bruce R. Walker, assistant attorney general; complainants Paul E. Devericks, Jr., and Barbara Devericks, in person and by counsel, Sharon M. Mullens, assistant attorney general; respondent Lewis County Board of Education by Denton King,

director of Special Education, and by counsel, Stephen A. Weber. The hearing was presided over by Christine M. Hedges, hearing examiner, and Russell Van Cleve, Chairperson of the West Virginia Human Rights Commission. A deaf interpreter was present during the first half of the hearing to interpret the proceedings to complainants Paul E. Devericks, Jr., and Barbara Devericks, but was excused during the last half of the hearing upon consent from all parties.

Subsequent to the hearing, memoranda regarding respondent's motion to dismiss were filed on behalf of all parties, and by order dated December 19, 1985, the hearing examiner denied respondent's motion to dismiss. No proposed findings of fact or conclusions of law were filed.

B. Issues

1. Whether respondent unlawfully discriminated against the complainants because of a handicap, by denying them a free, public education.

2. If respondent unlawfully discriminated against complainants, who is entitled to relief, and what relief should be granted.

C. Findings of Fact

Based upon the credible evidence adduced at the public hearing, the stipulations of the parties and the exhibits of the parties, the hearing examiner makes the following findings of fact:

1. Complainants, Paul E. Devericks, Jr., age 21,

and Barbara Devericks, age 19, are handicapped persons as those terms are defined by the West Virginia Human Rights Act.

2. Complainant, Paul E. Devericks, Sr., is the father of the other two complainants, acted as their legal guardian and next friend in filing the complaint herein at a time (November, 1981) before which the Devericks children had reached the age of majority.

2. The respondent, the Lewis County Board of Education, is a person subject to the provisions of W. Va. Code Section 5-11-9 and is a public accommodation as that term is defined by the West Virginia Human Rights Act. There is no legal entity named the Board of Special Education. The Department of Special Education is a division of the Lewis County Board of Education.

3. Paul E. Devericks, Jr., is profoundly deaf. He communicates solely through gestures which are homemade and have no syntax. He doesn't communicate except to make his basic needs known. Socially he has the maturity of a four-year-old. Barbara Devericks is hearing impaired. She is able to communicate orally. Since she began the agreed educational program in Lewis County in September, 1985, she has progressed substantially. She has the ability to learn independent living skills.

4. Paul E. Devericks, Sr., moved his family and enrolled his children in the Lewis County schools in November or December of 1977. At that time Lewis County had no appropriate education for deaf and hearing impaired students,

but Paul, Jr., and Barbara were taught in a separate class for two hours a day from approximately February, 1978, until summer vacation. In the summer of 1978, Paul, Jr., was committed to Weston State Hospital. During the 1978-79 school year Paul, Jr., and Barbara attended the Romney School of the Deaf and Blind, a residential school. Behavior problems caused Paul, Jr., to be expelled from the Romney School. Subsequently, the Devericks moved to Upshur County. The County Juvenile Court sent Paul, Jr., to the Brown School in Texas. The Devericks lived in Texas for a period of time. In March, 1981, they returned to Lewis County.

5. During the spring of 1981, the respondent provided the Devericks children with counseling and language therapy for a half-day, 2-3 days per week. The Lewis County Special Education department tried to work out residential placements for the children for the 1981-82 school year. They advocated sending Paul, Jr., to Huntington State Hospital and Barbara to Romney. Paul Devericks, Sr., objected to sending his children to residential programs and requested that they be provided an appropriate education in the Lewis County School system. During 1981-82 the children attended the already existing alternative school which consisted of approximately twenty children who would now be labelled as "behavior-disordered" children.

6. The Devericks children dropped out of the Lewis County school system around April, 1982. Between 1982 and 1984, Paul, Jr., was in Weston State Hospital for a period of

time.

7. From April, 1982, until September, 1985, the Devericks children received no services from the Lewis County Board of Education, although there were several meetings with Mr. Devericks during this time.

8. The complainants, at various times, requested that appropriate education be provided them in the Lewis County school system. The respondent attempted to convince complainants that they should accept residential placements elsewhere, including Huntington State Hospital, the Vocational Rehabilitation Center at Institute, the Romney School for the Deaf and Blind and possible placements in Florida and Texas schools.

9. During the times that the Devericks children received instruction in school and at Weston State Hospital (respondent's exhibit 33) the children made educational progress.

10. Paul, Jr., and Barbara are progressing in the individualized educational programs they receive now with a certified deaf educator and counselors in the Lewis County School system. Barbara is progressing academically very quickly. Paul, Jr., is gaining some academic and living skills. Both students would gain more in a residential setting with deaf peers with whom to communicate.

11. A due process hearing was held in 1981, regarding Barbara's placement. Placement Advisory Committee meetings were held for both students in 1983 and 1984. It is not clear from the record if the Devericks children were

accorded all of their procedural rights concerning their placement under state and federal law.

D. Conclusions of Law

1. The complainants, Paul E. Devericks, Jr., and Barbara Devericks are persons within the meaning of W.Va Code Section 5-11-3(a) and are proper complainants.

2. The complainant, Paul E. Devericks, Sr., was at the time of the filing of this action the guardian and next friend of the real parties in interest to this action. Paul E. Devericks, Sr., has not proven that he was discriminated against in violation of the West Virginia Human Rights Act, and he has not been appointed committee for the said Paul E. Devericks, Jr., and Barbara Devericks. He is a proper party to this action only to the extent that he was the guardian of said children for all time periods before they reached the age of 18.

3. The respondent, the Lewis County Board of Education, is a "person who is the agent of a place of public accommodations" as those terms are defined by W. Va. Code Section 5-11-3(a), Section 5-11-3; and Section 5-11-9(f).

4. Complainants filed a timely complaint and the West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to W. Va. Code Sections 5-11-8, 9 and 10.

5. The West Virginia Human Rights Act is violated when a county school board denies children an equal opportunity to an education because they are handicapped.

W. Va. Code Sections 5-11-9(f)(1); see also W. Va. Constitution Article XII, Section 1; Pauley v. Kelly, 255 S.E. 2d 859(W.Va. 1979); W. Va. Code Section 18-20-1 et seq.

6. The Education for All Handicapped Children Act (EHA), 20 U.S.C. Section 1401-61 (1975), also known as Public Law 94-142, conditions federal funding for state education on the state's providing special education to handicapped children between the ages of 3 and 21. The Act and regulations promulgated pursuant to it, and the state law (W. Va. Code Section 18-20-1 et seq.) and state regulations (complainant's exhibit 2) are all relevant to this case and set forth the standards to apply to this case to determine whether the respondent failed to provide an education to the complainants as required by these laws.

7. To determine whether a school board's placement of handicapped children is discriminatory under the W. Va. Human Rights Act, it must be determined whether the federal standards, and state special education standards were met by the school system.

8. The basic thrust of the federal law, EHA, is to require states to provide procedural due process to parents of handicapped students in determining their individual education plans, to "mainstream" special children as much as possible, and to prevent the use of tests and evaluations that are racially and culturally discriminatory. 20 U.S.C. 1412(5). Although West Virginia and federal law and regulations contain procedures for out-of-state and

residential placements, the least restrictive environment must be pursued. 34 C.F.R. 300.550-556; West Virginia Regulations for the Education of Exceptional Students (1983) (W.Va. Regs) 1.3(2)(d).

9. The respondent failed to adequately protect the procedural rights of the complainants to participate in their educational plans and placement. Although there was evidence that the father of the two handicapped individuals did not cooperate, the evidence was more convincing to the hearing examiner that the term "cooperation" was used to mean that the father would not go along with the respondent's preconceived plan to send the students to other schools.

10. The respondent failed to consider "least restrictive environment" placements for the complainants, offering only to send them out of the county. The EHA does not require mainstreaming in every case, but its requirement is that mainstreaming be provided to maximum extent appropriate, and in some cases, placement which may be considered better for academic reasons may not be appropriate because of failure to provide for mainstreaming. EHA, 20 USC. Section 1412(5)(B); Roncker on Behalf of Roncker v. Walter, 700 F.2d 1058(1983).

11. Although there may have been some disagreement as to whether the Devericks could be provided an appropriate education in Lewis County, and although cost is a proper factor to consider, cost is no defense if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children. Roncker,

supra, at 1063. Here, the school board was contending it would spend up to \$50,000.00 to send one child to a Texas school instead of hiring a teacher for only two hearing impaired children in the Lewis County schools.

12. The "Rowley" case defined a "free appropriate education" as one in which the school provided personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 at 3049; 73 L.Ed.2d 690, at 710 (1982). In that case, the Supreme Court found that even though the provision of a sign language interpreter for Amy Rowley would have allowed her the best education, she was performing better than average and was therefore receiving an adequate education. The respondent here is claiming that a residential placement for the Devericks would provide a better education. The complainants are asking only for personalized instruction with sufficient support services to enable them to benefit educationally from their instruction.

13. The testimony of the respondent's director of special education that in 1978 and in 1981 it was difficult for a rural West Virginia county to find and hire a certified deaf educator is credible. The evidence also indicated that Paul E. Devericks, Sr., may have been difficult to deal with. It is uncontroverted, however, that the respondent is now providing Paul, Jr., and Barbara with some education and that

they are receiving educational benefits.

14. Complainants, Paul E. Devericks, Jr., and Barbara Devericks are entitled to damages. Here, where no monetary damages would compensate the complainants for the loss of an education, an order requiring compensatory education is appropriate. The respondent should be required to provide the complainants with an appropriate education until they are each 24 years of age. The compensatory education should be provided pursuant to individual education plans drawn up each year which insure that the placement is in conformity with the least restrictive environment rules of the West Virginia Regulations and of 34 C.F.R. 300. 550-300.554.

E. Determination.

The respondent discriminated against the complainants because of their handicaps by failing to provide them with an appropriate education as determined by procedures/process which adequately considered the least restrictive environment, thereby violating the West Virginia Human Rights Act.

Proposed Order

The hearing examiner recommends that the Commission take the following action:

1. The respondent be required to provide to Paul E. Devericks, Jr., and to Barbara Devericks a free and appropriate public education until they each reach the age of 24. The respondent shall make an individualized education plan every year for each which shall insure that each student

CERTIFICATE OF SERVICE

I, Paul R. Stone, hereby certify that I have this 4th day of February, 1986, mailed a true copy of the Recommended Decision named in the foregoing letter by depositing same in the United States mail in properly addressed and stamped envelopes to the following persons:

✓ Paul E. Devericks, Sr.
Route 4, Box 35
Apartment 106
Weston, WV 26452

Bruce R. Walker, Esquire
Assistant Attorney General
Room E-26, State Capitol
Charleston, WV 25305

✓ Sharon Mullens, Esquire
Assistant Attorney General
1204 Kanawha Boulevard, E.
Charleston, WV 25301

Lewis County Board of Education
and Board of Special Education
322 East 3rd Street
Weston, WV 26452

✓ Stephen Weber, Esquire
Kay, Casto & Chaney
1616 Charleston National Plaza
Charleston, WV 25301



SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



PAUL CRABTREE
ADMINISTRATIVE DIRECTOR

ADMINISTRATIVE OFFICE
E-402 STATE CAPITOL
CHARLESTON 25305
304/348-0145

February 4, 1986

Mr. Howard D. Kenney
Executive Director
W. Va. Human Rights Commission
215 Professional Building
1036 Quarrier Street
Charleston, West Virginia 25301

Re: Devericks v. Lewis County
Board of Education - PAH 239-82

Dear Mr. Kenney:

Transmitted herewith is the file in the above-referenced matter, along with the Recommended Decision submitted by the Hearing Examiner. I have reviewed this decision, and believe it is now ready for review by the Commission.

If you have any questions, please feel free to call.

Sincerely,

A handwritten signature in cursive script that reads "Paul R. Stone".

Paul R. Stone
Chief Administrative Law Judge

PRS:bc

Encs.

cc: Christine Hedges, Hearing Examiner