

## CASE CLOSURE SUMMARY REPORT

County  
School Division

\_\_\_\_\_  
Name of Parents

\_\_\_\_\_  
Name of Child

**April 5, 2012**  
Date of Decision or Dismissal

**Kathy Mehfoud and Jason Ballum**  
Counsel Representing LEA

**Neil S. Johnson**  
Counsel Representing Parent/Child

**Parents of Student**  
Party Initiating Hearing

**County School Board**  
Prevailing Party

Hearing Officer's Determination of Issue(s):

1. *Application, need for, identification of and elements of ABA teaching method; determination of student's failure to meet standard of proof.*
2. *Appropriateness of Special Ed as determined by progress; determination of progress and student's failure to carry burden.*
3. *Statute of Limitations, lack of evidence in re: private placement. No decision required.*

Hearing Officer's Order and Outcome of Hearing:

*Order in favor of County School Board and students Due Process Request was dismissed.*

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision was faxed and mailed on April 5, 2012 to all parties.

*William J. Francis Jr.*  
Printed Name of Hearing Officer

*[Handwritten Signature]*  
Signature

APR 06 2012

Dispute Resolution &  
Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION  
DUE PROCESS HEARING

IN RE: -

HEARING OFFICER DECISION  
DISCUSSION AND ANALYSIS

This matter is before me having been brought by the parents of the student (" "), for a due process hearing and decision. is a nine year old student in the third grade who attends elementary school at in , County. receives educational services from County in an individualized program and participates daily with non-disabled peers for school activities other than academic curriculum. has been found and it is agreed by the parties that he is eligible for special education services under the ("IDEA") and his identification thereunder is one of autism and speech language impairment.

My decision herein is that through his parent's and counsel, has not carried the burden of proof required under the law. See Schaffer v. Weast, 546 U.S. 49 (2005).

Under the required methodology I have considered, reviewed and examined every exhibit offered on both sides, carefully listened to two full days of testimony, reviewed and analyzed over and over again the written Closing Arguments of counsel and have read and re-read the approximate 1900 page transcript of the evidence already heard at the hearing. At the close of the parent's evidence, the School Board made a motion to dismiss; that motion was denied. No motion to dismiss was made again at the closing of the School Board's evidence. I believe it is significant to understanding my decision to point out that had this matter been in a court of law, as opposed to being a due process hearing with an informal and relaxed evidentiary guideline, that I would have been inclined to grant the Schools Board's motion and most certainly at the close of the evidence, any court of law would have granted the same motion had it been made. Because of the nature of the due process hearing and the practice followed of presenting written closing arguments, preparing a transcript and the

requirement of a written decision, due process alone demands, however cumbersome, that the procedure be followed. It is noted here simply because my decision after numerous hours of review is exactly the same that it would have been had this been a court of law at the close of all the evidence. I.e. the parents of \_\_\_\_\_ have not sustained their burden of proof.

### ANALYSIS

The crucial and controlling issue involved in this decision was the complaint that \_\_\_\_\_ was not receiving an appropriate education as required under the ("IDEA"). Such appropriateness or lack thereof is determined under the law by the measurement of progress if any. See Bd. Of Ed. Of Hendrick Hudson Cent. Sch. Dist. V. Rowley, 458 U.S. at 176, 207 (1982). See Individuals with Disabilities Act, 20 U.S.C. code section 1400, et seq. ("IDEA"). Reviewing the cases cited by both sides by both sides; Hartman v. Loudon County Bd. Of Educ., 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997); MM., 303 F.3d at 526. See Conklin, 946 F.2d 306, 308 (4<sup>th</sup> Cir. 1991). See J.P. v. Hanover Sch Bd., 447 F. Supp. 2d 553, 584 (E.D. Va. 2006). I find that the standard of requiring the appropriateness of an education in accordance with the procedures of the ("IDEA") is required to confer educational benefit and such educational benefit means something more than minimum or trivial. Having made that legal finding however, I am still convinced that the student has failed to meet that burden as the evidence shows ever so clearly that there has been progress and it is certainly more than trivial or minimum.

At the very core of the student's burden is whether \_\_\_\_\_ County uses instruction in an academic curriculum described as Applied Behavior Analyst ("ABA"). Such an ABA program has variously been described throughout the evidence and testimony basically as best as I can understand as the only research based teaching program accepted as one for the teaching of children with Autism. I simply don't know what that means. There was no evidence, ever to qualify by teaching methods what curriculum or strategies are included in an ABA program, I simply can't tell. It is obvious from all the witness testifying randomly there are aspects of the ill- defined ABA program that are being used by \_\_\_\_\_ County and others that may not be utilized and still other aspects of whatever the ABA program is may be being measured improperly by \_\_\_\_\_ County. None of those random examples are of much help in identifying what a ABA program is, what it includes, why it may be appropriate for \_\_\_\_\_ and what part portion of or

all of such program is , or is not, being offered by \_\_\_\_\_ County to the student.  
This is at the core of the students' case.

\_\_\_\_\_ case is that a pure ABA program is not being offered by \_\_\_\_\_ County and can only be received and provide the required educational value and appropriateness by a private school setting. The students case I find fails at the core of, there being the above referred to, lack of definition of what a ABA program is. I still don't know. Therefore I have found that the student has not met the burden as required under the law.

Even if I were to ignore my dissatisfaction with the identification of the ABA program and how it is, or is not being applied in theory I believe I could still find that this student has not received a FAPE as required under IDEA because there has not been the required progress under the law. My finding as already indicated is to be contrary however and to so find would require me to ignore the creditability of appropriateness and the weight of the evidence. While I may agree that the parents retaining of an education advocate as well as other professionals and experts and going forth with the due process request and hearing is coincidental to the evidence of progress ,that evidence of progress does not give rise to the inference that such evidence is incredible and unworthy as a matter of law.

The clear notes that I have taken, my review of the testimony and my acceptance of the testimony of the witnesses \_\_\_\_\_ and \_\_\_\_\_ , demonstrate clear progress in many academic areas and in regard to behavioral and communication skills. It is my consideration of the creditability of these two witnesses that controlled beyond any others considering their appearance and manner from the witness stand, there intelligence, their interest in the outcome of the case and any bias if any has been shown and their opportunity for knowing the truth and having observed the things to which they testified. It is these two witnesses \_\_\_\_\_ and \_\_\_\_\_ , who are more believable and I have weighed their testimony accordingly.

The examples of \_\_\_\_\_ progress were appropriately summarized on pages 13, 14 and 15 on the written closing argument of the \_\_\_\_\_ County School Board as recapped below. These examples are adopted herein.

Pages 13, 14, 15  
OF SB CLOSING ARGUMENTS

The testimony of the Schools Board's expert witnesses, each of whom are professional educators, demonstrates that [redacted] has made "tremendous progress academically" in his current program, particularly given his identification as a student with Autism and speech language impairment, and a student with general cognitive ability level lower than 99 percent of other students his age. See TR 477-8, 489-90. By way of example, [redacted] has acquired dozen of key academic skills in the areas of oral language, reading, writing, number sense, computation and estimation, measurement, and geometry, among things. See e.g., SB 36. Likewise, [redacted] has made substantial gains in his behavior and communication skills. See e.g., SB 35; SB36. He has grown from a student who frequently "bolted" from the classroom and ran down the halls to one who now only occasionally attempts to leave his area, never "bolts" from his classroom, and works cooperatively with his peers. See e.g., 36, TR 398-00, 534-535.

[redacted] has made outstanding progress toward his annual IEP goals, which were agreed upon with parental consent on September 29, 2012. SB 31, 33, and 35. See e.g.; TR 392-93. [redacted] has mastered many of the objectives and annual goals in less than half a year, and he has made progress toward all of his IEP goals. Id. [redacted] has made so much progress in a short period of time that the IEP team has met on three occasions, November 11, 2011, December 12, 2011, and December 15, 2011 to discuss updating the student's academic and communication goals. TR 393-4 & 423-4.

[redacted] is the [redacted] Specialist and Service Coordinator for [redacted] County Public Schools and oversees specialized programs for approximately 200 students with [redacted] countrywide. TR 368-70. [redacted] is an expert in educating students with [redacted] and developing IEP's. See TR 368-72. [redacted] has worked with [redacted] since 2007, she has observed him on a monthly basis, and she participated in his IEP meetings during the past two years. Which is the relevant time period for the pending action, including all meetings during 2011-2012 school year. See TR 372-3, 377. [redacted] has observed numerous examples of academic progress, including [redacted] recently acquired

skills of reading with inflection. **TR 397**. With respect to behavioral progress, has described progress as "tremendous". **TR 407**.

is a licensed, nationally certified school psychologist for County public Schools. **TR 468**. During the hearing, was qualified as an expert in psychology, cognitive assessments, and educational programming for students with disabilities. See **TR 464-72**. evaluated in November 2010, and the evaluation results indicated that general cognitive ability score and nonverbal ability to score fall below the first percentile for students his age. **TR 473, 475** and **477-79**. was the only witness to testify who conducted a cognitive assessment of the child, and her psychological evaluation report was the only evidence which included the results of a cognitive assessment. SB 17.

Notwithstanding cognitive challenges, testified that she "was very pleased to see the increases in communication skills, both with adults and peers, and particularly his spontaneous language, in making requests, [and] asking for things that he needed." **TR 485**. She further testified that was "quite able to communicate what he wanted" during classroom activities. **TR 486**. has observed counting money; telling time to 15 minute increments; reading stories; and taking turns with other students. **TR 486-7 489-90**. In terms of social interaction, testified that participated in games and initiated contact with peers and that his efforts were reciprocated. See **TR 884**. , like , noted that progress exceeded her expectations based upon his cognitive ability. **TR 489**.

I feel that I would be impolite if I did not address what counsel for the student raises in page nine of his rebuttal brief, wherein he seeks to demonstrate that County has scripted the testimony and Schools Board's exhibits 35 and 36 and when testified, that in her observation she was looking for evidence to support the County Schools position in this case because she knew that a due process hearing was pending. Contrary to counsel's argument I find that admission is quite obvious and what is appropriate preparation for testimony to enhance the reliability of the evidence provided by that witness.

### **CONCLUSIONARY COMMENTS ON THE PROCESS**

As to other issues raised by this case notably, the identity of any private program and or its appropriateness, or issues of statute of limitations I make no finding as such is not necessary having decided this case solely on the student's failure to have met the required burden of proof.

The due process hearing process is laborious, confusing, complicated and expensive. Although I have decided this case against the parents, it is clear to me that the process has worked. By the parents retaining an advocate experts and others the evidence is clear that \_\_\_\_\_, is receiving a better education and is making significant progress which was not evident as early as two years before the filing of the due process request. Therefore as Hearing Officer and having observed the parents over a period of two days and listened to the testimony I say that you have made a difference.

### **DECISION AND ORDER**

Having previously been requested to and having extended the due date for this decision up to and including April 5, 2012, the same is so Ordered and found to be in the best interest of the student.

**IT IS FURTHER HEREBY ORDERED** the parents claims for relief through their amended due process request is dismissed.

### **RIGHT TO APPEAL**

This decision is final and binding unless either party appeals in a Federal District Court within ninety (90) calendar days of the latest decision or in a state Circuit Court within an one hundred eighty (180) days of the date of this decision.

DATED: Richmond, Virginia, **April 5, 2012**

  
**WILLIAM S FRANCIS, JR.**  
Hearing Officer