

IN THE VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION & ADMINISTRATIVE SERVICES

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SCHOOL BOARD OF THE)	
CITY OF)	
)	
Complainant,)	
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v.)	IN RE:
)	
Mr.)	AND
MRS.)	,
)	
Parents of)	
)	
SCHOOL BOARD)	
)	
Respondents.)	
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FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION

INTRODUCTION

A. Procedural History

On August 5, 2013, The School Board of the City of (LEA) filed a "Complaint for Due Process Hearing" ("Complainant") against Mr. and Mrs. ("Parents") in regards to ("Student"), the minor child of the parents.

The Complaint was filed pursuant to 20 U.S.C. 1415 (b) (6) and 8 VAC 20-81-210 (2). The LEA contends the parents failed to provide parental consent to the implementation of a proposed "Individualized Education Program" ("IEP") dated June 13, 2013 developed for the Student and a recommended placement identified for the Student for the 2013-2014 school year at the "The Programs" ("") that could provide the Student with educational benefit.

The LEA asserts in the Complaint that a proposed resolution of the matter is for the parents to provide written consent to the LEA to implement the proposed IEP dated June 13, 2013, including providing written consent for an observation by _____ that is a prerequisite for a proposed placement in the _____ Autism Spectrum Program ("ASP").

On August 7, 2013, the undersigned was appointed to serve as the hearing officer in the above captioned Due Process Hearing in accordance with the "Individuals with Disabilities Education Act ("IDEA") 20 U.S. C. §1400. The LEA also provided the hearing officer with a copy of its Complaint[†] that it filed.

The parents received the Complaint on August 8, 2013. The parties were contacted on August 9, 2013 to schedule the initial pre-hearing conference call which went forward on August 13, 2013. The purpose of the initial conference call was to discuss procedural matters relevant for going forward with the hearing, including the date of the final decision by the hearing officer, the date(s) for the hearing and the deadline for the five (5) day disclosure of documents and witnesses, the location of the hearing, party with the burden of proof, whether the parents wanted an open or closed hearing. The parties also discussed the issues in this case concerning an appropriate IEP and placement for the student for the 2013-2014 school year.

It was agreed at that time that the hearing would take five (5) days and would in view of the 30 day Resolution Session period, _____ begin on September 23, 2013 with the five day disclosure of documents to be submitted by September 16, 2013. The date for the issuance of the hearing officer's final decision was determined to be October 23, 2013. In view of the fact that the LEA had filed the Complaint, it had the burden of proof, the hearing would be a closed hearing at the request of the parents and the hearing would be held at the Layette-Winona School, in Norfolk.

On August 23, 2013, a second pre-hearing conference call was held. The hearing officer recognized that since the LEA had filed the Complaint and not the parents, there was no thirty (30) day Resolution Session period; accordingly, the hearing had to go forward and a decision issued within forty-five (45) days of the filing of the Complaint by the LEA. The parties indicated they preferred the hearing take place in accordance with the schedule set in the initial conference call; the parties were advised by the hearing officer that a motion for a continuance would be necessary and that the motion could only be granted if in the best interest of the child.

On August 28, 2013, the parents, through their advocate, Ms. Valerie Slater, submitted a Motion for Continuance ("Motion") requesting that the hearing go forward as initially scheduled. The Motion stated that the request for the continuance was in the best interest of the child. The hearing officer also received a letter from the LEA stating no objection to the Motion. However, as a follow on to the Motion, the hearing officer requested a conference call that was held on September 5, 2013. The parties discussed the Motion filed by the parents and as a result of the discussion, the hearing officer concluded that the continuance was in the best interest of the child and not for the convenience of the parents, parent's advocate, counsel for the LEA, nor the hearing officer. The parties therefore reviewed the dates for action in this matter and that the hearing would go forward as originally scheduled to begin September 23, 2013 with the final decision to be issued by October 23, 2013.

The parties scheduled a subsequent pre-hearing conference call for September 13, 2013 to discuss parents' contention that the LEA had not provided them with access to all relevant documents. A subsequent pre-hearing conference was to be held on September 16, 2013. The parents were advised to contact the local school to ensure they had documents they deemed relevant. This issue was not raised again at the hearing.

B. Pre-Hearing Summary:

The parents were represented in this hearing by Ms. Valerie Slater, Advocate, Steven M. Traubert, Esq. and Ms. Kati Kitts, Counsel for the parents. The LEA was represented by Derek A. Mungo, Esq. and Ms. , LEA representative.

The parents did not file a response to the Complaint and did not file a Notice of Insufficiency challenging the matters presented in the LEA Complaint; however, on September 11, 2013, the hearing officer received a "Motion to Dismiss, or in the Alternative, For Summary Judgment" ("Motion"). The Motion was filed pursuant to Federal Rule 12(b) (6) (failure to state a claim upon which relief can be granted) and Rule 56. (no genuine dispute as to any material fact) and requested that the Complaint be dismissed on the grounds that pursuant to 20 U.S. C. 1414 (d) (1) (A) (1) of the Individuals with Disabilities Education Act ("IDEA") and 8 VAC 20-81-110 G. 7 of the Virginia Regulations, the Individualized Education Program ("IEP") of a child with a disability is to include the location of services. The parents contend that the placement offered by the LEA at does not indicate a location of services.

The Motion filed by the parents per Federal Rule 12 (b) was denied as untimely and was addressed as a preliminary matter before the hearing proceeded on the record the initial day of the hearing, September 23, 2013. The parents received the Complaint on August 8, 2013 and filed the Motion on September 11, 2013, more than 21 days as required by the Rule. Further, the Motion for Summary Judgment was denied because, based on the Complaint filed by the LEA, and the arguments of the parties on the record, there are genuine issues of material facts, among which is whether the LEA proposed an appropriate IEP for the Student at a June 13, 2013 IEP meeting and whether the proposed placement of is appropriate for the Student.

(1) Disclosures:

As required by the pre-hearing conference call of August 15, 2013 both parties submitted Five-Day disclosures identifying their witnesses and containing their respective exhibits to be admitted into evidence as exhibits for the hearing.

(a) Exhibits:

(1) Parents' Exhibits:

1 through 15, including CD's covering three IEP meetings; June 24, 2013 (Parent Exhibit 3); February 22, 2013 (Parent Exhibit 4), and June 24, 2013 (Parent Exhibit 5).

(2) LEA Exhibits: (The disclosure documents of the LEA were incorporated into seven (7) volumes as follows):

- Volume 1: Teacher Data – September 2012 through February 2013;
- Volume 2: Teacher Data – March 2013;
- Volume 3: Teacher Data – April 2013;
- Volume 4: Teacher Data- May through June 2013;
- Volume 5: IEP Documents;
- Volume 6: Discipline, Parent Complaint, Work Samples and Strategies and Visuals;
- Volume 7: Emails and Communication. (The LEA also submitted a thumb drive regarding an incident concerning the student in the hallway at Blair)

(The disclosure documents of both parties were admitted into evidence without objection).

(2) Witness List:

(a) Parents:

- Mrs.
- Mr. (Expert)
- Mr. (Expert)
- Ms. (Expert)
- Ms. (Expert)
- Ms. (Expert)
- Ms. (Expert)
- Ms. (Expert)

(b) The School Board of the City of [redacted] (“LEA”):

Ms. [redacted], (Expert);
Ms. [redacted] (Expert);
Ms. [redacted] (Expert);
Ms. [redacted] (Expert);
Ms. [redacted] (Expert);
Ms. [redacted] (Expert);
Ms. [redacted] (Expert);
Mr. [redacted] (Expert);
Ms. [redacted];
Ms. [redacted];

C. The Record:

The Record in this matter upon which this decision is based consists of the following:

1. The Due Process Hearing Complaint dated August 5, 2013;
2. Transcripts of the five (5) days of the Hearing – September 23, 2013, September 24, 2013, September 25, 2013, September 26, 2013 and September 27, 2013.
3. Parents Exhibits, as listed above;
4. LEAs Exhibits as listed above;
5. Parents’ Closing Argument submitted October 16, 2013;
6. LEA’s Closing Argument submitted October 16, 2013;
7. The Pre-Hearing Summaries Reports: August 15, 2013, August 27, 2013, May 24, 2012, May 30, 2012, May 31, 2012, June 18, 2012, June 22, 2012, July 3, 2012 and July 13, 2012.
8. Parents Motion to Dismiss or in the Alternative for Summary Judgment submitted to the hearing officer on September 11, 2013;
9. This Findings of Fact, Conclusion of Law and Decision.

ISSUES TO BE RESOLVED

1. Whether the IEP developed for the Student dated June 13, 2013 is reasonably calculated to confer educational benefit to the Student;
2. Whether the proposed placement in the Autism Spectrum Program is appropriate for the Student, constituting the least restrictive environment for her;
3. Whether the parent fully participated in the IEP meetings and placement discussions;
4. Whether the LEA should be permitted to permit a observation of the Student, a prerequisite for placement in the ASP;
5. Whether the LEA can implement the proposed IEP in accordance with a Notice of Proposed Action dated June 24, 2013.

FINDINGS OF FACTS

The Student is thirteen years of age and has been determined eligible for special education services pursuant to the IDEA as a student with autism and she resides with her parents.

For the 2012-2013 School Year the Student attended the Middle School ("") as a sixth grade student. is not the student's home school and she was transported to by bus. is located at , Virginia 23

Pursuant to an IEP prepared for the Student dated May 9, 2012 (LEA Ex. 5, Tab 76), the Student was placed at for the 2012-2013 school year in the : Public Schools (" PS") Autism Inclusion Program ("AIP") at . The parents were participants in this IEP meeting.

Among other things, based on the May 9, 2012 IEP, the Student was placed at and required to receive support of a 1-1 special education teacher/case manager and a paraprofessional. Mrs.

served as the Student's special education teacher/case manager and Ms. served

the Student as her paraprofessional. Among other things, Mrs. [REDACTED] has completed the course work leading to being a Board Certified Behavioral Analyst and has 1000 hours in a clinical setting with students with autism. She was qualified to testify as an expert in the area of providing education services to middle school students with disabilities, particularly students with autism.

The AIP at [REDACTED] was developed by [REDACTED], (TR. Vol. II, 213:23-25). Ms. [REDACTED] is a program specialist with the LEA working with children with autism (TR Vol. II, 207:11-16). Ms. [REDACTED] testified as an educational expert in the area of educating students with autism. Ms. [REDACTED] worked with the Student's 5th grade IEP team, helping to design a program for the Student at [REDACTED], including the transitioning of the Student to [REDACTED]. Ms. [REDACTED] provided credible testimony that the IEP team knew there would be issues with transitioning the Student to [REDACTED]. The Student would demonstrate increase in anxiety as a result of the transition to a new environment. Therefore, the team concluded the Student required a one-on-one paraprofessional in addition to a teacher/case manager. The paraprofessional would assist her navigate through the hallways (TR Vol. II 249). Ms. [REDACTED] provided credible testimony concerning the Student's behavioral actions and means the LEA tried to address them.

The purpose for inclusion in the general education setting is to confer educational benefits upon students with autism by providing them with whole group instruction from a qualified teacher of the academic content; guided instruction and socialization opportunities and the development of socialization skills with non-disabled peers (TR Vol. I, 60:8-25, 61:1-3; TR Vol. III 33:18 to 34:14; 142:12) (Testimony of Mrs. [REDACTED] and Ms. [REDACTED]). It was expected that students in the AIP would be fully included in the general education setting by October or November 2012 (TR. Vol. II 218:3-7; TR Vol. III 34: 15-19).

The role of the special education teacher in the general education inclusion setting is to provide behavioral support and to identify triggers for students to enable them to work through behavioral issues (Testimony of Ms. [REDACTED]; TR. Vol. I, pg. 47). The AIP also offers a Learning Lab which is a classroom space for students to come for short breaks or just to relax (Testimony of Mrs. [REDACTED], TR Vol. I, pg. 48). There were two case managers in the AIP and together they had between 14-16 students (Testimony of Mrs. [REDACTED], TR Vol. I, pg. 50). In the AIP Learning Lab, the Student had Ms. [REDACTED] as her special education teacher/case manager and Ms. [REDACTED] as her paraprofessional. They worked with the Student providing academic instruction as well as dealing with the Student's behavioral issues (Testimony of Mrs. [REDACTED], TR. Vol. I, pg. 48).

During the period from September 2012 through February 2013, Mrs. [REDACTED] collected data on the Student (LEA Ex. 1). The data showed that the Student could not tolerate being in the general education inclusion class setting, even with the support of a special education teacher and a 1-1 paraprofessional. After the first month of school, the time the Student spent in the general education inclusion classroom dropped. (TR Vol. I, page. 59). Mrs. [REDACTED] testified that students in the general education inclusion setting should participate in at least 75 to 80 minutes a bell out of 90 minutes; however, the Student was not able to keep up with this requirement and received substantially less time in general education, sometimes to the point where she would simply walk in and then turn around and leave. Ms. [REDACTED] testified that the Student's strongest point is in the morning times (TR Vol. I, pg. 69).

During the period of September 2012 through February 2013, the data collected by Mrs. [REDACTED] showed that the student expressed aggressive behaviors toward her as the Student's teacher teacher/case manager, other staff members and students as the pace of the general education inclusion classroom increased (TR Vol. I 80:4;111: 82:22 to 83:6). As a result, the Student's anxiety level

increased and triggered aggressive behaviors including hitting, kicking, biting and throwing things at adults and other students resulting in the student being disciplined for her actions. (LEA Ex. #6 Tabs 1-3). As a result, the student was accessing less time in the general education inclusion setting and spending the bulk of her academic time in a special education setting designed for her. By being taken out of the general education setting, the Student's ability to access the general curriculum in the general and special education settings became limited.

Mrs. provided credible testimony that the Student required a small group setting free of distractions with limited transitions and a staff to student ratio of no more than 1-1 in order for the Student to reduce her anxiety she felt when exposed to the general education setting. The Student required a program that provided what is called a "thick" level of reinforcement, meaning multiple layers of continuous reinforcement strategies to control the Student's behaviors that prevent her from accessing the general academic curriculum.

The data collected by Mrs. provided facts that after the first month of the 2012-2013 school year, the time the Student spent in the general education classroom dropped and her aggressive behavior toward her teachers and other students increased (TR Vol. I pg. 75- 76:10).

On October 4, 2012, the Student was involved in an infraction (TR Vol. I 94:11-16). She hit other students, resulting in the IEP team convening on October 23, 2012 to discuss the Student's behavioral issues and it was concluded that a Functional Behavior Assessment ("FBA") should be conducted (TR Vol. I pg. 8-13). The parents participated in this meeting.

On November 26, 2012, the IEP team reconvened to review the FBA results (LEA Ex 5, Tab 57) and to develop a behavioral intervention plan ("BIP") for the Student. The FBA showed that the Student's aggressive behavior such as kicking, hitting, biting and throwing objects were triggered by transitions to and from the classrooms and task demands that required independent work from the

Student. Mrs. _____ provided credible testimony that the Student's behavior was a means for the Student to escape the general education classroom and avoid the increased work demands (LEA Ex. 5, Tabs 57 and 58; TR Vol. I pg. 44:10-24).

Ms. _____ testified that for the month of November, the Student spent 13 percent of her time in the general education inclusion setting on even days and 9.5 percent of her time in the general education setting on odd days (TR Vol. I, pg. 20-24).

On December 11, 2012, the Student had to be physically restrained as she hit and tried to bite Mrs. _____ ((LEA Ex. 6, Tab 6); TR Vol I, pg. 126, 4-7). The IEP team reconvened on December 17, 2012 to discuss the Student's behavior. Between this meeting and an IEP meeting on January 28, 2013, the Student was involved in three (3) incidents of hitting her teacher and the 1-1 paraprofessional.

Additionally, the Student received out of school suspensions for her behavior. From November 2012 through February 2013, the Student was issued five (5) out of school suspensions for hitting and/or kicking students and/or staff.

On February 22, 2013, the IEP team, including the parents met to address the Student's behavior that was escalating. Ms. Linda Miller-Dunleavy, the parent's advocate, was also in attendance at this meeting and she suggested that the Student be placed in a more restrictive setting at _____ as a result of the Student's behavior. The IEP team, including the parents, agreed with this suggestion that the Student be placed in a 2-1 setting during the month of March 2013 in which she would have an abbreviated schedule, a 210 minute school day and her school work would be modified further to reduce the Student's anxiety. The IEP team agreed to place the Student initially in a home based program on March 4, 2013. The IEP team agreed to reconvene on March 27, 2013 to discuss the Student's progress. The parents participated in this meeting. (LEA Ex 5, pg. 3-4).

The IEP team, including the parents discussed the continuum of placements that the LEA proposed for the Student, including a possible placement at . (TR Vol. 5, 15). The mother signed a release for . (Parents Ex. 10.)

Following the February 22, 2013 meeting the parents requested a meeting that was held on March 8, 2013. The mother came to the meeting to address her concerns about the plans for the Student as a result of the February 22, 2013 meeting. The March 8, 2013 meeting was terminated because neither the father nor Ms. Miller-Dunleavy, the parents' advocate, were able to attend this meeting.

The Student remained in the 2-1 setting from March 4, 2013 to March 28, 2013. Mrs. and the paraprofessional worked with the Student in a small classroom with no other students and no transitions. The Student worked on what are called "mastered out tasks" that included academic skills the Student was capable performing at the third grade level, for the purpose of reducing her behavior and gradually increasing her access to the higher academic work. The Student was also given unlimited access to the bathroom and other reinforcements.

The IEP team reconvened on March 27, 2013 and agreed to move the Student from the 2-1 setting to what is called the "Learning Lab" starting after spring break. The student was to remain on the abbreviated schedule and she continued to work on lower level mastered out academic skills. The intensity of the Student's aggressive behavior decreased in the 2-1 setting because the work demands were decreased, breaks increased and she was not subjected to the transition with other students in and out of the setting (TR Vol. II 36:8-17). Mrs. collected data recording identified as "Antecedent Behavior Consequence ("ABC") data recording for the month of March 2013, showed that there were eighteen (18) behavior incidents. In twelve (12) of those incidents, the antecedent to the Student's aggressive behavior was instruction to the Student, (LEA Ex. 2, Tab VII. C.)

The Student was transitioned from the 2-1 setting on April 8, 2013 working in the Learning Lab on an abbreviated schedule of 210 minutes per day.

Even though the consent was rescinded by the parents, Mr. [REDACTED] conducted an "informal" observation of the student. Mr. [REDACTED] is the Assistant Director for [REDACTED]'s autism program (TR. Vol. III, 179:10-14). Mr. [REDACTED] testified as an expert in the area of educating students with autism. (TR Vol. III, 182:16-21). Mr. [REDACTED] testified that he had been contacted by a representative of the LEA to observe the Student and he went to [REDACTED] in March to observe the Student. (TR Vol. III 183:21-25). He received the Student's records at [REDACTED]. He further testified there were classrooms available at the time of his observation and that he had shown them to LEA representatives, Ms. [REDACTED] and Mr. [REDACTED]. (TR Vol. III 199:1-15).

On April 29, 2013, an IEP meeting was held (LEA 5, Tab 12, pg. 8), which was supposed to be the annual review of the Student's IEP; however, the IEP team, including the parents, agreed to postpone the meeting until a third party observation of the Student could be conducted.

At the request of the parents, on May 6, 2013, the Student was to be reintegrated back into the general education setting. However, this attempt led to an increase in aggressive behavior on her part resulting in the Student biting Mrs. [REDACTED] on the arm after she attempted to take the Student in to see the general education classroom. A manifestation determination review ("MDR") meeting was held on May 9, 2013 regarding the May 6 biting incident.

On May 8, 2013 the Student had to be physically restrained after kicking the teacher in the stomach twice and attempting to throw a water bottle at another student. During this incident, she directed profanity at the principal, assistant principal, dean and Mrs. [REDACTED]. (LEA Ex. 6, Tab 16).

On May 14, 2013, the Student was being escorted from a restroom to the Learning Lab and after cursing another student she threw both her shoes at Mrs. [REDACTED] and Ms. [REDACTED], her

paraprofessional. The Student kicked Mrs. [redacted] and tried to pull her hair. The Student ripped posters off the wall and scratched Ms. [redacted] under her right eye when Ms. [redacted] tried to stop the Student from ripping more posters off the wall. (LEA Ex. 6, Tab 18; TR Vol. III 171:15 to 172:11).

The type of behavior exhibited by the Student in the Learning Lab was not restricted to the staff and other students, but extended to the Student's mother and aunt as well when they came to [redacted] to observe the Student. (LEA EX. 4, Tab IX .C).

The MDR team, that included the parents, concluded the biting of Mrs. [redacted] was a manifestation of the Student's disability (LEA Ex. 5, Tab 52). The team agreed that the Student should be instructed in the Learning Lab until the annual meeting reviewing the Student's IEP.

On May 17, 2013, an MDR meeting was held concerning the May 14th incident and the team concluded that the misconduct was a manifestation of the Student's disability. The team agreed to hold an annual review of the Student's IEP after an observation was conducted by the Training and Technical Assistance Center ("T-TAC") at Old Dominion University. The T-TAC observation of the Student was conducted on June 3, 2013. The T-TAC observation confirmed the conclusion about the student's educational needs. The T-TAC representative who conducted the observation was Ms. [redacted], a Certified Behavior Analyst, who stated that the data collected pertaining to the Student during the 2012-2013 school year was the "best data collection seen in a classroom." (LEA Ex. 5, Tab 61, pg. 1). The observation confirmed the LEA's position that the Student's behavior impeded her learning when she was in the general education setting, the 2-1 setting and the Learning Lab. The [redacted] PS members of the IEP team concluded that the Student's behavior must be brought under control before she could access the general curriculum (TR Vol. III 13:11-23; 131:15-23; TR Vol. IV 68:16-25)..

The IEP proposed by the [redacted] PS members of the IEP team is appropriate for the Student in that it consists of all the required components of an IEP as required by the IDEA. (20 U.S.C. 1414

(d)(1)(A)(i)(I-VIII); 34 CFR 300.320). The June 13 IEP includes the Present Level of Academic and Functional Performance (LEA Ex. 5, Tab 34); Postsecondary Goals and Transition Services (LEA Ex. 35); Diploma Options and Course of Study (LEA Bk 5, Tab 36); Annual Goals (LEA Ex. 5, Tab 37). Instructional and Testing Accommodations 9LEA Ex. 5, Tab 38). State and Division-Wide Assessments LEA Ex. 5, Tab 39); Virginia Grade Level Alternative VGLA/Virginia Substitute Evaluation Program (VSEP) (LEA Ex. 5, Tab 40); Virginia Modified Achievement Standards Test ("VMAST") (LEA Ex. 5, Tab 41); Virginia Alternate Assessment ("VAAP") (LEA Ex. 5, Tab 42); Services and Placement (LEA (LEA ex. 5, Tab 43); Free Appropriate Public Education ("FAPE) and Least Restrictive Environment ("LRE"), (LEA Ex. 5, Tab 45); Extended School Year ("ESY") Service 9LEA Ex. 5, Tab 46); Parental Consent for Billing Public Insurance 9LEA Ex. 5, Tab 47); and Notice and Consent/Transfer of Rights 9LEA Ex. 5, tab 48). In view of the above, the proposed IEP developed at the June 13, 2013 was drafted to provide the Student with educational benefit.

It is noted that at the June 13, 2013 IEP meeting, Ms. Miller-Dunleavy commented that the PLOP developed by the IEP team was well written, but asserted that it contained too much information about the Student, primarily her behavior issues and therefore she wanted certain information to be deleted from the IEP and PLOP; (LEA Ex. 5, Tab 33), pg. 2-3; TR Vol. III 16:10-15). The PLOP met the requirements of the IDEA requiring that it address how a student's disability affects the student's progress in the general education setting. The PLOP developed by the IEP team was sufficient to provide the Student with educational benefit. (TR VOL. III, 265-266:12; 267:2-13; TR Vol. Vol. IV, 93:6-94-22).

The PS members of the IEP team concluded that in order to extinguish the student's aggressive behaviors she required an educational placement with a small class size, free from distractions, limited transitions, high staff to student ratio, multiple layers of continuous reinforcement and a "thick"

schedule of reinforcement. (TR Vol. III 60:11 to 61:6). The PS members of the IEP team proposed a placement in the Autism Spectrum Program because it could address the educational needs of the Student. (TR Vol. III, 117:4-10; 121:2 to 122:5; TR Vol. IV 29:18 to 31:14; 43:4 to 46:10; 63:23 to 64:6-25; 95:2-14).

The Autism Spectrum Program had the necessary characteristics to meet the Student's educational needs. The PS members of the IEP team proposed that a pre-placement observation be conducted by [redacted] which is a prerequisite for a placement in the ASP. The parents disagreed with the placement at [redacted] and the parents refused to consent to the implementation of the proposed IEP dated June 13, 2013.

On June 24, 2013, the IEP team reconvened to discuss the parents' request for compensatory education services for the time the Student was in the 2-1 setting in March. The parents contend the Student did not receive appropriate educational benefit because she was not receiving 6th grade level work. However, the March 2-1 setting was initially suggested by the parents' advocate as an appropriate way to address the Student's behavior. The PS IEP team members informed the parents that the compensatory education services were not warranted and based on the facts of this case, the hearing officer agrees there is no basis here to conclude otherwise; accordingly, compensatory education is not warranted.

During the June 24, 2013 meeting, the IEP team, except for the parents, proposed that the Student receive specially designed instruction in a more restrictive setting other than [redacted] and in a regional day program offered by [redacted]. The parents did not consent to the proposed action.

On June 13, 2013, the IEP team, including the parents, met for the annual review of the Student's IEP based on the data that Mrs. [redacted] had collected during the 2012-2013 school year, the IEP team developed a proposed IEP for the 2013 school year. The IEP was to reduce the Student's aggressive

behaviors that hindered her access to academic work and to increase her ability to access the general curriculum. The team concluded that the Student required a placement with a very small class size, free of distractions, limited transitions, high staff to student ratio, multiple layers of continuous reinforcement and a "thick" schedule of reinforcement.

CONCLUSION:

Based on the Record, the IEP developed for the Student on June 13, 2013 is reasonably calculated to provide educational benefit to the Student. It complies with the requirements of the IDEA and the parents offered no specific information as to why the IEP is not appropriate. The only basis presented by the parents is that it leads to a placement at _____, which the parents do not want, but they offered no alternative other than to state a desire for a program to be created for the Student at _____. The Record shows that the LEA tried numerous attempts to design a program for the Student, but her behavior became more aggressive and was an obstacle to the Student succeeding academically.

Based on the Record, including the testimony of Mr. _____ and Ms. _____, the proposed placement at _____ is appropriate for the Student. Also, at the time of Mr. _____ informal observation, classrooms were available; yet, by rescinding the right of _____ to formally observe the Student, the proposed placement did not go forward. Accordingly, it is appropriate for _____ to conduct an observation of the Student in her current setting and determine an appropriate classroom. It is noted that the parents contend that by offering _____, a specific location has not been identified. However _____ is considered a school and based on the Record has classrooms available that should be appropriate for the Student.

The LEA filed for the Complaint because the parents had refused to consent to the implementation of the June 13, 2013 IEP developed by the _____ PS members of the IEP team who had determined that _____ was an appropriate placement for the Student. The record affirms that the

parents were fully engaged in all aspects of the IEP development and placement discussions for the Student with regard to the June 13, 2013 IEP as well as identifying an appropriate placement that the PS IEP team members concluded was _____.

The parties also had discussions about compensatory education services due to what the parents determined she was entitled to based on the Student not receiving 6th grade level academic support in March 2013; however, it is significant to note that the placement in the restrictive setting in March was at the suggestion of the parents' own advocate and even though the Student was in a restrictive setting, she still needed to get her behavior under control in order to receive educational benefit. Mrs. _____ provided credible evidence that she dealt with the Student working on so-called "mastered out tasks" to provide a means of providing positive reinforcement to the Student which facilitated the learning process. Therefore, there is no basis to conclude that the Student is entitled to compensatory education for any lack of educational benefit due to the placement in March 2013.

The Record here indicates the primary concern of the parents was the placement at _____. The parents wanted a program developed for the Student at _____; however, the parents offered no specifics as to what this program would consist of. Furthermore, based on the credible testimony of the PS witnesses, primarily Mrs. _____, Ms. _____ and Ms. _____, programs had been developed for the Student at _____; however, they had not worked for the Student largely because the _____ Inclusion program is designed to have student remain in the general education setting to receive their academic instruction. However, the Student had anxiety attacks when transitioning to and from the general education setting and acted out by attacking other students and staff members. It was concluded that until the Student got her behavior under control, she could not benefit from an academic program. Also, it should be noted that the Student's behavior of attacking other Students could lead to worse issues in the event a student hits or kicks back. Accordingly, it is clear that the Student's behavior control is

essential and that [redacted] cannot provide the services she needs in this regard and therefore the [redacted] AIP is not an appropriate placement for the Student and not able to provide the educational benefit she needs.

However, based on the testimony of Ms. [redacted] and Mr. [redacted], both of whom testified as experts in their respective areas, [redacted] can provide the behavior modification services the Student requires as well as the academic services and therefore is an appropriate placement for the Student. The parents contend the proposed placement at [redacted] is not appropriate because a specific location of a [redacted] classroom was not mentioned. In support of their argument, the parents rely on *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007). The *A.K.* decision is distinguishable from the facts here in that in *A.K.* the decision was that an IEP must identify a specific school. The [redacted] PS members of the IEP team for the Student in fact identified a specific school: [redacted], which is described as a school, although, as testified by Mr. [redacted] it is a school that operates using the classrooms of existing schools, such as those offered by [redacted] PS. [redacted] is described as a public body established pursuant to the Virginia Code and functions as a regional public school (Virginia Code 22.1-26).

It is noted that following the February 22, 2013 IEP team meeting, the parents consented to an observation of the Student by [redacted]. The parents subsequently withdraw their consent for a formal [redacted] observation; thus, none was conducted, although Mr. [redacted] was prepared to observe the Student and had determined that at least two (2) classrooms were available that he determined appropriate for the Student. In withdrawing their consent, the parents made it clear they simply did not want the Student to go to [redacted]; but offered no basis for this position, but made it clear that they wanted [redacted] to develop a program specifically for the Student in the general education setting following 6th grade instructional material, even though the Student had behavioral issues that needed to be addressed. It is of note that the parents do not disagree with the Student's behavioral issues as reported by Mrs. [redacted], Mrs. [redacted] and Ms. [redacted], all of whom are experts in their respective fields.

Based on the testimony of Ms. _____ and Mr. _____, such a program exists at _____, but a specific classroom had not been identified; however, Mr. _____ testified that there were two classrooms that were available at the time of his informal observation; consequently, had the parents not withdrawn their consent for the Student to be observed by Mr. _____, they would have had an opportunity to see the classrooms, observe the instruction and the program offered and then they could have made an informed decision about the placement of the Student. In any event, the hearing officer finds, based on the testimony at the hearing, that _____ provides an appropriate placement for the Student. Also, by observing the _____ program and the classroom it offered, if the parents then concluded that the _____ program was not appropriate, they could have challenged the placement. In any event, the AIP constitutes the least restrictive environment for the Student.

Based upon all of the evidence presented, the applicable statutes, regulations and case law and the arguments presented the hearing officer makes the following conclusions of law:

The IEP of June 13, 2013 represents an appropriate educational program for the student and the proposed placement at _____ can implement the program required for the Student. In Board of Education v. Rowley, 458 U.S. 176, 188 (1982), the United States Supreme Court concluded that the “free appropriate public education” requirement is satisfied by “providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” The June 13, 2013 and the proposed placement at _____ satisfies this requirement.

DECISION

IT IS HEREBY ORDERED as follows:

The LEA’s IEP dated June 13, 2013 is reasonably calculated to confer educational benefit to the student; accordingly, the LEA is authorized to implement the IEP pursuant to the Notice of Proposed Action dated June 24, 2013:

The LEA's recommended placement at Autism Spectrum Program is appropriate for the student, constituting the least restrictive environment for her;

The LEA is hereby permitted to conduct and/or permit a observation of the student by , a prerequisite for placing the student in the Autism Spectrum Program in a classroom appropriate for the student.

RIGHT TO APPEAL

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.



David R. Smith
Hearing officer

10-23-15

Date