V I R G I N IA:

IN THE VIRGINIA DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DIVISION

DUE PROCESS HEARING

NAME OF PARENTS: Mr. and Ms.

NAME OF CHILD:

SCHOOL DIVISION: County Public Schools

SCHOOL DIVISION COUNSEL: Mr. John F. Cafferky, Esq. and
Ms. Patricia A. Minson, Esq.

PARTY INITIATING HEARING: Parents

HEARING OFFICER: Morgan Brooke-Devlin, Esq.

FINAL DECISION

STATEMENT OF THE CASE:

A Due Process hearing was held on November 14, 15, 19 and 21, 2013, in County Virginia. The parents, Mr. and Ms. , ("parents") and 's Godfather, , were present throughout the hearing as well as Counsel for the Public Schools (" PS"), Mr. John F. Cafferky, Esquire and Ms. Patricia A. Minson, Esquire ("counsel"). Also present were Dr. the Director of Special Education for Public Schools and Mr. Brian K. Miller, Esquire, who was appointed by the Virginia Supreme Court to monitor the hearing for the first two days. The parents were not represented by counsel.

(" ") is a fourteen year old young who has Down Syndrome. was a student at Elementary School in from when was two years old until she completed fifth grade. lives at home with her parents who are warm, intelligent and loving people dedicated to helping their daughter reach her potential with the hope that she can have a career and become a self-supporting member of the community.

The parents filed this Amended Due Process Request because they believe that when was in grades 3-5 they were not given advance prior written notice and information required by IDEA regarding the type of diploma would later be eligible to earn if she was enrolled in the Virginia Alternate Assessment Program ("VAAP"). They also maintain that was not provided with FAPE for those years because she was assigned to a primarily self-contained classroom instead of participating in the regular non-special education classrooms with her peers.

The School system objected to the Parent's Due Process Request on the basis that it is time barred by the IDEA two year statute of limitation. The parents claim that the PS intentionally withheld information that they were required to give pursuant to the IDEA and that this constitutes an exception to the statue.

This decision is timely and within the 45 day time limitation period under the IDEA. The record includes written motions, responses, hearing officer's Orders, the hearing officer's three pre-hearing reports, the parties' exhibit books, transcripts and written closing arguments.

The parents' exhibits A-L and 1-11 and the School system 's exhibits 1-123 were admitted at the end of the Hearing without objection from either party.

This Hearing is brought under the Individuals with Disabilities Education Act, ("the IDEA"), 20 U.S.C. 1400, *et seq.*, and the regulations at 34 C.F.R., Part B, Section 300, *et seq.*, and the Virginia Special Education regulations, ("Virginia Regulations"), at 8 VAC 20-81, *et seq.*

BURDEN OF PROOF: In *Schaffer v. Weast,* 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof, in an administrative hearing challenging the IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Id.,* at 537. Parents filed this due process hearing request. Accordingly, I find that the parents have the burden of proof at this due process hearing.

WEIGHT GIVEN TO WITNESSES:

In determining the relative weight to be given to the testimony of the witnesses I find that the testimony of the Public School's experts which included 's teachers and other professionals who were actively involved with during her years at Elementary School to be the most persuasive.

The parent's experts who testified telephonically, Dr. and Dr. , while accepted as experts in their fields, had never met or spoken with ; they never observed during her years at ; did not contact her teachers to discuss 's educational progress or the basis of her third through fifth IDPs; did not review her full third grade through fifth grade IEPs or her other educational assessments and records

Dr. who was qualified as an expert in the field of special education had experience with the Virginia VAAP program and children with Down Syndrome and while her testimony in that respect was informative it was not particularly relevant to and the issues before the hearing officer. She was not able to testify in depth about since she had been provided with only a limited number of 's educational documents and had no direct knowledge of other than what Mr. had told her. Tr. 293-295

Dr. , the parents' second witness, was qualified as an expert in the field of child development. She testified generally that children with Down Syndrome learned differently than other children and that they have a different style of assimilating information and acquiring adaptive skills. Tr. 340 Again, this testimony was informative and generally relevant to but was not about . Dr. never reviewed any of 's IEPs, her educational progress reports or any information about her actual educational placement between years 2007 and 2010. She testified that her understanding of 's placement came from speaking with the and confirmed that she had reviewed a very limited selection of 's educational documents and records. Tr. 293, 295

In comparison with the specific, detailed and extensive testimony of the PS witnesses who knew and worked with for years I give the testimony of Dr. and Dr. little weight. I found Mr. and Mrs. ' testimony to be credible and sincere; however, it failed to be persuasive when considered against the PS witnesses.

ISSUES:

1. **Is the parents' Due Process Request time barred by the IDEA two year statute of Limitations?**

2. **Did Public Schools fail to provide the parents with prior written notice?**
3. **Was provided with FAPE in grades three through five?**
4. **Should there be any compensatory services ordered?**

FACTUAL FINDINGS AND LAW REGARDING ISSUE NUMBER 1: STATUTE OF LIMITATIONS

The threshold issue in this case is whether the parents have met their burden of proof in establishing that there exists in their favor an exception to the two year statute of limitations regarding 's Individual Educational Plans for third to fifth grades.

Public Schools filed a Motion to Dismiss the Parents' Due Process Complaint and Amended Complaint for being in violation of the Individuals with Disabilities Education Act of 2004 (IDEA) on the ground that it was time barred by the provisions of IDEA and that neither of the two exceptions that would permit the Parents to evade the two year statute are present.

The school system's Motion to Dismiss was deferred to permit the parents to present their evidence at the Due Process Hearing in support of their claim that one of the exceptions to the IDEA should be found to exist and because of that they should be permitted to maintain their complaints about the School system and allegations of denial of FAPE. The parents' Amended Complaint was found to be sufficient to permit them to proceed with their case in accordance with *Schaffer v. Weast, Id.*, which held that "Congress has chosen to legislate the central components of due process hearings. It has imposed minimal pleading standards, requiring parties to file complaints setting forth "a description of the nature of the problem." Section 1415(b)(7)(B)(ii). Also, their allegations regarding an exception to the statute of limitations

required that evidence and testimony be presented in order to determine if there was merit to their claim.

The IDEA as well as the Commonwealth of Virginia have a two-year statute of limitations period within which parents can raise concerns and note objections regarding their child's educational process and/or bring complaints regarding the actions taken or not taken by the School system in the delivery of a free and appropriate education to the child (FAPE). 20 U.S.C. Section 1415 (b)(6)(B). The two year period runs from the date the party knew or should have known about the alleged violations of the law or regulations. (20.U.S. C. Section 1415(f)(3)(C)). According to 34 CFR 300.511(f) the only exceptions are when the parent is prevented from requesting a due process hearing due to (a) specific misrepresentations by the District that it had resolved the problems forming the basis of the complaint, or (b) the district's withholding of information from the parent that the IDEA required it to provide and because of that the parent was prevented from requesting a hearing. (20.U.S. C. Section 1415(f)(3)(D)(ii); 34 CFR 300.511(f)).

The parents filed a response to the PS Motion to Dismiss in which they alleged that PS did not comply with the IDEA in the adequacy of the Child's Individualized Education Program for 's third, fourth and fifth grade school years and additionally that PS failed to give them prior written notice, intentionally and consistently withheld information it was required to give to them in accordance with IDEA and that as a result of the PS's actions they were unable to file a complaint for due process within the statute's timeline and, therefore, the second exception, the withholding of required information, should be found to exist.

The parents are well educated and have been actively involved with their daughter's education and Individual Educational Plans (IEP) for each school year since

she began attending at two years of age. Tr. 460 Specifically, one or both of them attended and participated during IEP meetings from 's third through fifth grade school years and signed their agreement to the IEPs for years three and four and disagreement to the fifth grade IEP.

At the IEP meetings the PS provided the parents with copies of Procedural Safeguards in conformity with the notice requirements of IDEA. Each IEP for school years three through five contain a signed acknowledgment by a parent acknowledging receipt of a copy of the Procedural Safeguards. Ms. confirmed that the parents received copies of their Procedural Safeguards at every IEP meeting and that she knew that the notices provided information as to the steps to be followed if the parents were not in agreement with the IEP proposed by PS. In fact, they eventually instructed the school to stop giving them copies because they "already had a stack of them." TR. 459-460, 511-512

Ms. testified that the parents were aware that they had the right to file a due process complaint but decided not to. She testified that even though she and Mr. were not in full agreement with 's proposed IEPs in grades three through five, they did not file a due process complaint because they didn't want to alienate 's teachers and the staff at Elementary and that they wanted to try and "work with" the school system. On cross examination Ms. admitted that beginning in 2007 and going forward the parents disagreed with elements of 's education; that she knew by 2007 that the parents had procedural safeguards and that if they disagreed with things pertaining to 's educational program they could either

not agree to the IEP; they could file a state complaint; or they could file for a due process hearing. Tr. 489 In response to questions from counsel whether there was anything that prevented the parents from exercising their procedural rights she explained that:

"But the idea is to work with— has— has—up until things started not being that great, we had a wonderful education, had a wonderful education at . And why would you go nuclear and jeopardize something like that? Why would you not work with the system, with the teachers, with who is there, and make this happen and not be disruptive, or upset teachers who hold sway over your child all day. Tr. 490

After hearing Mrs. testimony the Hearing Officer asked Ms. :

Q: Ms. , would it be fair to say that you were aware of your special education rights, your Procedural Safeguards, but that for the benefit of your daughter's interaction with her teachers, that you opted not to exercise your procedural rights to object to what was being proposed?

A: We opted...I could say that, yes, in that we opted to work with the teachers and hope that...you know, just to work and do what we can, even though we were not happy with what small thing we had asked for, as far as putting in some time with the general ed class for the first time in three years, two years."

"To work with them and make this fifth grade, this last year at the school with these teachers as trouble-free and smooth as possible." Tr. 512-23

In light of Ms. ' testimony and the parents' signatures on the IEPs for grades three through five acknowledging receipt of their Procedural Safeguards it is clear that the parents not only received their Procedural Safeguards in accordance with IDEA but that they also were aware of their rights under those safeguards and

intentionally decided not to avail themselves of their right to file a complaint or request a due process hearing within the two year statute of limitations periods.

The parents maintain that although they were given the procedural safeguards they were also entitled to receive prior written notice and that PS should have discussed with them at the IEP meetings in grades three to five the least restrictive environment for and the ramifications of her being in the Virginia Alternate Assessment Program ("VAAP"), and how it would affect her later options as to which diploma she would be eligible to receive.

Parents base this belief primarily on the written sections of the third to fifth grade IEPs that state that diplomas are to be discussed with the parents annually and sections that refer to prior written notice. P. ex E. 4, F. 4, G. 8. They maintain that they were entitled by law to be provided with written notice prior to every IEP meeting and to have the VAAP discussed with them yearly. In support of their argument they point to these sections of the IEP's that were left unchecked in the third through fifth grade IEP's. P. ex. D 14, E. 16, F. 17,

The inclusion of these sections in the child's IEPs has led to confusion and the Parent's unfounded claim that PS intentionally withheld information and notice that was required to be provided under IDEA. The parents also claim that PS predetermined 's graduation options by placing her in the VAAP program.

The parents' position regarding VAAP is not supported by any testimony, regulations or evidence and is directly contradicted by the PS witnesses. VAAP Participation Guidelines are just that: guidelines that do not constitute an express IDEA

requirement. See *Evan Supra.*, which held that provisions in documents do not constitute express IDEA requirements.

Dr. , the Director of Special Education for Public Schools, testified that the inclusion of the VAAP language on the IEP form is because the forms in use during 's third through fifth grade years were purchased from a company that provided computer generated forms for multiple states. Tr. 1052-1055

She explained that because another state may have regulations that required that diplomas be discussed with parents annually this provision was included in the IEP for the benefit of that state but that this was not a required element of Virginia's elementary school IEPs. She also testified that the IDEA does not require a school to discuss diploma options with parents until a child reaches sixteen years of age while Virginia requires that the discussion be held when the child is fourteen years of age and that despite the wording on the IEPs under discussion, there is no requirement under IDEA or Virginia regulations that the school system discuss a child's diploma with the parents for children in grades three through five.

Ms. also confirmed that although the PS policy is that discussion of diploma options does not begin until middle school she did discuss VAAP with the parents during 's IEP meetings. Tr. 706-707

The parent's allegation is also contradicted by the testimony of Ms. , who was the LEA representative and assistant principal while was at Elementary School in grades one through five. She testified that the same IEP form is used for students with a variety of disabilities from kindergarten through senior high school

and that as students begin to amass credits towards graduation in eighth grade the IEP team begins discussions with the parents about graduations options. When she was asked if it made sense to have discussions with parents of third, fourth or even fifth graders she replied " No. Because students are changing, and it—to me, it feels unethical to make a predetermination about a child's diploma status in third grade." LEA Tr. p. 169-170

Predetermination is a procedural violation of the IDEA, and can deprive a child of a FAPE where the parents are effectively deprived of meaningful participation in the IEP process. *Deal v. Hamilton Co. Bd. Of Education*, 392 F. 3'd 840, 855, (6th Cir. 2004). Predetermination is not, however, synonymous with preparation or with stating an opinion. Federal law "prohibits a completed IEP from being presented by the IEP team meeting or otherwise being forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and the parents have the opportunity to make objections and suggestions. *N.L. ex rel. Mrs. C. v. Know County Sch*, 315 F. 3d 688, 694 (6th Cir. 2003).

Ms. , 's teacher in grades third through fifth stated that she was 's case manager and that she participated in her IEP meetings including those held on January 10, 2007; October 4, 2007; October 3, 2008 and November 2, 2009. Further:

"As was my uniform practice, at each of these IEP meetings, we reviewed and discussed all parts of the IEP. These included (among others) the present levels of performance, goals and objectives, amounts of special education and related services to be provided, the checklist for the "Least Restrictive Environment", the

accommodations/modifications page, and the choice of assessments, (whether the VAAP, SOL, VGLA or otherwise) team considerations , and placement." PS ex. J.

The parents' claim of predetermination and inability to have meaningful participation in 's IEPs is further contradicted the fact that during 's November 11, 2009 IEP meeting when, for the first time during 's education, they actively disagreed with the proposed placement and requested that she be taught science and social studies in the general education class instead of in Ms. 's class PS agreed and accommodated the Parents' request. Tr. 474-476

There was no evidence presented by the parents that they were prevented from participating in IEP meetings, asking questions, making suggestions, or discussing 's future goals as to the Virginia Alternate Assessment Program ("VAAP") or that any misrepresentations were made by PS. In fact, Ms. ' testimony confirmed her participation in as well as agreement to all of 's IEP meetings, (until the May 24, 2010 IEP). Both parents participated in the November 2, 2009 IEP meeting where they expressed concerns about being in Ms. 's classroom for science and social studies. They also requested that the IEP be changed to have attend science and social studies in the general education class was implemented. PS Ex. 24, Tr. 474-475

They also participated in the May 24, 2010 Transition IEP meeting, where for the first time, they refused to consent to the proposed IEP. PS Ex. 25, Tr. 475

What compromises the withholding of information is not defined in the law or regulations, however, the courts have given this a very narrow interpretation in holding

that it does not refer to the withholding of *any* information but instead "refers solely to the withholding of information regarding the procedural safeguards available to a parent under that sub-chapter." And further, that the exception only encompasses the withholding of that "specific information required to be provided to the parent by the relevant sub-chapter". *Evan H. v. Unionville-Chadds Ford Sch. Dist.*, 51 IDELR 157 (E.D. Pa. 2008) "When a school provides the parents with procedural safeguards, the statute of limitations for IDEA violations commences regardless of whether the parents read them". *El Paso Indep. Sch. Dist. V. Richard R.* 567 F. Supp. 2d 918, 945 (W.D. Tex 2008). "When a local educational agency delivers a copy of the IDEA procedural safeguards to the parents, the statute of limitations for IDEA violations commence without disturbance." "Because there is no allegation that the parents were not apprised of the complaint process, we conclude that the 'withholding of information exception' does not apply in this case." *Tindell v. Evansville-Vanderburg Sch. Corp.*, 805 F. Supp. 2d 630, 645 (S.D. Ind. 2011). The parents have confirmed that they received the Procedural Safeguards required by IDEA and have failed to produce argument, evidence, or cited any authority to the contrary in support of their position.

I find that information regarding VAAP is not information that is required to be provided to the parents when a child is in third through fifth grade. The failure to provide this information, or any other information or notice, which is not the "... specific information required to be provided to the parent by the relevant sub-chapter," Evan *H., supra.*, does not constitute an exception that would stay the two year statute of limitations. Furthermore, I find that the School system did not predetermine 's

educational programs, that she was placed in the least restrictive environment, and that the Parents did have meaningful participation in 's IEP meetings.

When PS provided the Parents with copies of the Procedural Safeguards at the IEP meetings in third through fifth grades it satisfied the statutory notice requirements of IDEA. Therefore, I find that the parents have not sustained their burden of proving an exception to the two year statute of limitations.

FACTUAL FINDINGS AND LAW REGARDING ISSUE NUMBER 2:
PRIOR WRITTEN NOTICE

The parents contend that PS failed to provide the prior written notice they were entitled to when it proposed at the May 24, 2010, transitional IEP meeting to remove from her participation in general classroom science and social studies and return her to Ms. 's classroom for those classes. They argue that this constituted a change in placement for which prior written notice was required and that as a result of the withholding of this information they were unable to file a complaint for due process within the statute's timeline and, therefore, the second exception, the withholding of required information, should be found to exist

. The school system is required to provide the parents with written prior notice when the LEA "proposes to initiate or change; or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education for the child. 20 U. S. C. Section 1415 (b)(3).

The prior written notice must contain six elements:

1. A description of the action proposed or refused by the agency;
2. An explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
3. A statement that the parents of a child with a disability have protection under

the procedural safeguards of this part [*20 USCS §§ 1411* et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
4. Sources for parents to contact to obtain assistance in understanding the provisions of this part [*20 USCS §§ 1411* et seq.];
5. A description of other options considered by the IEP Team and the reason why those options were rejected; and
6. A description of the factors that are relevant to the agency's proposal or refusal.
20 U.S.C. § 1415(c)(1)(A)-(F).

The issue here is when and how the "prior written notice" is to be provided. Ms. testified that the word "prior" refers to the provision of written notice *prior* to the implementation of the IEP *not prior* to the IEP meeting. Tr. 855 This interpretation was confirmed by Dr. . Tr.1056, 1088 Both experts testified that 's IEPs from grades three through five contained all of the required six elements and that there was a narrative paragraph which incorporated by reference other sections of the IEP instead of repeating them and that taken together this satisfied the IDEA prior notice requirement in a form that has been approved by the state department of education. Tr.1057-58, 1088, 1102

Dr. testified that she was familiar with the requirement that PS is required by law to provide prior written notice and when it is required to be given:

Q. Is it prior to—is it a written notice that's supposed to be provided prior to the IEP, or prior to the implementation of the IEP?
A. Its prior to the implementation of the IEP.
A. Prior written notice, which is often confusing because it has the word "prior" in it, but basically it's saying, before the school division will implement the IEP, prior to us implementing it, this is what we are offering. And a School division cannot implement an IEP until the parents have consented. Tr. 1056, APS 19, pg. 38.

In *Doyle v. Arlington County School Board*, 806 F. Supp. 1253, 1260 (E.D. Va. 1992), *aff'd* 1994 U.S. App. LEXIS 30495 (4th Cir. 1994), the court reversed the ruling of a hearing

officer, in part because he found that PS had failed to provide the parents with prior written notice. The court held that the IEP itself could appropriately constitute the required prior written notice. In that case the court found that the proposed placement appears on the very face of the school system's proposed IEP. The Court found in regard to the prior written notice requirement, that:

"The parents had extensive actual notice of all of the things required by that section of the regulations....The parents here have participated fully in the assessment, eligibility, and IEP process. " The court went on to note that:

"Indeed, the same type of "lack of notice" argument embraced by the local hearing officer was condemned by another District Court in *Brookline School Committee v. Golden*, 628 F. Supp. 113,115 n. 1 (D. Mass 1986) The court there noted that:

"the fact of actual knowledge casts a shadow over the parents' motives for pressing the issue of Brookline's compliance with the statutory notice requirements at the Bureau hearing. Likewise here, the alleged lack of further written notice to the parents of the Nottingham placement proposal is practically and legally irrelevant." *Id.* p. 7.

One of the basic elements and requirements of IDEA is that the parents should fully participate in their child's education and that in order to do that they need to know what is being proposed and why. However, the notice requirement is not intended to be super technical. *See, e.g., Buffalo Lake-Hector School District* #2159-01, 55 IDELR 238 (SEA MN 2010) (holding that the failure to include certain information in a PWN was harmless error because, *inter alia*, "[t]he Parent was present and participated fully in that [IEP] meeting"; accordingly, the administrative law judge held that "it does not appear that any infringement of parental participation or educational harm occurred because of this procedural violation of IDEA")

's parents were thoroughly involved in each of her third to fifth grade IEPs. *See, e.g.*, Tr. 540 (K.); 167 (M.).

Furthermore, the Parents signed their agreement to the IEP in October 2007, October 2008, and November 2009 and their disagreement, in May 2010. On all of the IEPs that are at issue in this case the parents signed on the same page where each prior written notice statement was located which makes it hard to find that they were not provided with prior written notice. *See* PS Ex. 18, p. 36 (written notice is titled "Prior Notice of Review and Placement Decision"); PS Ex. 19, p. 38 (same); PS Ex. 20, p. 63 (written notice is on page titled "Prior Notice" under section titled "Placement Decision"); PS Ex. 24, p. 65 (written notice is titled "Placement Decision"); PS Ex. 25, p. 51 (same). Also see PS exhibits 9-17.

Even if the PS had committed a procedural violation this does not mean that the child was denied an educational opportunity unless the procedural flaws result in a denial of FAPE to . *See MM v School District of Greenville County,* 303 F.3d 523 (4th Cir. 2002) (A procedural violation in IEP delivery which does not cause a denial of FAPE does not contravene the IDEA); *See also Gadsby v Grasmick,* 109 F.3d 940 (4th Cir. 1997). Furthermore, the parents' consistent and active involvement in 's IEPs and their knowledge of her goals, objectives and other essential elements of her education placement and their actual knowledge of the proposal made in the 2010 transitional IEP to return to Ms. 's classroom for science and social studies would render a failure to comply with the specific form and timing of prior written notice "practically and legally irrelevant" *Brookline, Supra.at p. 7,* and to find that a technical error in the delivery of prior written notice to the parents would constitute an exception to the two year statute of limitations would be substituting form over substance.

Based upon the exhibits as well as the testimony of the teachers and the parents themselves I find that the parents were appropriately provided with prior written notice and were

not deprived of the opportunity to participate in 's IEPs but instead they actively and knowingly participated to the fullest extent.

FACTUAL FINDINGS AND LAW REGARDING ISSUE NUMBER 3:

FREE AND APPROPRIATE PUBLIC EDUCATION (FAPE)

In order to determine if was provided with FAPE in grades three through five it is important to understand what constitutes a Free and Appropriate Public Education.

In *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982), the U.S. Supreme Court defined a "free appropriate public education," ("FAPE"), as one that provides "personalized educational instruction." FAPE is provided in the IEP if it is "specially designed to meet the unique needs of the handicapped child, [and] supported by such services as are necessary to permit the child 'to benefit' from the instruction."

> "Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley,* at 203-204.

There is no obligation to provide the best education or an ideal education in order to provide a FAPE. *Id.* at 200.

In *Hartmann v. Loudoun County,* 118 F.3d 996, 1004 (4th Cir. 1997), cert. denied, 552 U.S. 1046 (1998), the 4th Circuit, quoting the *Rowley* decision, stated that federal courts cannot run local schools and they must be given "latitude" in creating an IEP.

Thus, "The IDEA does not deprive educators of the right to apply their professional

judgment. Rather it establishes a 'basic floor of opportunity' for every handicapped child." *Rowley, Supra* at 201. States must provide specialized instruction and related services 'sufficient to confer some educational benefit' on the handicapped child, *Id.* at 200. The IDEA does not require 'the furnishing of every special service necessary to maximize each handicapped child's potential.' *Id.* at 199.

A student receives a free appropriate public education through the IEP process. *MM v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002).

Review of Faith's IEPs:

Did receive FAPE and were her IEPs personalized and specially designed to meet her unique needs while providing her with specialized instruction and related services sufficient to confer some educational benefit on her as was necessary to permit her to benefit from the instruction?

A thorough review of 's third through fifth grade IEPs and the testimony of her parents, teachers and others who participated in the creation of her IEPs clearly demonstrate that received FAPE in that she made steady educational and academic progress within the framework of IEPs that were customized to provide her with not only a "basic floor of opportunity" but with an education far superior to the basic level of education required by IDEA. PS ex. 18-32.

's parents believe that she should not have been placed in VAAP and that her placement in VAAP proved that PS had low expectations for and that they had predetermined her placement.

The testimony of Ms. , Dr. , Ms. and Ms. as to the educational progress made by was confirmed by the third, fourth and fifth grade IEPs that described slow but steady progress. Similarly, 's regular education teachers, all of whom were accepted as experts in the various fields of education, testified about their high expectations for .

The testimony of the PS teachers and educators who were called by both parties demonstrated a high level of professional ability as well as a fondness for and a commitment to helping her achieve academically that belies the Parents' claims that her teachers had low expectations for her.

Ms. , who was 's teacher in third to fifth grades, explained that "I had high expectations, and at times wondered if they might be too high for her, because they were very academic. But [I] continued to hold her to those standards. Tr. 727

Ms. , 's third grade general education teacher testified that although she believed that the IEP team's decision that participate in the VAAP program was the correct one she nevertheless had high expectations for her. Tr. 539-540

's educational progress was confirmed during her third through fifth grade years by the progress she made towards her IEP goals, her improvement on PALS, the increase in the number of Dolch sight words and her passing the VAAP for school years third through fifth. PS Ex. 54-71

's teachers all testified that the VAAP rather than the Standards of Learning (SOL) was the appropriate program for her. See, e.g. Tr. 554-555. Ms. explained that VAAP would be the most appropriate end-of-year assessment for . Tr. 665-666

Ms. , who had the most contact with over the years, stated that she met the criteria for VAAP, because:

"She did have a significant cognitive disability. She was working on—she needed extensive direct instruction, small group, one-to-one, individualized. Things were changed and modified. Materials were modified in order for her to have some learning opportunities and to be able to make some progress. So she really was not able to access the SOLs as written and offered at the third grade level". Tr. 879

Ms. , who is an expert in the field of speech language pathology and who had worked with from preschool through fifth grade and Ms. who is an expert in the field of speech and language pathology, early childhood special education and who was involved in one of 's IEP meetings both rendered their expert opinions that VAAP was the appropriate program for . Tr. 881-882, 978-986

The IDEA does not deprive educators of the primary role in developing an IEP and deference is given to PS educators for the decisions made on behalf of . *Hartmann v. Loudoun County Board of Education,* 118 F.3d 996, 1001 (4th Cir. 1997); *see also, Springer By Springer v. Fairfax County School Board,* 134 F.3d 659, 663 (4th Cir. 1998) ("The task of education belongs to the educators who have been charged by society with that critical task..."); *MM by DM and EM v. School District of Greenville County,* 303 F.3d 523, 531 (4th Cir. 2002) ("The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities.").

I am persuaded by the weight of the exhibits and testimony that received FAPE and that her IEPs were personalized and specially designed to meet her unique needs while providing her with specialized instruction and related services sufficient to confer some educational benefit on her as necessary to permit her to benefit' from the instruction. I find that there was no violation of IDEA.

FACTUAL FINDINGS AND LAW REGARDING ISSUE NUMBER 4:

COMPENSATORY SERVICES: LINDAMOOD-BELL

In order to be successful in a claim for the compensatory services requested by the parents it must first determine that the public school failed to provide with a free appropriate public education in accordance with IDEA. *See County School Board of Henrico Co. v. R.T.*, 433 F. Supp.2d 692, 697 (E.D. Va. 2006); *See also School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 371-372 (1985); *Tice v. Botetourt Co. Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990). Compensatory education is an appropriate remedy only where there is determined to be a deprivation of a free and appropriate public education. *Interboro Sch. Dist.*, 109 LRP 40946 (SEA Pa. 2007) (citing *M.C. ex. Rel. J.C. v. Central Regional School District*, 81 F. 3d. 389, 391, 392(3d Cir. 1996)).

I find that FAPE had been provided to by Public Schools through its' IEPs development, placement decisions and delivery of services for grades three through five. Therefore, compensatory services are not appropriate or warranted and the parents' request for services is denied.

RULING:

The United States Supreme Court has held that the burden of proof, in an administrative hearing challenging the IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Schaffer, Supra.*

As previously noted the threshold issue in this case is whether the parents have met their burden of proof in establishing that there exists in their favor an exception to the two year statute of limitations regarding 's Individual Educational Plans for third to fifth grades. I find that they have not sustained their burden of proof: the Parents failed to prove that Public

Schools withheld information from them that the IDEA required it to provide or that they were prevented in any way from requesting a hearing. Accordingly, the IDEA two year statute of limitations precludes them from bringing any complaints pertaining to 's third through fifth grade IEPs and their complaints are time-barred. However, I do find, based upon the weight of the evidence and testimony, that received FAPE in grades three through five and that there was no violation of IDEA.

RELIEF GRANTED: None.

APPEAL AND PREVAILING PARTY NOTIFICATIONS:

1. Appeal: Pursuant to 8 VAC 21-81-T and §22.214 D of the Virginia Code, this Final Decision is made final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state court within 180 days of the date of this decision.

2. Prevailing Party: Public School system is deemed the prevailing party.

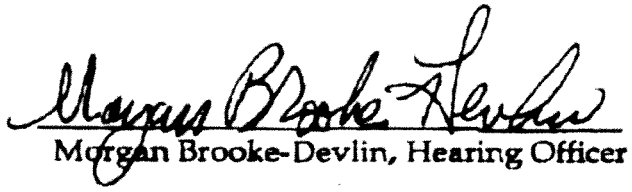
Decision Date: November 29, 2013

Morgan Brooke-Devlin, Hearing Officer

CERTIFICATE

I, Morgan Brooke-Devlin, Esq., Hearing Officer in the above Special Education Due

Process Hearing, certify that I have sent the above Final Decision to all parties and to the VDOE on this 29th day of November, 2013.



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