12-007

COVER PAGE FOR HEARING DECISION

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

, et als. Complainants

v.

PUBLIC SCHOOLS Respondent.

Student & Parent:

Child's Attorney:
Michael J. Eig, Esquire

LEA's Attorneys:
John F. Cafferky, Esquire
Patricia Amberly, Esquire

Administrative Hearing Officer:
John V. Robinson, Esquire
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REISSUED DECISION OF THE HEARING OFFICER

I. Findings of Fact[1]

The requirements of notice to the parents were satisfied. The student is a 7th grader whose date of birth is , 1998[2]. The student suffers from multiple disabilities, is a cancer survivor and is eligible to receive special education and related services under the disability categories of Other Health Impairment ("OHI"), Hearing Impairment ("HI") and Specific Learning Disability ("SLD"). SB 2 and 11[3].

The issue for decision by the hearing officer in this proceeding is whether the IEP for the 2011-12 school year, and the placement under that IEP of School (" "), proposed by the respondent Public Schools (" PS", the "school division" or the "LEA") was reasonably calculated to offer the student educational benefit in the least restrictive environment ("LRE").

The student is and has overall cognitive abilities in the average range. SB 41, p. 4 and 8. The student has certain academic weaknesses including letter and word recognition, math computation, spelling, and processing speed. *See e.g.*, SB11, 37 and 41.

The student has problems with organizational skills which require occupational therapy ("OT") and articulation difficulties which require speech language therapy ("SL"). *See e.g.*, SB 11, 37 and 41.

As a result of medical treatment for cancer as a young child, the student suffered high-frequency hearing loss in both ears and exhibits particular difficulty in hearing very high pitch soft sounds, like the "s", "sh", "shhh" and "f" sounds. Tr. 611-615.

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1 To the extent the other section entitled, "Additional Findings, Conclusions of Law and Decision" includes findings of fact, these findings are incorporated into this section.

2 The parent and the student are referred to generically herein to preserve privacy.

3 Exhibits submitted by the LEA and admitted into evidence in this proceeding are cited as "SB <Exhibit Number> <page reference, if any>". Exhibits submitted by or on behalf of the student and admitted into evidence in this proceeding are cited as "CC <Exhibit Number> <page reference, if any>". References to the verbatim transcript of the hearing held over 3 days on September 26-28, 2011 are cited in the following format "Tr. <page number>." References to the Parent's post-hearing Opening and Reply Briefs are cited in the following format: "POB <page number>" and "PRB <page number>," respectively. References to the LEA's post-hearing Opening and Reply Briefs are cited in the following format "FOB <page number>" and "FRB <page number>," respectively.

Fortunately, brand new hearing aids which the student has just received have frequency compression which gives the student more access to these high pitch, softer sounds. Tr. 613-616.

Accordingly, the student can adequately hear conversational speech with the assistance of advanced hearing aids. Tr. 611-615.

The student has significant compensating areas of relative strength. She is a hard worker, and has developed good compensatory skills that have allowed her to acquire knowledge even with individual academic skills at a much lower level. Tr. 124-125. The student also has very well-developed oral language skills, and is not shy about expressing her opinions. Tr. 124-125, 397, 693.

The student is able to follow school routines and to move around her school environment independently and safely. For example, at (" "), the student successfully navigates the sometimes crowded halls when she changes classes. Tr. 274.

The student has satisfactory motor skills to allow her to participate in all school activities. Tr. 339, SB 39. The student can use a computer at school and at home. Tr. 318, 335-37, 560.

PS conducted numerous updated evaluations of the student in May and June of 2011. SB 35-39 and 41. After completing these evaluations, PS convened an IEP team on July 7 and 22, 2011 to develop an educational program and placement proposal for the 2011-12 school year. SB 10, 11.

The July 7, 2011 IEP meeting lasted about three (3) hours. Tr. 449. This meeting was attended by the parent, Dr. (the parent's educational consultant), Dr. , the Head of Academy (by telephone) and by nine (9) representatives of the LEA. SB 10.

At the July 7, 2011 IEP meeting, the IEP team discussed and reached consensus concerning the student's areas of educational functioning and need. SB 10 and 11.

The student's unanimously agreed areas of educational need are specified in detail in the draft IEP prepared and proposed by PS. SB 11. They include: Communication - Articulation; Organization; Mathematics; Writing / Written Language - Written Composition; Self-Advocacy; Reading - Decoding, Word Analysis & Spelling (encoding); Reading Fluency; and Social Skills. SB 11, p. 3-11 of 26.

At the July 7, 2011 IEP meeting, after all the members of the IEP team discussed and agreed upon the student's areas of educational functioning and need, they then proceeded to address and agree upon a plan of educational goals and objectives, as well as necessary classroom accommodations (such as extended time, frequent breaks, graphic organizers, spell checker, shortened assignments and preferential seating), for the student. SB 10; Tr. 450-58. There were no other goals suggested that were not incorporated in the IEP. Tr. 458.

After about three (3) hours, the IEP team got to the LRE page (AE 10, p. 20 of 24) and were discussing the service delivery when the team realized that some members had to leave and that "we were getting to the place where it was really important that we had plenty of time to have discussions regarding the services and placement, so we decided to end the meeting there and reconvene." Tr. 459.

Accordingly, on July 22, 2011, the IEP team met again for about two (2) hours to discuss the remaining portions of The student's IEP - namely, principally, services and placement. Tr. 461. Again, the parent, Dr. and Dr. (by telephone) participated and, again, nine (9) representatives of the LEA attended the IEP meeting. CC 46. The PS team members proposed 20 hours per week of special education for students with learning disabilities, all in a self-contained setting; and related services including (per month) 3 hours of SL; 1/4 hour of Audiology; 2 hours of HI instruction and consultation; and 1 hour of OT, focusing on organizational skills. SB 11, p. 23 of 26.

In the professional opinion of PS staff, the student's educational needs could be met and she could receive educational benefit in a combination of both (a) small, self-contained special education classes for all her core academics, including reading, and (b) in regular education classes which encouraged and drove interaction with nondisabled (and other disabled) peers in an elective such as drama and in her PE class.

The parent and her consultant agreed that the student did not need special education or "adapted" physical education. Tr. 713-14. The PS IEP team members proposed that the student's placement to implement the IEP for her -grade year be a . *See* SB 11.

is the student's base or neighborhood public day school, within walking distance of her home. Tr. 667. It has a little over 900 students, of whom 123 have IEPs, with about 10% (93) of the entire student body identified as learning disabled. Tr. 667. All the students a are in the or grade. *Id.*

At , all the student's core academic courses - English, math, science, U.S. history and reading - would be taught in self-contained special education classes having 6-12 students. Tr. 696-7.

The student would be taught by a certified special education teacher, with at least one and sometimes two instructional assistants. *See* SB 11, p. 13 of 26; Tr. 696-699.

Teachers at use many instructional techniques, including a lecture format, participation in hands-on activities and group projects to capture and hold the students' interest. Tr. 718-21.

Specific techniques geared to assist with learning are used in self-contained classes, such as mnemonics. Tr. 720-721.

One of the student's elective classes at would have been reading. The reading class at which the student best fits into is an all-year, self-contained class with 9 students. Tr. 699.

The reading teacher is a certified LD teacher and she also has a specialization in literary skills. There are two instructional assistants in this reading class and 's speech/language teacher also goes into this reading class periodically to work with some of her students as a push-in. Tr. 698-699. uses different methodologies in the reading class. Tr. 700-701.

The student's other elective for grade would have been drama/theatre arts. Tr. 703-04. That class has 20 students, and is a favorite of students with disabilities. Tr. 703-04, 715.

Ms. , the Special Education Department Chairperson at , testified:

> That's one of the classes that the [special education] students tend to do very well in. They oftentimes will join the theater arts class, not only in the regular classes, but they will also be a part of the theater arts in the afternoon.
>
> Because we have after-school programs, and they decide to join that. They also become part of the play that the students put on, on a yearly basis.

Tr. 704-05

Finally, as noted above, the student would have participated in a regular physical education class. Neither the parent nor Dr. requested adapted PE, as noted above.

The parent rejected the proposed IEP and Ms. sent her a written notice letter summarizing the proposal on August 4, 2011. SB 5.

The parent, by counsel, contends that PS has failed to provide the student with a free appropriate public education ("FAPE") and seeks a placement and funding at the School of (" ") for the 2011-12 school year (POB at 19).

is a private school where all students are educationally disabled. Tr. 272. There are about 350 students at , first grade through twelfth grade, ages 6 through at least 18. Tr. 272, 255. There are 77 junior high students. Tr. 242.

The building has sometimes crowded hallways and classrooms on three floors. Tr. 273-74.

is located in , . The student's parent drives her there, about 45 minutes each way. Tr. 232-33.

Essentially, the parent contends that the student can learn only if provided with full-time, intensive special education. *See, e.g.*, POB at 2. However, in many material aspects, is similar to the private day school placement that the parent insists is appropriate and that the student needs. Indeed, in certain material respects the PS' placement is superior. Importantly, the placement allows the student to interact with her nondisabled peers.

At the time of the hearing, had as yet not developed its own IEP with an agreed-upon set of educational goals, objectives, and accommodations. Tr. 332.

As noted above, at , all of the student's academic classes, including reading, would be small, self-contained classes designed to meet the needs of students with learning disabilities.

The classes would be staffed with a qualified special education teacher, and at least one instructional assistant. *See* SB 11 at 13; Tr. 696-699.

Both the parent and Dr. agreed that the staff at Irving was professional. Tr. 77, 209. Dr. said they were "great" and the parent has worked with Ms. before concerning her son, finding them all very professional. Tr. 77, 112, 209, 713.

Teachers at , as at , use different modalities such as student participation and hands-on learning. Tr. 718-21.

The same related services (OT and SL) are available.

also offers additional services (audiology and HI services) not available at .

As appropriate at , the related services are integrated into the classes, so that the therapist consults with the teachers, and works with students, there. Tr. 326.

LD classes at would be an instructional peer group for the student, including students at academic levels similar to the student's. Ms. testified: "these are not unusual to the needs of many students they have successfully supported at ." Tr. 507; *see also* Tr. 521.

Ms. testified that the student's level of educational functioning in reading, math, and written language from the 8/25/11 testing was "very similar" to the level of educational functioning of the other students in the learning disabled classes at . Tr. 787-88. Teachers at have successfully worked with many such students in the past. Tr. 729. The student was not in the eyes of the LEA members of the IEP Team "a student that we saw as a student with severe disabilities who needed intensive programming." Tr. 693-4; *see, also*, Tr. 507, 525-7, 729.

The parent has not presented probative evidence that would justify the need for "special education" lunch or study hall (at it is called "Learn & Earn," and includes academic support (Tr. 511)).

The student is a bright student who enjoys speaking her mind. Tr. 30, 60, 87, 397. The student went through a difficult period of transition at Academy (Tr. 126, 182, 480-1) and even at . Tr. 187, 264-65. However, the LEA, expecting transition issues in any return of the student to a public day school setting, is experienced in adopting proactive steps to ease any transitional issues. Tr. 480-1.

For example, if the student experiences any difficulty changing classrooms, the student could, if necessary, leave a few minutes early, an accommodation routinely used at for other students. SB 5. Tr. 480-1.

The student does not have any motor skill or sensory problems that would prevent the student from being successful at . Tr. 554-61, 600-01.

As noted above, the student's hearing loss is primarily at higher frequencies, such that the student can satisfactorily hear speech. Tr. 612. Even if the student's hearing is somewhat reduced in large settings such as the halls or auditorium, the student's hearing aids adjust to optimize the student's hearing in those different environments. Tr. 617-18. Additionally, if necessary, the student could use a closed FM system, which she has previously used in the LEA. Tr. 628-29.

Of course, the student would be receiving her academic education in small classrooms, with doors, not in the hallways in any event. Tr. 789.

The evidence does not support the claim that the student is so psychologically fragile that she could not manage herself in the program. Tr. 209-211.

The only psychologist to testify, Ms. explained that, "there were no indicators of depression or withdrawal or deep-seated sadness in any area. In fact, almost the opposite. The student can really be very life proactive, so to speak." Tr. 941. Concerning her evaluation including measures of emotional functioning, Ms. concluded that "I don't see any reason in the profile of why [the student] couldn't be [at] and be successful." Tr. 951-52.

At the request of the parent and Dr. , the student was moved from her neighborhood elementary school ( ) mid-way during third grade, and placed in the Hearing Impaired program at . Tr. 201.

was a program designed for students with Hearing Impairments, who were taught in a small class most all academic subjects by a teacher of the Hearing Impaired (for grade, Ms.).

The student and Ms. had a strained relationship and did not do well together. Tr. 64, 102, 906-907. Similarly, the parent and Ms. did not get along. Tr. 207-208. The only time the parent and the student have had such a strained relationship with a teacher was with Ms. . Tr. 209.

The Learning Disabilities program is very different from the Hearing Impaired program at . Tr. 191, 689. For example, far from a strained relationship between the parent/student and one primary HI special education teacher, at , the student would be taught by five (5) different special education teachers trained specifically for Learning Disabilities and numerous different instructional classroom aides supporting the different teachers. The students in the LD classes are on the whole also much more verbal than those in the HI class at . Tr. 226, 906. As. Ms. testified, the Hearing Impaired program is "definitely a different program" from the Learning Disabilities program. Tr. 689. The former is focused on "the needs of the students with hearing impairments that are significantly affected by their hearing impairment, who are not able to access the services provided at their base school." Tr. 689. Indeed, as Ms. explained, it is precisely for that reason that in the July 2011 IEP meetings, it was agreed that the middle school-level Hearing Impaired program, at School, would *not* be appropriate for the student. Tr. 463-4.

During fifth grade, the student did take one academic subject - science - in a "team taught" format. That class was a larger one taught jointly by a regular and special education teacher, and included both students with disabilities, and those without. Tr. 904-05. The student did well in the class, and at the end even passed the same Virginia Standards of Learning examination (the "SOL") that all other students take. Tr. 898, 904-05. The student narrowly missed passing the student's fifth grade writing SOL. Tr. 905.

Despite experiencing some difficulties during fifth grade at , the student made educational progress.

For the 2010-11 school year, PS proposed an IEP and placement that would have continued the student at . SB 8, 9. The parent was not in agreement and unilaterally placed the student at Academy, a private facility in , Virginia.

did not have an IEP, but rather employed PS' IEP as best it could. The school could not offer related services such as SL, or OT, at all. Tr. 186.

Pursuant to a settlement agreement dated August 16, 2010, the parent and PS resolved all educational claims for the student through the end of the 2010-11 school year. CC 40. As part of that agreement, the parent expressly acknowledged that the parent could not thereafter predicate claims for future years on what had occurred during earlier years. *Id.* at paragraphs 4, 5.

Under the settlement agreement, PS was to prepare a new IEP and placement for the student for the 2011-12 school year, and the parent agreed to consider it in good faith. CC 40, paragraph 8.

However, unknown to PS, even before the parent was first contacted by Ms. on April 27, 2011 to begin the IEP process, the parent had decided that the parent would not agree to if it were proposed, saying the student would attend there "over [her] dead body." Tr. 221; SB 69, page 141.

Subsequently, when a spot at opened up sometime in early or mid July 2011, the parent quickly committed to having the student attend there. The parent did so before PS had the chance to complete its IEP and placement proposal on July 22, 2011. Tr. 229.

The obligation to participate in good faith in the educational process for the benefit of the student is not a one-way street; of necessity, the parents and student must shoulder some of the responsibility.

During the period relevant to this proceeding, the parent in her determination to provide what she considers the best education for the student, has clearly made evident her ultimate goal of having the LEA fund the student's private placement at . *See, e.g.,* SB 69, p. 141; Tr. 221.

The parent realizes that the LEA is not legally obligated to reimburse the parent or to pay for the parent's private placement of the student at unless the LEA fails to offer the student a FAPE.

Based on the totality of the administrative record, the parent has predetermined that no placement other than would be appropriate for the student concerning the educational placements at issue in this administrative proceeding. Tr. 221; SB 69, p. 141.

The parent and her educational consultant, Dr. , were afforded the opportunity to fully participate in the development of the student's IEP. Tr. 453-5. At the IEP meetings on July 7 and 22, 2011, the IEP team was well informed concerning the student's educational and medical needs by the numerous detailed updated evaluations, the parent's significant input and the assessments by LEA personnel.

Numerous detailed accommodations, goals, objectives and services were carefully and skillfully crafted by the Team to support the student's unique educational needs. SB 10, 11.

During the IEP Meetings held on July 7 and July 22, 2011, the IEP Team reviewed, discussed and made revisions to the IEP, based on information from the parent, Dr. and Dr. . Tr. 453-5. The IEP Team considered a public school setting. Specific goals and objectives were discussed and developed. After consideration of all evaluative reports and other information, the LEA representatives on the IEP Team determined that the student's academic and other educational needs could be appropriately addressed in general and special education settings in the LEA in accordance with the Virginia Regulations, 8 VAC 20-81-130 Least Restrictive Environment and Placements. Tr. 172, 472-3, 501-2. Specific teaching strategies and supports for the student's success in a school environment would be determined by her teachers and related services personnel based on her individual needs, IEP goals and objectives.

LEA representatives also testified that the LEA would adopt specific enumerated strategies to ease any transition back into the public day school and the proposed IEP also included numerous supports and accommodations to address any transition concerns for the student. Tr. 480-1.

Dr. and the witnesses who appeared from while familiar with their own educational programming for the student were admittedly not familiar with nor were they familiar with the legal obligations imposed on the LEA and they had not worked much in a similar program. Tr. 76, 92-93, 95, 99-100, 275, 278-279, 280-282, 331-332, 338-339, 344, 402-405, 407-409.

By contrast, the LEA representatives were intimately familiar with the student's proposed placement at , the reasons why they determined it was appropriate and they exhibited knowledge about and experience in complying with the many legal obligations imposed on them in the public school context. Tr. 426-428, 430-431, 441-443, 447-8, 471-482, 652-658, 800-840.

The parent herself on occasion has appeared to adopt an inappropriate optimization standard concerning the placement at , describing it as "a perfect fit." Tr. 226, 501; FRB at 4.

The testimony of the LEA's educational professionals was both credible and consistent on the major issues before the hearing officer and is entitled to deference from the hearing officer. The demeanor of such professionals at the hearing was candid and forthright. LEA personnel acted appropriately in exercising their considered professional judgment, well within the bounds of their professional, educational discretion.

The LEA has made a good faith, collaborative, coordinated, reasonable effort to develop and offer appropriate educational programs to the student for her 2011-12 school year. Tr. 445, 453-4, 526-7. The student did not suffer any loss of educational opportunity due to any action or inaction on the part of the LEA.

Any procedural violations were technical and did not actually interfere with the provision of a FAPE to the student. Any procedural violations did not cause the disabled student to suffer a loss of educational opportunity.

II. Additional Findings, Conclusions of Law and Decision[4]

In this administrative due process proceeding initiated by the parent, the burden of proof is on the parent. *Schaffer, ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

The law retains the previous definition of a "free appropriate public education." Section 612(a)(1)(A) of the *Individuals with Disabilities Education Improvement Act of 2004* (the "IDEA 2004"). Accordingly, any analysis of the standard of FAPE must begin with *Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). The *Rowley* Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education. The *Rowley* analysis provides that the disabled child is deprived of a free

4 To the extent the above section entitled, "Findings of Fact" includes conclusions of law, these conclusions are incorporated into this section.

appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. *Rowley, supra*, 206-7 (1982); *Tice v. Botetourt County School Board*, 908 F.2d 1200 (4th Cir. 1990); *Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987); *Gerstmyer v. Howard County Public Schools*, 20 IDELR 1327 (1994).

The LEA has at all times been willing to offer the student the services under the July 22, 2011 IEP while the parent has demonstrated that she is unwilling to accept any offer of FAPE by the LEA which does not include placement at . SB 69, p. 141; Tr. 221. Accordingly, this proceeding is akin to *MM v. Sch. Dist.* 303 F.3d 523 (4th Cir. 2002), where the Court held:

> It is significant that there is no evidence that MM's parents would have accepted any FAPE offered by the District that did not include reimbursement for the Lovaas program. As we have noted, the District is not obligated by the IDEA to provide a disabled child with an optimal education; it is only obliged to provide a FAPE. Rowley, 458 U.S. at 192, 102 S.Ct. 3034.

While at the beginning of this proceeding, the parent appeared to raise certain procedural deficiencies these alleged procedural deficiencies were not pursued or developed at the hearing and, in any event, simply do not rise to the level necessary to cause the student a loss of educational benefit. Tr. 6.

A small violation of IDEA ' s procedural requirements does not, without evidence of an actual loss of educational opportunity, constitute a failure to provide the disabled child with a free appropriate public education. *Rowley, supra*; *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997); *MM v. School District of Greenville County*, 303 F.2d 523 (4th Cir. 2002); *Dibuo v. Board of Educ.*, 309 F.3d 184 (4th Cir. 2002); *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985); *Tice, supra*; *Doe v. Alabama Department of Education*, 915 F.2d 615 (11th Cir. 1990); *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992); *Evans v. School District No. 17 of Douglas County*, 841 F.2d 824 (8th Cir. 1988). Technical violations of IDEA procedures that do not deny the student FAPE are considered *de minimis. See, e.g., Fairfax County Sch. Bd. v. Doe*, Civil Action No. 96-1803-A (April 24, 1997); *see also Roland v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990), *cert. denied* 499 U.S. 912 (1991); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990); *Spielberg v. Henrico County Sch. Bd.*, 853 F.2d 256, 259 (4th Cir. 1988); *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 633-635 (4th Cir. 1985); and *Board of Educ. v. Brett Y*, 155 F.3d 557 (4th Cir. 1998).

In *Dibuo*, the Court reaffirms the law in our circuit that not every procedural violation of the IDEA warrants granting the relief requested. Before any relief can be afforded, the Court (or hearing officer) must proceed beyond the finding of any procedural violation of the IDEA to further analyze whether the procedural violation actually interfered with the provision of a FAPE to a child:

> Most recently, in MM, we relied upon our decision in *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997) to reiterate that [HN6] "when . . . a procedural [violation of the IDEA] exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA." *MM*, 303 F.3d 523, 533, 2002 WL 31001195 at *7.

Dibuo, supra, at 190.

Essentially, this standard has now been codified in the most recent reauthorization. IDEA 2004 Section 615(f)(3)(E)(ii); *see also,* 8 VAC 20-81-210(O)(17). Any asserted procedural violation concerning this proceeding simply does not rise to the level necessary to constitute a loss of educational opportunity and denial of FAPE to the student.

The determination of the IEP's reasonableness at the time of its creation is limited to the information known to the IEP team when it wrote the IEP. *See Adams v. State of Oregon*, 195 F.3d 1141, 1150 (9th Cir. 1999) (IEP "was reasonably developed based on information available to the [multidisciplinary team] including information from the parents").

Rowley and subsequent court decisions have also been careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators.

In *Hartmann v. Loudoun County*, the Court stated:

> Although section 1415(e)(2) provides district courts with authority to grant 'appropriate' relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section 'is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' (citations omitted)... [t]hese principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

See also Springer v. Fairfax County, 134 F.3d 659, 663 (4th Cir. 1998) (holding that "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task"); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 151-52 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and *Tice v. Botetourt County, supra*, at

1207 (once a "procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals" – rather, the court should "defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides").

Accordingly, hearing officers must not succumb to the temptation to substitute their judgment for that of local school authorities in IEP matters. *Arlington County Sch. Bd. v. Smith*, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

IDEA defines FAPE as special education and related services that (i) have been provided at public expense and under public supervision and direction; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary school education in the state involved; and (iv) are provided in conformity with an IEP. 20 U.S.C. § 1401(8).

The IEP is the backbone of a student's special education program. To that end, the Supreme Court of Virginia has recognized that an appropriate set of IEP goals is in and of itself is a significant factor in determining whether a school district has offered an appropriate program. *See School Bd. v. Beasley*, 238 Va. 44, 52, 380 S.E.2d 884, 889 (1989).

Here, there is agreement concerning the July 22, 2011 IEP, that the description of the student's current level of functioning, her educational goals and objectives, and the necessary classroom accommodations are appropriate for the student. These go a long way toward demonstrating that PS has offered an appropriate education here.

Just as the student's goals were reasonably calculated to allow the student to advance in each of her unanimously agreed areas of need, her services were structured so that they would have been provided in an environment that would allow the student to make progress.

At , the amount of self-contained special education would have been intensive. All of the student's academic classes (English, math, science, reading, and history) would have been in small, highly-structured classes of only about 6-12 students. Tr. 696-7. Since reading is such an important area for the student, it would have included - in addition to English class - a separate intensive reading class of 9 students with a teacher and two assistants. Tr. 699.

While the parent's witnesses expressed concern that the student is aware of her academic deficits, as Ms testified, at the student would be in academic classes with students whose level of functioning is comparable to her own. Tr. 730-31. has a successful record of working with students with learning disabilities. has also successfully provided education to other students with hearing impairments, and even some who are cancer survivors - one of whom was elected student body president. Tr. 689-90, 731-33.

In determining the quantum of educational benefit necessary to satisfy IDEA, the Rowley Court explicitly rejected a bright-line, single standard test. Instead, educational benefit "must be

gauged in relation to the child's potential". *Rowley* at 185 and 202; *see also, Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985).

Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-1001 (4th Cir. 1997); *Johnson v. Cuyahoga County Comm. College*, 29 Ohio Misc.2d 33, 498 N.E.2d 1088 (1985).

The proposed placement of the student within , her neighborhood school, pursuant to the proposed July 22, 2011 IEP, provided the student the support to learn and progress academically in the least restrictive environment. Tr. 172, 472-3, 501-2. The proposed July 22, 2011 IEP for the student's 2011-12 school year was reasonably calculated to provide the student with the necessary quantum of educational benefit required by law. The LEA has offered the student a FAPE.

The IDEA 2004 like the IDEA 1997 requires that children with disabilities be educated in the LRE and have the opportunity to be educated with non-disabled children to the greatest extent possible. 20 U.S.C. § 1412(A)(5); *see, also* 34 C.F.R. § 300.550(b). Removal of disabled children from the regular education environment should only occur when the nature or severity of the disability is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily. Id. LRE is a mandate to all public schools which must be considered by the appropriate multi-disciplinary IEP Team in programming for children.

The LEA has looked at the student's strengths, weaknesses and progress in light of her disability and has proposed an IEP in which her weaknesses, both scholastically and socially can be addressed, but where her academic strengths can also be developed, accommodated and built upon. The LEA's proposed IEP also provided the student a regular education opportunity to promote her socialization skills and participate in activities with non-disabled students in certain areas, as mandated by the LRE requirement. Tr. 172, 472-3, 501-2. The children at are all disabled. Tr. 272.

The hearing officer agrees with the LEA that Judge Hilton's painstaking remand analysis in *Doyle v. Arlington County Public School Board*, 806 F.Supp. 1253, 1254 (E.D.Va. 1992), *aff'd*, 39 F.3d 1176 (4th Cir. 1994) has application *mutatis mutandis* to the facts and circumstances concerning this proceeding. FOB 10. In this proceeding, like in *Doyle*, the greatest weight must be accorded to the testimony of the public school staff because they had familiarized themselves with the student's needs through the lengthy and comprehensive IEP process and were extremely knowledgeable and experienced with the LEA's proposed program. *Doyle*, 806 F.Supp. 1253, 1254. By contrast, here as in *Doyle*, the parent's witnesses were not particularly experienced in or very familiar with the LEA's type of proposed program. *Id.*

The parent bears the burden to establish by a preponderance of the evidence that the LEA has failed to provide the student with FAPE concerning her request for tuition reimbursement and concerning the issues she has raised in this proceeding and she has not sustained this burden.

The LEA is reminded of its obligations concerning 8 VAC 20-81-210(N)(16) to develop and submit an implementation plan to the parents and the SEA within 45 days of the rendering of this decision.

Right of 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.

ENTER: 10 / 18 / 2011 *nunc pro tunc*

John V. Robinson

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail, facsimile and/or e-mail, where possible)