

VIRGINIA:

DUE PROCESS HEARING

GH and BH,)	
)	
Complainants,)	
)	
v.)	In Re: Student
)	
PUBLIC SCHOOLS,)	
)	
Respondent.)	

STATEMENT OF FACTS

1. Prior to LEA-E

Student was born November 8, . At ages three and four-and-a-half, Student participated in Virginia’s Child Find program to determine if she needed special education (Parents-2). She was not found eligible as a result of this process and attended the WP (Parents-4). Before she began kindergarten at OL, Student was screened again, but still not provided services. *Id.* Student attended a private school – OL Catholic School in , Virginia – for kindergarten and half of first grade (Tr. at 58-59).

Her parents hired a tutor to give Student extra help with letters, spelling, reading, and math (Testimony of BH, Tr. 60).

By the middle of her first grade year, Student’s parents noticed that she was not making progress at OL and transferred her to LEA-E (Parents-4). Five of the

parents' six children went through LEA-E, with the second youngest there now (Testimony of BH, Tr. 50).

2. LEA-E 1st Grade

Student began attending LEA-E in the middle of first grade on January 4, 2004 (Tr. 54-55, 62; Parents-4). The record does not reflect any educational or social issues for the balance of first grade.

3. LEA-E 2nd Grade

In the fall of 2004 Student's second grade teacher, Miss E, developed concerns about Student's reading and written language skills. Miss E then made a referral to the LEA Local Screening Committee to determine whether Student would be eligible for special education services. On November 4, 2004 the Local Screening Committee directed that Student be evaluated (Parents-13, 2; Tr. 64-65).

LEA staff conducted the following evaluations:

- | | |
|---------------------|---|
| Psychological | - DGW, School Psychologist (Parents-3) |
| Educational | - LL, Learning Disability Teacher (Parents-5) |
| Sociocultural | - CDL, LCSW (Parents-4) |
| Hearing and Vision | - MQ (Parents-7) |
| Speech and Language | - PS, CCC-SLP (Parents-8) |

On January 26, 2005, Student was found eligible for special education services on the basis of a learning disability (LEA -1). The eligibility committee

concluded that Student demonstrated a disorder in auditory memory and visual motor integration, and also concluded that she was not achieving commensurate with her age level in the area of basic reading skills and accordingly had difficulty with reading, written expression and verbal expression (LEA-1, Tr.194) .

The first meeting with LEA staff and Student's parents to develop her IEP was held February 15, 2005. The proposed IEP identified two Primary areas of Need - "Basic Reading Skills" and "Written Language". Annual Goals and Short Term Objectives were established. Curriculum and Classroom accommodations were also identified whereby Student was to receive preferential seating, extended time for her assignments and given the opportunity to respond orally. The IEP further provided that Student was to receive special education services for 3 hours a week in a special education setting on a regular basis and also special education services in general education setting on an intermittent basis. GH and BH agreed with the contents of the IEP. The IEP covered the balance of the 2nd grade and to the middle of the 3rd grade up to February 15, 2006 (Parents-9).

4. LEA-E 3rd Grade

The evidence presented to the Hearing Officer did not include any materials for Student's 3rd grade at LEA-E except for the notes of the IEP meeting held on February 22, 2006 (LEA-22). This IEP was to provide for special education services for the balance of third grade (2/22/06 to 6/20/06) and the upcoming fourth grade 2006-2007

school year (9/05/06 to 2/22/07). At this IEP meeting Needs and Goals were now identified in the following areas, namely “Reading - Word Recognition”, “Reading Fluency”, “Written Language” and “Mathematics”. A Qualitative Reading Inventory (QRI) test given Student showed that she was reading at a second grade level. In discussion with Student’s parents concerns were also expressed about motor control of her tongue which made it difficult for Student to sound out new words. Curriculum and Classroom accommodations were increased from 3 to 15. It was also agreed that she would participate in Virginia SOL tests in English: Reading, Math, Science, and Social Studies: History. Her special education services were increased from 3 hours to 9.5 hours a week of which 2.5 hours would be provided in a special education setting only while the balance would be provided in a regular education setting. GH and BH agreed with the contents of the IEP (Parents-46). Progress reports dated April and June 2006 at the end of third grade regarding Student’s areas of need indicated that Student was making sufficient progress to achieving her goals within the duration of the IEP (Parents-12).

5. LEA-E 4th Grade

During the summer between 3rd and 4th grade on July 12, 2006 Student received an LEA occupational therapy evaluation by LBA (Parents-11) due to Student’s teacher’s concerns about Student’s handwriting legibility and her difficulties with keyboarding. The scores from the tests given as part of this evaluation demonstrated that Student struggled with writing and typing, with the manipulation of school tools, as well

as those tasks that required fine motor skills. As a result of these findings, LEA spoke with Student's parents and it was agreed that Student's IEP would be amended to add occupational therapy as a related service. Student was scheduled to receive occupational therapy 2 hours a month with 1 hour in a special education setting. Subsequently an IEP meeting was held on September 14, 2006 after Student's return to school for the fourth grade where Student's parents signed the IEP to formally add occupational therapy as a related service for Student. In addition the IEP team decided to increase Student's special education services from 9.5 hours to 15 hours a week, 5.0 hours of which would be provided in a special education setting only while the balance would be provided in a regular education setting. This IEP added a new Need and Goal in the area "Fine Motor/Visual Motor". GH and BH agreed with the contents of the IEP. The IEP covered the balance of the 3rd grade and the fourth grade up to February 22, 2007 (9/14/06 to 2/22/07) (Parents-12).

In November 2006 an IEP progress report was prepared regarding Student's areas of need which indicated that Student was continuing to make sufficient progress to achieve her goals within the duration of the IEP (Parents-12).

On January 31, 2007 Student's parents submitted an application for her to attend the Private Learning Disabled School (PLDS) (Parents-13). The parents did not notify LEA at this time.

On January 11, 2007 Student was referred for evaluation to _____'s Assistive Technology Services. These services were started February 8, 2007 when Student was provided with an Alpha Smart with co-writer (LEA-24).

During the winter of 2006-2007 her parents noticed that Student was having more development problems including trouble reading as well as difficulty speaking in the mornings. In addition in February 2007 Student switched from being right handed to left handed (Parents-15). Also during this winter period her right side had become weak with numbness in her right leg which affected her gait, she had a droopy left eye, and a fine tremor of her right hand (Parents-19). Student was examined by her family neurologist who arranged for an MRI examination. She was also examined by physicians from JH and underwent tests at the CNMC. There were no obvious findings except for a possible post traumatic brain lesion which was attributed to a fall when Student was three years old (Parents-19, 20).

The next development came on February 13, 2007 when Student's IEP team and her parents met again to prepare Student's annual IEP which would cover the balance of the fourth grade and into the fifth grade (Tr. at 1171-72, Parents-15). This IEP again showed Student as having Needs and Goals in the areas of "Reading-Word Recognition", "Reading Fluency", "Mathematics", and "Written Language". To these were added two additional areas of Need and Goals: "Organization" and "Hand Use for Classroom Tasks". The number of Curriculum and Classroom accommodations was increased from

15 to 19. Student was once again to participate in the Virginia SOL tests in English:Reading, Math, and Social Studies:VA studies. However, this year Student's participation in the SOL's was to be with accommodations. (Parents-12) Student's hours of special education services were to remain at 15 hours, but her IEP team increased the hours in a special education setting from 5 hours to 6. GH and BH agreed with the contents of the IEP. The IEP covered the balance of the 4th grade and the 5th grade up to February 22, 2008 (Parents-15, p.14).

A further IEP meeting was held a week later on February 21st with BH signing an IEP addendum which called for LEA to conduct an Adaptive PE Evaluation because Student had displayed significant difficulties involving balance, locomotor skills, and motor planning. The evaluation concluded that additional support from the Itinerant Adapted Physical Education Program was warranted. Student's IEP was amended to add 2 hours of Adapted Physical Education (APE) a month to be conducted in a regular education setting.

On March 23, 2007 Student was offered admission to PLDS (Parents-14), and on April 5, 2007 Student's parents signed the contract to attend PLDS and paid the \$2,000 deposit on April 9th (LEA-60). On March 27th Student mentioned to her special education teacher, SPL, that she would be going to PLDS, which BH confirmed the next day in an email to Ms. SPL (Parents-14).

In the spring of 2007 Student took the Virginia SOL exams. She passed the Virginia Studies and Reading exams while she narrowly failed the Plain English Mathematics (LEA-52).

In April 2007 LEA staff prepared an IEP progress report as to her areas of need (LEA-53). At this time her progress was noted to be only that she had “demonstrated some progress” towards achieving her goals, which had now increased to seven with the addition of “Self Advocacy in Physical Education”, with the exception of mathematics where she continued to make sufficient progress toward achieving her goal.

On April 21, 2007 LG, a Speech Language Pathologist at PLDS, conducted a comprehensive speech language assessment of Student and recommended that there be speech language intervention at the rate of one 45 minute individual session and one 45 minute small group session per week (Parents-21).

On May 9, 16 and 30, 2007 JD, an LEA Speech Language Pathologist, also carried out testing of Student (Parents-25). Her report stated that Student appeared to demonstrate age-appropriate receptive and expressive language skills and strengths in grammar, listening and syntax. At the same time she exhibited weaknesses in the relationship between words and the ability to hold and manipulate language in her working memory. She also evidenced dysarthric speech, which affects the articulation of consonants which in turn causes the slurring of speech. Ms. JD recommended that the speech/language clinicians should provide assistance to Student’s teachers in

understanding and improving the intelligibility of Student's speech.

On May 7, 2007 BH formally approved the Assistive Technology Services IEP addendum (LEA-24). Later on May 21, 2007 the parents agreed to the Adapted Physical Education IEP addendum (Parents-16). In June 2007 LEA in the Progress Report continued to find that Student had only "demonstrated some progress" towards achieving her goals which had, as noted above, increased to seven with the addition of "Self Advocacy in Physical Education", although in mathematics she continued to make sufficient progress toward achieving her goal (LEA-53).

Three weeks later on June 13, 2007, five days before the end of the 2006-2007 school year, Student's parents met with Student's IEP team to prepare her IEP for the 5th grade 2007-2008 school year (Parents-26). Reference was made to the LEA Speech and Language Evaluation Report, and it was noted that her speech difficulties, including unintelligibility, may be neurologically related and thus might not improve. It was also noted that, while her standardized test scores were within normal limits, her teachers also reported that she exhibited weaknesses in these areas. It was further noted that additional strategies could be taught in speech sessions in small group settings. A new Area of Need was identified as "Oral Communication - Intelligibility". As a result 2 hours a month of "Speech and Language" related services were to be provided Student in a special education setting. GH signed the IEP indicating that he agreed with the contents of the IEP. The IEP covered the balance of the remaining 5 days of the 4th grade and the

fifth grade up to February 13, 2008 (Parents-26, p.6). There are no comments in the IEP documentation that would indicate that Student's prospective enrollment in the PLDS was discussed, although the participant's versions of the discussions which took place at this IEP meeting which were presented at the due process hearing varied.

Student's final school progress report from LEA-E for the 4th grade showed that she received an A in Music; B's in Health, Mathematics, and Physical Education; and C's in, Spelling and Written Communication, Science, and Social Studies. With respect to Work Habits she was either satisfactory or good, with the exception of needing improvement in Organizing Materials.

6. PLDS (PLDS) Intermediate/5th Grade

On August 28, 2007 Student completed her enrollment in PLDS (Tr. 304). She has continued her enrollment for three full school years and is currently participating in her fourth year.

On November 15, 2007 Pyramid Resource Specialist, SE, after telephone and email messages sent to Student's parents in September 2007 about her absence from school had not been responded to, confirmed by letter to Student's parents that Student had in fact been withdrawn from LEA and her parents had enrolled her in the PLDS. She indicated LEA's willingness to reconvene the IEP team to reconsider Student's IEP and also noted that the parents had been provided with the Procedural Safeguards document (LEA-6).

Also on November 15, 2007, Michael J. Eig, Esq. wrote SF, Principal at LEA-E, that he had been retained by Student's parents to represent Student's special education needs. He enclosed the current IEP from PLDS and requested an IEP meeting with LEA staff to review Student's IEP (Parents-31).

This correspondence initiated a process whereby LEA attempted to continue to offer special education services under revised IEP's to Student over the succeeding years, all of which were rejected by Student's parents and their advisors. During this time PLDS staff was also preparing IEPs for Student. In addition as part of that process PLDS staff performed a number of evaluations.

6. PLDS (PLDS) Intermediate/5th Grade

During the Intermediate 5th grade year, the following assessments and evaluations were undertaken by PLDS:

On April 21, 2007 Comprehensive Speech and Language Assessment was conducted by LG, PLDS Speech-Language Pathologist (Parents-21);

On October 1, 2007 the Woodcock Johnson III Normative Update Tests of Achievement (WJ III) was conducted; the tester was not identified (Parents-30);

On October 9, 2007 a Physical Therapy Evaluation was conducted by SS of the PLDS staff (Parents-28).

An IEP team meeting between Student's parents and PLDS staff took place on October 10, 2007, and the group determined that Student should receive the following

services at PLDS until the next IEP meeting took place in October 2008 (Parents-30):

<u>Service</u>	<u>Provider</u>	<u>Time</u>	<u>Type</u>
Special education	SE Teacher	32.75 hrs	Specialized Instruction
Speech/Language	S/L Therapist		Integrated Services
Occupational Therapy	OT Therapist		Integrated Services
Speech/Language	S/L Therapist	45 min	Individual
Speech/Language	S/L Therapist	45 min	Group
Occupational Therapy	OT Therapist	45 min	Individual

All of the above services would be rendered in a self-contained Special Education setting. Goals were established in the areas of “Written Language”, “Reading”, “Math”, “Social Behavior” , “Speech and Language” and “Occupational Therapy”.

A short while later on December 6, 2007, the LEA Local Screening Committee at LEA-E met with GH to conduct Student’s triennial evaluation to determine whether Student continued to be eligible for special education services. The Committee reviewed the results of previous testing conducted by LEA together with the private testing conducted by PLDS which had been provided by Student’s parents. The eligibility Committee concluded that additional data would be required to determine eligibility. Subsequently LEA conducted the following evaluations:

On December 17, 2007 a Psychological Evaluation was conducted by DGW (LEA-39);

On January 7, 2008 PM and MG of the LEA staff visited PLDS to observe Student and to make Occupational Therapy and Physical Therapy evaluations (LEA-40, 41). .

After a second committee meeting, the Local Screening Committee concluded that Student was not achieving commensurate with her age level and that she demonstrated a severe discrepancy between ability and achievement in the areas of Basic Reading Skills, Reading Comprehension, and Written Expression. It was concluded that Student had a processing deficit involving understanding and using language, including auditory memory, visual memory for abstract information, visual discrimination, visual motor integration, and perceptual motor speed. On January 25, 2008, Student's parents were formally advised that she continued to be eligible for special education services (LEA-12).

Following up on that determination, the LEA IEP team held a series of meetings with Student's parents, their advisors, and representatives of PLDS beginning on February 11, 2008, continuing on February 25, 2008, and concluding on June 18, 2008 (LEA-26). The IEP team reconsidered Student's Needs and Goals in the six areas of "Reading - Word Recognition", "Reading Fluency", "Written Language", "Organization", "Mathematics - Speech Intelligibility", "Self-Advocacy in Physical Education". The IEP team also added five additional Needs and Goals in the area of "Communication - Speech Intelligibility", "Reading Comprehension", "Written Expression", "Language - Oral Narration" and "Language - Word Retrieval".

The number of Curriculum and Classroom accommodations was increased from 19 to 28. It was also agreed that Student would be eligible to take the 5th grade Standards of Learning tests in the areas of English: Reading, Mathematics, Science, and English: Writing. She again would participate with accommodations. All of her areas of Need were to be addressed in both the special education setting on a regular basis as well as a general education setting on a regular basis. Student's special education services were to be increased from 15 hours to 21.5 hours a week, of which 7.5 hours would be in a special education setting only. Student was to continue to receive related services in the areas of Adaptive Physical Education for 4.0 hours a month, Speech and Language for 4.0 hours a month, and Occupational Therapy for 1.0 hour a week, all of which would occur in a general education setting. The IEP team also determined that Student was eligible for Extended School Year (ESY) services in the area of Language Arts, and she was to be provided LD services in the areas of Reading - Word Recognition and Reading Fluency for 15 hours a week during the summer for four weeks. Student's parents, together with their counsel and educational consultant, indicated their disagreement with the proposed IEP, believing that Student required a self-contained private day program. Once again on July 2, 2008 Miss SE wrote to Student's parents outlining the proposed LEA IEP program and advising them that they had a right to appeal the decision of the IEP committee. This IEP was to apply to the period through 2/11/2009.

On June 27, 2008 Mr. Eig wrote to Miss SE confirming his clients' rejection of the proposed IEP and the placement, and for the first time stated the parent's intention to seek funding from LEA for Student's on-going placement in PLDS.

During this school year the PLDS conducted the following evaluations:

March 2008 – PLDS Occupation Therapy Report (Parents-44)

March 2008 - Annual Speech and Language Report (Parents-45)

April 15, 2008 – PLDS IEP (Parents-47) This IEP maintained the level and types of services provided in a self contained environment except that Occupational Therapy services were to be provided 2 times per week. Goals continued to be established in the areas of “Written Language”, Reading”, “Math”, “Social Behavior” , “Speech and Language” and “Occupational Therapy”.

June 2008 – PLDS Progress Report (Parents-48)

7. PLDS (PLDS) Intermediate/6th Grade

Student's parents renewed their contract with PLDS on June 10, 2008 and continued her education at PLDS. During this school year PLDS prepared the following reports concerning Student:

Summer 2008 - Intensive Speech-Language Phonological Awareness Reading Fluency Intervention Report (Parents-57)

February 2009 - Occupational Therapy Annual Progress Report (Parents-65)

February 24, 2009 - Woodcock-Johnson III Normative Update Test of

Achievement (Parents-68)

March 2009 - Annual Speech and Language Report (Parents-66)

April 20, 2009 – PLDS IEP (Parents-68) This IEP maintained the same level of services and placement as did the April 15, 2008 IEP. Goals continued to be established in the areas of “Written Language”, Reading”, “Math”, “Social Behavior” , “Speech and Language” and “Occupational Therapy”.

June 2009 – PLDS Progress Report (Parents-70)

LEA did not conduct any IEP meetings or make any visitation to observe Student at PLDS during this school year.

8. PLDS (PLDS) Junior High/7th Grade

Following Student’s completion of 6th grade, on June 1, 2009 Student’s parents filed a request for a Due Process Hearing (Parents-71, 72). On June 10, 2009 LEA requested consent to make Psychological, Educational, and Speech and Language evaluations of Student to take place (Parents-75). Subsequently Student’s parents filed an Amended request for a Due Process Hearing on July 15, 2009 (Parents-79, 80). Because of scheduling issues, on August 31, 2009 Student’s parents withdrew their request for a Due Process Hearing (Parents-91).

LEA subsequently received the following evaluation reports:

August 3, 2009 Educational Evaluation conducted by Deborah K. Kiljora
(Parents-86)

August 4, 2009 Speech and Language Evaluation Report conducted by Beth Borelli, CCC-SLP (Parents-87)

August 5, 2009 Psychological Evaluation conducted by DGW, MA (Parents-88)

December 4, 2009 Physical Therapy Evaluation by JF, PT (Parents-95)

PLDS then carried out a Speech and Language Assessment dated September 10, 2009 conducted by DGP, CCC-SLP (Parents-92).

On September 24, 2009 PM, SPL and LMS of the LEA staff again visited PLDS to observe Student in her classroom environment (Parents-95, p. 26). On December 4, 2009 JF, a LEA Special Education teacher, also visited PLDS to observe Student in her school environment (Parents-95).

The LEA IEP team then initiated a series of meetings with Student's parents, advisors, and PLDS staff to formulate a new IEP for Student. Meetings based upon the latest evaluations were held on October 9th, November 18th, December 9th, and were concluded on December 15, 2009 (Parents-95).

At that meeting LEA staff proposed an IEP containing Needs and Goals in the following areas: "Reading - Word Recognition/Phonemic Awareness", "Reading - Comprehension", "Reading - Fluency", "Articulation", "Intelligibility", "Word Retrieval", "Written Expression 1", "Written Expression 2", "Written Expression 3", "Written Expression 4", "Functional Performance", "Mathematics- Calculation/Word problems/Fluency", "Adapted Physical Education (Gross Motor Skill Development)" and

“Self - Advocacy”. It was also proposed that Student would take Virginia SOL tests in the areas of English:Reading, Math, Social Studies, and US History - 1877 to present.

Student would again participate with accommodations. Under the terms of the proposed IEP Student would be provided 22 hours a week of primary services of which 18 would be carried out in a special education setting on a regular basis. In addition she would receive speech and language services 5 hours a month with 4.75 hours being provided in a special education setting. Occupational Therapy would be provided 4 hours a month with 3.5 hours provided in a special education setting. Adapted Physical Education would be provided 4 hours a week all in a special education setting. Her placement would be at LEA-Middle School. It was also proposed that Student would again benefit from Extended School Year services. This IEP was to cover the period 10/9/09 to 6/22/10 and from 9/7/10 to 10/9/10.

The parents did not agree with this proposed IEP (Parents-102) and again maintained that Student required a fully self contained program. On January 6, 2010 SE, LEA’s Program Manager, sent to Student’s parents Written Notice of the proposed revised IEP and advised them of their right to appeal the IEP teams’ proposal, and also tendered a copy of the Procedural Safeguards document.

Additional evaluations were carried out by PLDS to include:

January, 2010 Occupational Therapy Progress Report by PLDS (Parents-101)

March, 2010 Annual Progress Report by PLDS (Parents-103)

March, 2010 Annual Speech and Language Report by PLDS (Parents-104)

April 7, 2010 PLDS IEP for 2010-2011 school year (Parents-105). Once again this IEP maintained the same level of services and placement that had been established the prior year. Goals continued to be established in the areas of “Written Language”, “Reading”, “Math”, “Social Behavior”, “Speech and Language” and “Occupational Therapy”.

During this period Student’s parents and their counsel and advisors made a visit to the LEA’s proposed placement, LEA-Middle School, and on May 6, 2010 wrote LEA counsel confirming their visit to LEA-Mand requesting another meeting of the IEP team. (Parents-106).

On June 18, 2010 the IEP team met to consider the proposed LEA IEP for the 2010-2011 school year (Parents-109). The LEA members on the IEP team reiterated that they believed that the proposed IEP which contained the same level of services and placement as did the December 19, 2009 IEP would enable Student to receive educational benefit. Parents’ counsel advised the IEP team that the parents rejected the IEP, explained their reasons, and again asserted that Student needed to receive special education services in a self-contained environment. On July 2, 2010 the Prior Written Notice Letter was sent from SE to GH and BH (LEA-21).

On July 30, 2010 GH and BH filed a Due Process Hearing Request (Parents-111) which forms the basis for this hearing. On August 16, 2010 LEA filed its

response to the Due Process Hearing Request (Parents-113).

**DID THE PROPOSED JUNE 13, 2007 IEP PROVIDE STUDENT WITH
FAPE?**

The parties differed as to their evaluation of Student's stay at LEA-E up to the time of her transfer to PLDS.

LEA VIEW OF STUDENT'S STAY AT LEA-E

"Student received special education services in the 3rd grade while she was in Ms. B.'s class, where Ms. SPL served as an instructional aide. (Tr. at 1152). Ms. SPL would assist Student within the general education classroom with reading and social studies (Tr. at 1152). Student also received assistance with a spelling-reading program from a phonics textbook three days a week, and assistance with her spelling words throughout the week (Tr. at 1152-53). She also received pull-out services when needed (Tr. at 1153-54).

Student's hours of special education services remained at 15 hours, but her IEP team in February 2007 increased hours in a special education setting from 5 hours to 6, so that her special education teacher (Ms. SPL) could incorporate the new goals in the areas of hand use and organization (Parents-15, Tr.1172). The goal in the Area of Need "Hand Use for Classroom Tasks" was necessary because of Student's change in hand dominance in February 2007, when she began writing with her left hand instead of her right. (*Parents-15*, p.8, Tr. 132, 318). Another IEP addendum took place on May 21, 2007 which added adapted physical education ("APE") two hours per month and an annual goal of self-advocacy in physical education. (LEA-25, Tr. 1176-77, 1343-47). APE was added as a result of an APE evaluation of Student

by Ms. SMJ beginning in March of 2007. (Tr.1328-41, LEA-33). As part of the APE evaluation, Ms. SMJ spoke with Student and learned that Student enjoyed PE, and “still wanted to be in the middle of everything even though [she couldn’t] necessarily do it as well as others.” (Tr. 1332). LEA asserted although physical education is not an “academic” class, it is covered by IDEA. There is a great deal of benefit that students receive from PE. Ms. SMJ testified that physical education is not solely athletics; instead it attempts to teach

“... lifelong skills that will maintain health and an active lifestyle.

So it has a lot more to do than just sports. It has to do with cooperation, it has to do with teamwork, it has to do with socializing, problem solving.” (Tr. at 1323-24).

Based on her evaluation, Ms. SMJ determined that Student “needed support in general ed.” (Tr. 1335-36). Indeed, as a practical matter Ms. SMJ had begun providing Student with adaptive PE help in the regular class since she had conducted her March 2007 evaluation, as the log of activities attached thereto attests (LEA-33, p. 4).

Ms. SPL served as Student’s special education teacher for the 2006-07 school year, her 4th grade year. Ms. SPL saw Student five days a week in both the general education classroom and the special education classroom (Tr. 1154-55, 1508-09). Student received reading services in the special education classroom, as well as assistance with writing and organization (Tr. 1154-56). Every morning, Ms. SPL would review the schedule with Student, making certain Student had written her homework assignment in her assignment book and reviewing Student’s parents’ signature from the previous evening (Tr. 1157). Ms. SPL would then accompany Student to math class, in the general education classroom (Tr. 1157). From 2:00 to 3:00 every day, Student participated in a self-contained reading class where she worked with Ms. SPL on decoding and comprehension goals (Tr. 1157-58). From 3:00 to 3:45 Student worked on writing and Ms. SPL would occasionally work with Student in the special education classroom (“learning lab”) on brainstorming and other aspects of writing (Tr. 1158). Learning lab was a place where Student and other students could go to meet with Ms. SPL to review anything that had been taught in class or if they needed assistance completing work (Tr. 1154-55). The class consisted of a small group of students (four or less) meeting with Ms. SPL in her classroom (Tr. 1154-55).

As noted above, in the spring of 2007 Student also received APE services and benefitted from them. Ms. SMJ adapted the PE curriculum to assist Student by breaking down

multiple steps – such as tumbling – into smaller steps to help with Student’s processing the elements of an activity and be successful in doing it (Tr. 1338-1340). Ms. SMJ would also tell Student to slow down to focus on a task, rather than rushing through it (Tr. 1342). The APE goal in Student’s IEP was not for improvement in certain physical activities but instead it was a goal of self advocacy. The purpose of a self- advocacy goal in APE is for children to “advocate for themselves so that they can be empowered, so they have a voice and they are heard and they are not ashamed of being heard and asking for help.” (Tr. 1320). Ms. SMJ testified that self advocacy is stressed for many students in APE because those students are usually “the ones who are least likely to ask for help and the least likely to advocate for themselves.” (Tr. 1320-21).

Student received special education services in the general education classroom and LEA believed she was successful in the general education classroom. An example of special education services within the general education classroom was the mnemonics that Ms. SPL taught to Student to help her remember the multiple steps involved in math functions such as long division (Tr. 1163-65). Another example of special education support in the general education setting was the social studies interactive notebook, which enabled the students to review previously learned information, review the lesson, and apply the curriculum (Tr. 1165-66). Student’s social studies and science classes used a variety of formats and modalities, providing for interactive and hands-on opportunities to learn (Tr. 1167-69).

Student had a number of accommodations on her IEP to help her. One was an Alpha Smart – a portable computer that Student used at her desk to compose written responses that can be transferred to a computer (Tr. 1158-59, 1792-95). Student’s accommodations are detailed on her IEPs and, as stated by DK, Student actually received them in the classroom (Tr.

1525-26, LEA-37).

LEA asserts that Student was able to understand and access the 4th grade curriculum and she made progress during her 4th grade year at LEA-E. (Tr. 1193-1200, 1787-88, LEA-48, 50, 53). Student's teachers testified that she was making progress in the areas of math, reading, and writing (Tr. 1207-08).

LEA contended that evidence of that progress took many forms.

1. Qualitative Reading Inventory and Instructional Levels

Student's reading comprehension at the time she was found eligible for special education services was at a 1st grade instructional level. Student's reading improved one grade level from September 2006 to February 2007, as seen by her improvement on the Qualitative Reading Inventory ("QRI") (which is detailed on the Present Level of Performance pages of Student's IEPs) (Tr. 1173-74, 1215-16, Parents-12, 15). When she left LEA-E she was at a 3rd grade instructional level (Tr. 276-77). Specifically, as this contemporaneous – and at the time agreed – documentation demonstrates:

2. IEP addendum 9/14/06 (Parents-12 p.2)

QRI shows high 1st/beginning 2nd instructional level for reading comprehension.

3. IEP 2/13/07 and re-evaluation note 10/07 (Parents-15 p.3) (LEA-36)

According to the QRI, Student's reading comprehension was now at an instructional level of 3rd grade.

This too demonstrates progress in the area of reading comprehension.

4. Read Naturally program

Working with Ms. SPL, Student also made extensive use of the Read Naturally program during 4th grade (LEA-31, pp 37-48). Read Naturally is a fluency-based reading program (Tr. 1203). She had started the previous year at a level 1.5 (LEA-30 p.1). During the 2006-07 school year, Student progressed from a level 1.8 in the Fall of 2006 to a level 2.5 in April 2007 and she finished the school year with a 2.6 in June 2007 (Tr. 1202-03, 1218-21,1566; *see also* Tr. 276; LEA-31, p. 37).

5. Lexia reading program

Evidence of Student's improvement in the area of reading is also reflected in her progress with the Lexia program. The Lexia report tracks many, many different skills, such as "segmenting words into sounds," "sound/symbol for short vowels," "irregular first and second grade Dolch words," and "medial short vowel discrimination" (among many others) (Tr. 1221-23; LEA-31, pp. 67, 135-41). As Ms. SPL testified:

A. Yes. The blocks, if they are completely full, showed 90 to a hundred percent. And then three quarters was 75 to 89 percent correct. She was definitely progressing in her ability. (Tr. 1223).

6. Developmental Spelling Analysis

The Developmental Spelling Analysis ("DSA") measures five different spelling skills: abstract vowels, final consonant blends and diagraphs, affricates, initial consonant blends and diagraphs, and initial and final consonants. Over the course of the 2006-07 school year, Student

was administered the DSA three different times: September 2006, and February and April 2007. As Ms. SPL explained, based on her test scores over that time, Student had made progress in all these areas (Tr. 1216-18; LEA-31, p. 17).

7. IEP Progress Reports and Report Cards

IEP progress reports from Student's teachers demonstrate that she was making progress towards her IEP goals (Tr. 277; LEA-48, 51, 53). The IEP progress reports use a 1-5 "Likert" scale similar to that used at PLDS. Nothing of course guarantees that a student will progress so far as to master IEP goals, but Student was making sufficient progress, or at least "some progress" toward achieving them. A few specific examples drawn from the contemporaneous comments for that year include (there are many others):

11/06: "Student's writing is starting to contain more detail . . ."

"Student did a great job in math learning place value and time units."

"Student continues to make progress is decoding words with long and short vowels sounds with the blends of th, sh and bl."

4/07: "she is learning to recheck her work and to solve word problems. She participates confidently."

"Student is increasing bilateral cutting skills"

"Student is learning to organize her desk area."

6/07: "Student's paragraph organization is expanding and she is beginning to elaborate by adding details and descriptive vocabulary."

"Student [tries] problem-solving strategies independently before asking for help."

She takes time to check accuracy.”

“Student is modeling strategies to organize priorities for multiple-task completion.

“Student is beginning to accept modifications and is willing to work one-on-one for skill acquisition when needed.”

(LEA-48 pp.1, 2; LEA-53 p. 2, 3, 4; Tr. 1194-1200).

Student’s grades on her report card “showed that she was achieving what she needed to achieve to show that she was making progress,” acquiring new skills in all subject areas (Tr. 1566, 1529-30, LEA Ex. 50). Student earned grades primarily of “B” and “C,” indicating satisfactory work. With respect to reading, Ms. SPL explained:

“We actually worked on five strategies in fourth grade. We worked on connections -- making connections, visualizing and determining importance, cause and effect and fact and opinion. So those pretty much showed that she was producing average work in the reading in terms of grasping those concepts.” (Tr. 1194-95).

8. Standard of Learning exams

Student passed all of her Standards of Learning (SOL) tests in 3rd grade and all but one in 4th grade (Tr. 277-78, 1208-14, 1530-3; LEA-49, 52). On the 4th grade math exam, she fell only one question short of passing in math (Tr. 1531). Student’s success on the Virginia History SOL in 4th grade was especially indicative of progress since, according to DK, “that was a new skill that she had only done that school year, it’s something where we can look at and say that she really did make good progress in that area.” (Tr. 530). It is true that the reading exam did not

test Student's decoding of words. It did, however, test reading-related skills such as comprehension, word meanings, vocabulary, use of a dictionary, and determining an author's purpose (Tr. 1088-89, 1123, 1210-11, 1560).

9. Gray Oral Reading Test

As Ms. DGW explained, due to her ability to use context and other strategies, Student's reading comprehension has consistently been measured as better than her individual word decoding (Tr. 212-12). With respect to that, the one standardized reading test administered to Student while she was still attending LEA-E was the Gray Oral Reading test, 4th edition (GORT-4). This was administered in December 2004 (Parents-3), and again in April 2007 (Parents-21). According to this test, Student improved from the 25th to the 37th percentile in reading comprehension over that span (Compare Parents-3 p. 10 with Parents-21 p. 10). She also improved in reading rate from the 2nd to the 9th percentile in reading rate during that time (*Id.*).

10. Socially

Socially, both Ms. SPL and DK testified that Student was a happy student and an active participant in class (Tr. 1171, 1178-79, 1513-14). Student got along well with the other students in her class and she assisted her peers in areas such as math, which was one of Student's areas of strength (Tr. 1171, 1179-80, 1522). Ms. SPL testified that Student enjoyed going to her special education class and she did not feel singled out when Ms. SPL provided special education services to her within the classroom, because Ms. SPL assisted a number of students within

Student's fourth grade class (Tr. 1170-71). For example a note from her pediatrician on January 17, 2007, reported that Student enjoyed playing with friends and that school was "going well." (LEA-70). In their PLDS application on January 31, 2007, the parents themselves had said that they were looking carefully for any recurring signs of frustration or loss of spirit, but had not seen any (Parents-13). PLDS's own speech language evaluation, done April 21, 2007 near the end of Student's tenure at LEA-E, reported that Student was "happy and likes school." (Parents-21 p. 3). Her IEP addendum at the end of that year, May 21, 2007, likewise reported that Student was "happy and enthusiastic" about school. (Parents-16). Nor is there anything in their extensive e-mail communications with DK or Ms. SPL during that period suggesting that Student was often sad or upset (Parents-14). The Speech and Language (SL) services provided in this IEP would have been provided in the special education class, in a small group, or one-on-one (Tr. 1658-59). The SL teacher would work with Student's classroom teacher to discuss Student's difficulties, review strategies for use in the classroom, and coordinate an appropriate time for providing SL therapy during the school day (Tr. 1658-60).

Nonetheless both Student's parents and Student were a bit ambivalent about moving to a new school, on account of the logistical challenges of getting Student to PLDS, as well as her attachment to LEA-E and her siblings attendance there. They agreed with LEA staff, however, that it made sense to have a "back up" IEP and placement available immediately in the event that PLDS did not work out (Tr. 112, 141-42).

Both of Student's parents agreed with the proposed IEP and with continuing placement in a special education program at LEA-E Elementary (Tr. at 111, 1182). As Ms. SPL

testified, the parents made no criticism at all of the education that Student had been receiving and was proposed to receive at LEA-E (Tr. 1187-89). The parents had also repeatedly received a copy of the Virginia special education procedural safeguard requirements, and had read it (Tr. 121, 1176-77; LEA-26, 75). Indeed, Ms. BH stated that they “actually joked a little bit about how many times they handed us that packet.” (Tr. 167).”

STUDENT’S PARENTS VIEW OF HER TIME AT LEA-E

The Parents viewed Student’s stay at LEA-E as follows:

“1. Initial Special Education Eligibility 2nd Grade 2004-2005”

Although she successfully transitioned to LEA-E, Student had immediate trouble with the academics, and would often misplace or lose her papers and assignments (Testimony of BH, Tr.61-62). Early in the 2004/2005 school year, Student’s teacher at LEA-E, Ms. E, became concerned about Student’s reading and writing abilities and agreed with the parents to initiate evaluations by LEA in the areas of psychological, sociocultural, educational, speech/language, hearing, and vision (Parents-2) to determine if Student would qualify for special education services. Ms. E emphasized in her formal evaluation of Student that Student needed one-on-one help for all tasks and learning. (*Id.*) Ms. E was very frustrated and concerned and did not know what to do with Student because she was unable to do anything that the other students could do (Testimony of BH, Tr. 66). Ms. E also noted that Student would reverse letters and could not write. (*Id.*) This confirmed what the parents had been observing and dovetailed with their own concerns .(*Id.*)

LEA psychologist DGW evaluated Student on November 17 and December 2, 2004 (Parents-3). She found that Student had below-average verbal comprehension, working memory, and processing speed according to the Weschsler Intelligence Scale for Children-IV (WISC-IV). (*Id.*) Student struggled to express herself and would forget common words (Testimony of BH, Tr. 70-71). The Beery Developmental Test of Visual Motor Integration placed Student in the 9th percentile, three years behind her age. The Gray Oral Reading Test-4 (GORT- 4) revealed, not surprisingly, that Student had a very slow reading rate with little accuracy or fluency. (*Id.*)

CDL of LEA performed a sociocultural evaluation of Student on January 21, 2005 (Parents-4). She noted that Student needed constant attention and assistance to complete her work, that she struggled completing sentences and remembering what she had already written or said, that she had difficulty with word problems and math, and that she had trouble with balance. (*Id.*) The report also recounted Ms. E's belief that Student needed individualized instruction (*Id.*; Testimony of BH, Tr. 72).

Student's teacher, Ms. E, completed a teacher narrative on December 21, 2004, highlighting that Student required most tests and papers read to her so she could complete them and that her writing suffered from a lack of story or formulation; She simply repeated herself (Parents-6). Finally, PS of LEA conducted a speech/language consultation in January of 2005 (Parents-8). Ms. PS observed that Student's biggest struggle was, "her reading and writing, which affects all areas of the curriculum." (*Id.*) Student had difficulties expressing herself through words on paper, often blanking on word choice, verb tense, and word order. (*Id.*)

Student also had problems sharing stories of any length, confusing details and the logical sequence (*Id.*). Ms. PS nevertheless concluded that Student did not require speech/language therapy because, “her weaknesses do not prevent her from successfully participating in oral language experiences in the classroom.” (*Id.*)

LEA found Student eligible for special education on January 26, 2005. LEA-1.

2. 2nd and 3rd Grade at LEA-E 2005-2006

Student’s first IEP meeting was held with LEA on February 2, 2005 (Parents-9). The school system identified two annual goals covering broad reading and writing with intermittent special education in a general setting and regular pull-out special education services, together totaling three hours per week. (*Id.*) The IEP team concluded that Student did not have speech/language needs. (*Id.*) The parents accepted the IEP team’s conclusions and signed the IEP in reliance on the county and because they felt they needed more help than they could provide with private tutoring (Testimony of BH, Tr. 75).

Although the IEP called for simplified homework, preferential seating, and extra time, the parents noticed that there was poor follow-through at the classroom level and the teachers themselves did not seem to be involved in implementing the goals in a measurable way (Testimony of GH, Tr. 338).

Even the report cards were a problem at LEA-E; they were difficult to decipher and implied progress in school that was not observed at home (Testimony of BH, Tr. 76).

The parents actually noted a lack of progress during the course of this first IEP, with Student continuing to have poor word retrieval, an inability to blend letters or decode new words, and a tendency to guess based on the first letter of a word. Six weeks into the remedial reading program in which LEA had placed her, Student revealed that she did not understand what it was that she was supposed to be doing (Testimony of BH, Tr. 79). The parents contacted the teacher, and were told the program was used successfully with dyslexic children; Student is not dyslexic (*Id.* at 81). She did continue to have problems with handwriting, organizational skills, and copying things down (Testimony of BH, Tr. 80). The parents did not think Student would be advanced to third grade. (*Id.*)

An IEP meeting was held on February 22, 2006 (Parents-12), where LEA offered four goals covering reading, fluency, written language, and math. (*Id.*) Math was added to this IEP because LEA recognized that Student had developed problems with multiple steps doing multiplication and carrying numbers (Testimony of BH, Tr. 88). Reading fluency and reading recognition were also new additions. (*Id.* at 89) Student was to be accommodated with extended time, small group, individual instruction, preferential seating, simplifying/clarifying directions, reading of directions, opportunity to respond orally, various math aids, use of word processor, dictation, calculator, and reduced language level/reading level. (*Id.*) The IEP provided for special educational services in a general educational setting for 9.5 hours a week and special education in a self-contained setting for 2.5 hours a week. (*Id.*) Once again, there were no speech services offered by LEA. (*Id.*) The parents thought that the school system believed that no further aid was necessary. (*Id.*)

In an IEP Progress report in June of 2006, LEA stated that Student was making sufficient progress on all her goals to achieve them within the duration of the IEP (Parents-12).

3. 3rd and 4th Grade at LEA-E - 2006-2007

A short two months later, LEA acknowledged, at a September 2006 IEP Addendum meeting, that in actuality Student was at least two grades behind in reading (Parents-12). Staff also admitted that Student required additional services beyond those listed in the February 2006 IEP. (*Id.*) After requests by the parents that Student be evaluated for occupational therapy-related deficiencies such as the shaking of her right hand when she attempted to write and poor handwriting, LEA consented and later acknowledged that she also needed occupational therapy as a related service (Testimony of BH, Tr. 89-90; Parents-12). Student's handwriting was illegible because she had significant trouble grasping her pencil, she had poor spacing, and she formed letters poorly (Parents-12).

To address these significant concerns, the school system offered only two hours of occupational therapy a month, one of which would be in a special educational setting. (*Id.*) The parents supplemented these services at their own expense, taking Student to the CTC for physical and occupational therapy (Testimony of BH, Tr. 97-98).

With their lack of confidence in the ability of LEA to address Student's needs, the parents applied to PLDS on January 27, 2007. In the application, Student's parents described how LEA was treating the symptoms and not the cause of Student's educational deficits – giving her a calculator to substitute for her difficulties in math and providing her a computer keyboard

to compensate for her undeveloped handwriting abilities (Parents-13). The parents also felt that Student was not getting the correct services she needed; she was not improving in the key areas and skills that she needed (Testimony of BH, Tr. 56). Significantly, Student's teachers at LEA-E were enthusiastic about Student applying to PLDS (Testimony of BH, Tr. 106-107).

In an effort to remain in the LEA system, the parents attended an IEP meeting on February 13, 2007 (Parents-15). LEA increased the IEP to six annual goals covering word recognition in reading, fluency in reading, math, written language, organization, and hand use for classroom tasks. (*Id.*) Classroom accommodations included use of a calculator and having tests and assignments read to Student. (*Id.*) Fifteen hours of special education services were to be provided, with six in a self-contained setting. (*Id.*) The IEP also called for two hours of occupational therapy, one-and-a-half of which was to be provided in a self-contained setting. (*Id.*) LEA acknowledged that Student's reading comprehension was only at a 2nd grade level as she finished 4th grade and that this deficit impacted her ability to successfully access the general educational curriculum. (*Id.*) Student's recent switch to using only her left hand for writing was considered by the team to be "unusual," but the parents had to specifically request that LEA test Student for abnormalities (Testimony of BH, Tr. 93).

Despite the increase in services provided by LEA, the parents continued to have concerns that those services and their implementation were neither sufficient nor appropriate for Student (Testimony of BH, Tr. 100). Since the resource teachers were separate from what was going on in the classroom, Student would not participate in the class work when receiving special education support. (*Id.* at 100-101) The materials Student used in class were not simplified

versions of the classroom work, but separate. (*Id.* at 102)

Additionally, the parents were shocked and offended by some of the suggestions for adaptive physical education that LEA had proposed (Testimony of GH, Tr. 335). An example of these suggestions was the idea that Student's physical education classmates would all put marshmallows in their mouths and try to talk to simulate Student's speech difficulties. (*Id.*) There seemed to be no recognition that such an exercise would irresponsibly wound Student's self-image and emotional health. (*Id.* at 336)

During the winter and spring of 2007, the parents began to notice decreased use of Student's right side, tremors in her right hand, a droopy right eye, and for the first time ever Student mentioned apparent numbness in her right leg (Parents-19). Concern over these growing motor problems led the parents to have Student examined by SEd, a pediatric neurologist, on March 16, 2007. (*Id.*) Dr. SEd suggested and scheduled an MRI. (*Id.*) The MRI at CNMC showed evidence of prior neurological trauma, possibly related to a fall Student sustained as a three year old (Parents-20, Parents-19). The trauma had produced a lesion on a sensory/motor part of Student's brain (Parents-14). Since the lesion was not new, why it was then affecting her was unclear (Parents-14, Parents-20). Meanwhile, the effects of the problem continued to manifest in Student's even more hindered approach to reading and writing (Parents-14). Just before this MRI, Student switched from writing with her right hand to writing with her left hand (Testimony of GH, Tr. 317). She complained numerous times that her right leg kept falling asleep and that she could not make it move the way she wanted to (Parents-14). Student's 4th grade special education teacher, SPL, observed some of these developments and

was made aware of these problems through her communication with the parents. (*Id.*) Other than noting the consequences of Student's new neurological condition, Ms. SPL did not suggest any further courses of action or services that the school could have pursued, perhaps because she was not yet a certified special education teacher during the time she served that role for Student. (*Id.*)

Student's new motor/neurological problems did not cause the widespread academic problems she was then experiencing or that she continues to battle today (Testimony of GH, Tr. 325). Student has always had trouble sequencing, telling stories, keeping things in order, and reading. (*Id.*) When she was first moved into LEA-E, the school tried to help her with reading because she could not do it. (*Id.* at 326.) The level of her academic needs has always been the same. (*Id.* at 327)

DK testified that the reading, writing, expression, and concept recall problems that Student had only started to occur in the second half of her 4th grade year, and after Student's motor deterioration began (Testimony of DK, Tr. 1564-6). This is in direct contradiction to all LEA reports, including those going back as far as Ms. E in 2004, and virtually everybody else's recollection. (*Id.*)

Student's 4th grade year marked significant deficits in both academic and social standing, and although she had always had a positive attitude and was motivated in school, she would now come home crying from the stress of not understanding things (Testimony of GH, Tr. 320-321). She had lost her friends; they would not call her. (*Id.*) The impact was significant; she had no fingernails because she would bite them all the time. (*Id.* at 323-324) Her older

siblings noticed how she was acting and thought it was “spooky.” (*Id.* at 324) She feigned reading books of all types. (*Id.*)

During this year when Student struggled with the loss of her friends and academic failure, she often asked to have lunch with Ms. SPL instead of the rest of the children at LEA-E. (Testimony of Ms. SPL, Tr. 1170).

On March 28, 2007, the parents informed Ms. SPL via email that Student had been accepted at PLDS and that they intended to place her there (Parents-14). Ms. SPL responded that she was happy that Student had been accepted. (*Id.*) Ms. SPL even seemed relieved that Student would be attending PLDS (Testimony of BH, Tr. 107). During the same series of emails, the parents expressed their desire to amend Student’s IEP to add needed occupational therapy services for the remainder of her time in LEA. (*Id.*)

Even as Student struggled to adapt to her new physical challenges, it quickly became apparent that the services already provided to her were not appropriately tailored to her many needs (Parents-14). Many of the homework assignments proved too difficult for her, and quite notably above her reading level. (*Id.*) Her parents spent considerable time in an attempt to complete the assignments with her. (*Id.*) When Student attempted such homework assignments by herself, she earned scores of 65 percent and a 73 percent correct. (*Id.*) These grades, which required parental signatures, were quite discouraging and unfairly implied that Student was not trying hard enough. (*Id.*) DK even wrote comments on Student’s papers including that she must “pay better attention” and that she “needs to try harder.” (Testimony of GH, Tr. 393).

DK confirmed and reinforced Student's lack of progress through her speech/language narrative of May 31, 2007 (LEA-34). She judged that Student rarely demonstrated one third of the general goals and did not always demonstrate any of them. (*Id.*) DK also reported that Student had difficulty recalling concepts she supposedly learned earlier in the year and that she had difficulty expressing herself during group instruction. (*Id.*) Earlier that same year in her evaluation of Student as part of the PLDS application, DK also described Student around this same time as nosy, easily distracted, anxious, resenting correction, and lacking in organization (Parents-13).

An adaptive physical education teacher, SMJ, completed an evaluation in March of 2007, further confirming Student's lack of progress (LEA-33). In the evaluation, Ms. SMJ wrote, "Student requires one-on-one verbal prompting to follow directions, learn and complete tasks." Ms. SMJ found that, compared to her peers, Student had difficulties in balance, locomotor skills, and motor planning. (*Id.*)

Despite the manifest reading and writing problems that were both well documented and pervasive throughout Student's 4th grade year at LEA-E, her end-of-year progress report inexplicably listed her reading level and writing level as average (LEA-50).

In the spring semester of 4th grade, it was clear that Student could not read (Testimony of GH, Tr. 310). GH would do a lot of Student's homework with her because she could not be left to do it on her own and then have it checked. (*Id.*) She could not read anything more difficult than very basic content. (*Id.* at 312.) Student also developed a kind of reading fantasy where she would pick big books and take them to bed with her. (*Id.* at 311) This

behavior concerned the parents; Student would often be in tears after trying to do homework because she was not able to write a sentence. It was very painful for her. (*Id.* at 315-316)

Student took her Virginia Standards of Learning (“SOL”) tests at the end of her 2006-2007 school year. She failed the math test (LEA-52). She did pass the reading SOL, but the reading test was actually read to her as she received non-standard accommodations to compensate for her disability (Testimony of GH, Tr.339). LEA essentially accommodated Student out of the testing environment entirely. (*Id.* Even Ms. SPL conceded that these accommodations converted the reading test into one of oral comprehension (Testimony of Ms. SPL, Tr. 1277). Student passed her reading SOL on this basis.

Read Naturally is a reading program used to work on reading fluency, and was used with Student at LEA-E. LEA reflected that Student progressed in her 4th grade year from a 1.5 level in the program to a 2.6 (Testimony of Ms. MRD, Tr. 548). However, these numbers do not correspond to grade levels and were not supported by subsequent work with Read Naturally at PLDS. (*Id.*)

PLDS’s initial speech/language evaluation of Student by staff Speech Pathologist LG in the Spring of 2007, while she was still enrolled at LEA-E, revealed that her lack of progress at LEA was much more dire than her parents had realized (Parents-21). For example, Student’s ability to follow directions was at the second percentile, her ability to recall sentences was even lower, at the four-tenth’s of the first percentile, her expressive language index was at the first percentile, and her language memory index was at the third percentile (Parents-21). Student’s oral reading quotient on the Gray Oral Reading Test–4 (GORT-4) was in the second

percentile. (*Id.*) Spontaneous writing ranked in the fifth percentile. (*Id.*) Ms. LG noted that Student's verbal fluency was negatively impacted by difficulties with word retrieval, sentence formulation, and language organization. (*Id.*) She recommended a full-time learning disabilities placement as well as regular group and individual speech/language therapy. (*Id.*) She felt that it was critical for a speech language pathologist to work with Student and that Student should have a small class environment given her disabilities in reading and literacy (Testimony of Ms. LG, Tr. 621).

Not surprisingly, when Student started at PLDS in the Fall of 2007 she was not remotely close to grade level upon entry to PLDS; it was determined that she would have to go back to basics and rebuild her reading foundations (Testimony of BH, Tr. 115-116).

On June 13, 2007, LEA and the parents met to supplement the IEP drafted in February with new information gleaned from Student's recent speech/language testing (Parents-25, Parents-26). JD of LEA performed a new evaluation once LEA had received the PLDS report; Ms. JD found that Student had misarticulated phonemes, inadequate tongue structure with sluggish function, had lingual tremors while both tongue was both protruded and at rest, and that her lingual movement was slow and sluggish (Parents-25). Nonetheless, she reported that Student had age-appropriate receptive and expressive language skills. (*Id.*) This conclusion directly contradicted both LG's comprehensive evaluation and LEA teacher observations (Parents-21, Parents-8).

Taking into account Ms. LG's evaluation, LEA added speech and language services in June of 2007 (Testimony of BH, Tr. 110). The parents then confirmed that they did

not agree with the IEP, its services, or its placement. (*Id.* at 112.) They did sign the June 2007 IEP, but did not want to (Testimony of GH, Tr. 301). In fact, the parents only signed the IEP because the IEP team explained that it could be a back-up in case Student returned to LEA after trying PLDS (which everyone understood would be Student's placement in the fall). (*Id.*) LEA was fully aware of the parents' intention to enroll Student at PLDS for the 2007-2008 school year, and at no point did the parents communicate any other intention (Testimony of BH, Tr. 112-113). LEA also claimed that if the parents did not sign the IEP and allowed it to lapse, that if Student did return to LEA she would not necessarily be given special education services (Testimony of GH, 301).

Ms. SPL testified at the hearing that she felt Student gained a lot from the social interactions at LEA-E, but she and DK described Student that very same year as a "loner" and "anxious" (Testimony of Ms. SPL, Tr. 1191).

LEA noted in an end of 4th grade progress report that Student's occupational therapy services under her LEA IEP had not produced carryover skills in the classroom and that Student was not making sufficient progress to achieve her goals (LEA-53).

Student's scores on the QRI, an informal reading program used at LEA-E, did not indicate progress; in fact, they suggest some regression (Testimony of Ms. MRD, Tr. 1918). Student's score actually went down from 3rd grade to the end of 4th grade, answering fifteen of twenty correct in 2006 but only eleven of twenty correct in 2007. (*Id.*) This led to a decrease in Student's ability from "instructional" to "frustration." (*Id.*)

Student also did not progress in any significant way at LEA-E when her IEP progress marks are considered (Testimony of Ms. MRD, Tr. 1924). In 3rd grade she received scores of a four on her IEP goals, which indicated progress but not mastery. (*Id.*) In 4th grade, her IEP goal scores lowered to threes, indicating less progress on these goals than on the goals the year before. (*Id.*) Student never achieving mastery in any of her progress goals while at LEA. (*Id.*)

CONCLUSIONS OF LAW

The instant case involves two typical issues found in IDEA disputes. First, did the local LEA provide FAPE to the student in question. Second, can the parents be reimbursed for their educational expenses when they unilaterally withdrew their child from the public school and placed her in a private school.

Statutory Background

We get to this position by virtue of the provisions of the Individuals with Disabilities Education Act (IDEA) (formerly the Education of the Handicapped Act), 20 U.S.C. § 1400 *et seq.*, which requires states that receive federal funds for education of the handicapped to provide such children with a "free appropriate public education." 20 U.S.C. § 1412(1) (1988) colloquially known as "FAPE".

The term "free appropriate public education" is defined to mean "special education and related services that - (A) have been provided at public expense, under public

supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title (20 USC 1401(9))

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including - (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education. (20 USC 1401(29))

“Related services” are defined to mean transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. (B) Exception The term does not include a medical device that is surgically implanted, or the replacement of such device. (20 USC 1401(26))

In general The term "child with a disability" means a child - (I) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. (20 USC 1401(3))

The initial step in the special education process is to determine whether the student in question is a “child with a disability”. To this end a “Local Screening Committee” is convened by the student’s school (LEA) which arranges for educational, psychological, sociocultural, hearing and vision and speech and language and other necessary evaluations. If the student is found by the Committee to be a “child with a disability” the next step is to convene an IEP team consisting of LEA staff including the student’s teachers as well as the student’s parents. This team then develops an Individualized Education Plan (IEP) which identifies the student’s Needs. Based up this identification of Needs the team develops Goals and Objectives to meet the student’s Needs, specifies the special education or related services that are to be provided and where the child is to be placed as the same time considering the “least restrictive environment”.

(5) Least restrictive environment (A) In general To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 USC 1412(A) (5))

In the LEA system “least restrictive environment” is required to be evaluated in the following manner by the IEP team

To the maximum extent appropriate, students with disabilities must be educated with students without disabilities. This is called the least restrictive environment. The IEP team must consider all of the factors below and then determine the placement alternative that is the least restrictive environment for the student.

1. The educational needs of the student as reflected in this IEP.

2. Opportunities for education with age appropriate peers, unless the IEP requires some other arrangement.

3. Unless the IEP requires some other arrangement, the student is educated in the school that he/she would attend if not a student with a disability (neighborhood school).

4. Any potential harmful effect of the placement on the student or on the quality of services that the student needs.

5. The student should not be removed from the general education classroom solely because of the needed accommodations or modifications in the general education curriculum.

6. Removal from the general education environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplemental aids and services cannot be achieved satisfactorily. LEA IEP Form LRE

As the above excerpts make clear LEA and the parents have differing views as to whether Student's stay at LEA-E provided her with "some educational benefit". In evaluating those views we are guided by a number of principles.

1. The burden of proof to show that the services and placement

proposed by LEA was not "reasonably calculated to enable the child to receive educational benefits." rests with the parents.

The issue of who bears the burden of proof in a case such as this was recently settled by the US Supreme Court in the case of *Brian SCHAFFER, a minor, by his parents and next friends, Jocelyn and Martin SCHAFFER, et al., Petitioners v. Jerry WEAST, Superintendent, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.* 126 S. Ct. 528 546 U.S. 49 U.S. Supreme Court (2005) where the Court stated

“We hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is Brian, as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ. The judgment of the United States Court of Appeals for the Fourth Circuit is, therefore, affirmed.”

2. Whether the June 2007 proposed IEP was "reasonably calculated to enable the child to receive educational benefits." must be judged as of the date it was proposed based upon the data available to the parties at that time.

The only outside data available to the IEP Committee in June 2007 was the PLDS Speech and Language Assessment prepared in April of 2007 by LG. In her assessment Ms. LG had recommended one individual 45 minute session per week (180 minutes a month) and one small group 45 minute session per week of Speech and Language therapy while the LEA IEP team in June provided an almost identical program

for Student with 2 hours (120 minutes) a month in a full special education setting. This difference did not form a basis for removing Student from LEA.

Student's parents also assert that other test data derived in succeeding years at PLDS provides a basis for showing that StudentH's performance at LEA-E was so bad as to justify her transfer. It is clear, however, that the June 2007 IEP must be judged as of the time it was prepared. See *Brian SCHAFFER, a minor, by his parents and next friends, Jocelyn and Martin SCHAFFER; Jocelyn SCHAFFER; Martin SCHAFFER, Plaintiffs-Appellants, v. Jerry WEAST, Superintendent Montgomery County Public Schools; BOARD OF EDUCATION OF MONTGOMERY COUNTY, MARYLAND, Defendants-Appellees* 554 F.3d 470 U.S. Court of Appeals, Fourth Circuit 2009 where the Court stated

“Assigning dispositive weight to evidence that arises only after the administrative hearing presents one additional and important danger: turning district court review of IEPs into a second-guessing game that will only harm the interests of the disabled children the statute was intended to serve. Judicial review of IEPs under the IDEA is meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; *Burlington*, 736 F.2d at 788; *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). But this prospective review would be undercut if significant weight were always given to evidence that arose only after an IEP were created. *Cf. Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 161 (3d Cir. 1994) (affirming the district court's conclusion that evidence of a later IEP was "irrelevant to the issue of the appropriateness of prior IEPs). Judicial review would simply not be fair to school districts, whose decisions would be judged in hindsight "based on later assessments of a student's needs at [a] later point in time." Brief for Appellees at 28; *see also Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995).

And more importantly, if services added to a later IEP were always used to cast doubt on an earlier one, school districts would develop a strong disincentive against updating their IEPs based on new information. This scenario is the exact opposite of what Congress intended when it provided for regular review and revision of IEPs, see 20 U.S.C. § 1414(d)(4)(A), and it would do little to help the interests of disabled”

3. Student's physical condition had changed significantly during the 4th grade year.

Both parties agree that Student's physical condition changed significantly beginning with the 2006-2007 winter and spring. This change required numerous visits to medical specialists and reflected both motor and neurological deficits which impacted Student both in school and out. At the time of the IEP meeting in June of 2007 neither Student's parents or LEA staff were fully aware of what the full impact of these changes would have on her educational performance. The Goals merely reflected the Needs as they then existed.

4. Student's needs had expanded.

Because of these change both LEA staff and Student's parents recognized that her needs had expanded. They now included "Reading - Word Recognition", "Reading Fluency", "Written Language" "Mathematics". and "Fine Motor/Visual Motor". Given the changing nature of her physical condition these Needs and Goals were appropriate. While the parents assert that Student did not make progress in the 4th grade it is clear from the terms of the IEP that any so called lack of progress was really a reflection of Student's changing condition and everyone on the IEP team recognized that Student's needs had increased since her last IEP.

5. The scope of special education services and the amount of those services had increased with each IEP following the initial IEP in February of 2005.

Given the increased needs the IEP team with Student's parents participation had increased the level of special education services from the provision of 3 hours as set out in her IEP in 2005 to the recommended level of service in June of 2007 when Student left LEA-E to 15 hours of special education services a week with 6 hours in a special education setting. There is no evidence to show that this level of services if performed at LEA-E would not have been reasonably calculated to enable Student at that time to receive educational benefits.

6. These changes resulted in Student being provided additional related services such as Occupational Therapy, Speech and Language and Adaptive Physical Education to attempt to deal with the impact of her physical changes.

Under the June 2007 Student was to receive Occupational Therapy for 2 hours a month 1.5 hours being in a special education setting, Speech and Language services for 2 hours a month with all hours being provided in a special education setting and Adaptive Physical Education Services for 2 hours a month in a general education setting. These services clearly added to Student's educational benefit.

7. Student's parents had agreed that the level of services and placement were appropriate if Student was to attend LEA.

Throughout her career at LEA-E Student's parents consistently participated in the IEP meetings and agreed with all her IEP including the ultimate IEP that the IEP team had formulated. While the record is clear that the Student's parents had decided that

they were going to enroll her at PLDS as far back as January 2007, even before the change from right hand dominance to left hand dominance, it is significant that the parents did nothing at the June IEP meeting to challenge the level of services or placement being proposed. Indeed if they thought that Student needed a totally self contained environment for her education they could have requesting an independent evaluation of Student or a due process hearing. GH in the course of his testimony asserted that he signed only because LEA staff had asserted that this would assure he and his wife that Student would still received special education services if it turned out that they didn't want to stay at PLDS. Whether or not LEA staff made these comments it does not detract from the fact that GH was willing to accept the level of services and the placement set out in the June 2007 for Student if she came back to LEA-E.

8. There is no data available to show that the services proposed for Student would not have provided the “educational benefit” at LEA-E.

Since Student was not given the opportunity to see whether the services called for in the June 2007 IEP would provide her “educational benefit” the parents in attempting to discredit the LEA proposals have relied on incidental comments made by some of Student's teacher. An examination of those comments (See Parent's view pp 29-42) in the context of the full reports prepared by Student's teachers show that they were mostly personality as opposed to educational issues. Particularly in the spring of 2007 when Student was experiencing so many new and different physical problems it is

not surprising to see such comments from a youngster Student's age. While the parents assert that Student did not make progress in the 4th grade it is clear from the evidence and the terms of the IEP that any so called lack of progress was really a reflection of Student's changing condition and not a deficiency in her IEP's.

9. The failure of the parents to challenge the June 13, 2007 IEP negatively impacts the credibility of their claims.

The entire Special Education process as set out in IDEA is designed to provide parents with the maximum level of participation. As noted above Student's parents received notices of every meeting and proposed action and were urged to participate in each and every meeting that impacted the services being provided to their child or on her placement. But, equally fundamental in the process is the parents right and duty to object and to seek the level of services and placement that they feel is best for their child. Indeed in the 2004 amendments to IDEA a special "resolution meeting" between the school system and the parents was added to the process. See 20 USC 1416 (B) Clearly Congress wanted to do whatever it could to insure consensus was arrived at between parents and the local school system to meet the student's needs. Such a prolonged and elaborate hearing such as the one we are currently involved in becomes the result when tools of IDEA are not utilized. If the parents felt that a fully self-contained environment was essential for their daughter to receive "some benefit" from her public school education, then the burden was on them to force LEA to explain why their

daughter should not have those kind of services and that kind of placement. The parents at no point assert that they asked LEA to provide additional services in a self contained environment before they unilaterally placed Student in PLDS or otherwise objected to the services and placement being offered. To just withdraw her and then later attempt to force a comparison of programs many years after the fact does not support the process set up by IDEA. If Student's parents wished to provide her with an education in a self contained environment they are certainly free to do so. Certainly nothing brought out at the due process hearing would indicate that such a decision would not have been a wise choice. The problem in the instant fact situation is that such action is not required by IDEA and it should not be taken at the public's expense.

Accordingly, I find that the IEP of June 13, 2007 was reasonably calculated to enable Student to receive educational benefits and did provide her with a "Free Appropriate Public Education".

DID THE SUBSEQUENT IEP'S PROPOSED BY LEA ON JUNE 18, 2008, DECEMBER 15, 2009 AND JUNE 18, 2010 PROVIDE FAPE FOR THE SUCCEEDING YEARS THAT STUDENT WAS ENROLLED IN PLDS?

Once again because Student was not enrolled in LEA schools during the period after August 2007 there is no direct comparison of data to determine whether these three LEA IEP proposals would have provided "some educational benefit" for Student and thus provided FAPE? However, even assuming that the proposed IEP's did not

provide FAPE, there was no evidence presented which showed that Student required the totally self contained environment that existed at PLDS.

While the witnesses presented on behalf of Student's parents all professed support for the "least restrictive environment" concept it was clear that their interpretation of it's application fell far short of the statutory requirements.

As noted above special education services must be provided in many environments.

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including - (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.

As the LEA witnesses recounted there were many opportunities each school day for a student such as Student to interact with her non disabled peers in civics, lunch, physical education and Lancer time. Granted as time passed her LEA IEP's provided more self contained services nonetheless there were still many opportunities for contact with non disabled student if only at lunch and walking to school. Most significantly GH and BH's comments clearly reflected their rejection of LRE concept when they expressed concern on numerous occasions that Student would feel different if she had to take advantage of the accommodation that the LEA's IEP's provided. The fundamental principle behind IDEA was to provide for the integration in the public school setting of disabled and non disabled students in as many situations as possible so

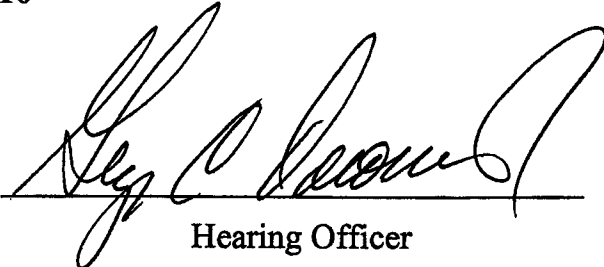
that both would feel comfortable in the presence of the other.

While the parents have cited cases where self contained instruction can be mandated, those cases all involve students with far more severe disabilities than the record shows that Student had. The parents in their testimony at the hearing tried to maintain that Student's final months at LEA-E were nothing more than grossly uncomfortable, their comments in the documentary record made to health care providers and even to PLDS outside of the hearing process reflect otherwise.

Accordingly it is clear that the level of Student's disabilities do not require that all her special education services be provided in a totally self contained environment. As a result Student's enrollment in PLDS instead of attending LEA-E or LEA-M was not justified by the evidence nor required by IDEA.

Accordingly I find that the June 18, 2008, December 15, 2009 and June 18, 2010 IEP's provided FAPE for Student and that her parents are not entitled to reimbursement for the fees and expenses incurred as a result of her enrollment in PLDS for the 2007-2008, 2008-2009, 2009-2010, and 2010-2011 school years.

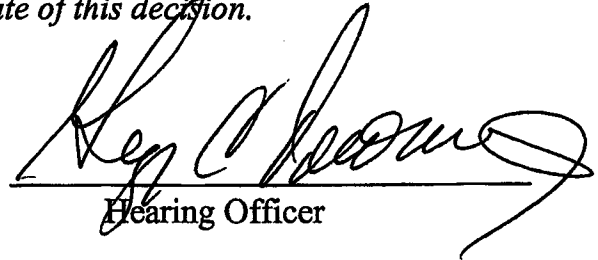
Entered November 22, 2010


Hearing Officer

APPEAL NOTICE

The parties are hereby notified pursuant to 8 VAC 21-81-T and Virginia Code Sec 22.214 D that a decision by the hearing officer in any hearing, including an expedited hearing, shall be 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.

Dated: November 22, 2010


Hearing Officer