COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: Child

Due Process Hearing

Findings of Fact and Decision

Counsel for Parents:

Lois N. Manes, Esq.
Post Office Box 1675
Williamsburg, Virginia 23187-1675

Counsel for City Public Schools:

LaRana J. Owens, Esq.
Assistant City Attorney
Office of the City Attorney
2512 George Mason Drive
Building 6, Suite 123
Virginia Beach, Virginia 23456

This matter came to be heard upon the complaint for due process filed on September 8, 2010, by the Parents, ("Parents"), against Public Schools, ("the LEA"), under the Individuals with Disabilities Education Act, ("the IDEA"), 20 U.S.C. 1400, *et seq.*, and the regulations at 34 C.F.R., Part B, Section 300, *et seq.*, and under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 794, and the Virginia Special Education Regulations, ("Virginia Regulations"), at 8 VAC 20-81-10, *et seq.*

This due process hearing was held before the undersigned hearing officer [1] over

[1] Parents have consistently requested recusal of this hearing officer for alleged bias in remarks set forth in the pre-hearing report and for corrective cautionary remarks at the hearing. This hearing officer is selected at random from the list maintained by the Executive Secretary for the Supreme Court of Virginia to render decisions in administrative hearings. This hearing officer affirmatively asserts no bias or predisposition

five days, on November 17, 18, 19, 29, 2010, and on December 1, 2010, at the City School Administration Building, City, Virginia. The hearing was open to the public and transcribed by a court reporter. Counsel represented Parents and the Child at the hearing.[2] A Special Education Coordinator and counsel represented the LEA.

Parents filed the due process request on September 8, 2010. [3] Parents amended the complaint. Parents resubmitted the complaint on October 7, 2010. This decision is timely and within the 45 day limitation period under the IDEA.

The record includes: written motions, orders, exhibits, closing briefs and addenda, transcripts, and the written decision.[4]

Parents claim that the LEA's Individualized Education Program ("IEP") does not provide the Child a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). Parents seek tuition reimbursement and related costs for the Child's unilateral placement at a private school ("Private School") in City, Virginia.

The Child qualified for special education services under the IDEA on May 20, 2010,

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against the Parents at this hearing. Thus, this hearing officer declined recusal prior to and during the due process hearing. See 8 VAC 20-81-210.H (2010).

[2] A special education advocate originally represented the Parents and the Child. Prior to the commencement of the due process hearing, the Parents employed legal counsel who represented the Parents and the Child at the hearing. Upon LEA counsel's motion, Parents' counsel only was allowed to speak for the Parents and the Child. The special education advocate complied with this ruling. Over the objection of LEA counsel, however, the special education advocate rebutted specific allegations regarding two school meetings.

[3] The original due process request is stamped, "September 9, 2010." It was submitted after the business day closed on September 8, 2010.

[4] After the hearing concluded, the Parents and the LEA submitted closing remarks which are included in the evidentiary record. LEA counsel objected to counsel's written rebuttal remarks submitted after December 6, 2010. LEA counsel filed a "Motion to Exclude and Strike Addendum and Objection to the LEA's Closing Argument" because closing remarks were to be simultaneously completed. This hearing officer overrules LEA counsel's motion, permitting Parents to rebut and respond to the LEA's motion. Thus, the evidentiary record maintains the Parents' and the LEA's post-hearing responses.

when he was in grade. [5] SB 22-30. [6] Parents removed the Child on August 23, 2010,[7] and placed him at the Private School in September 2010. The Child's disability is Other Health Impairment ("OHI") because of Attention-Deficit Hyperactivity Disorder ("ADHD"). Parents allege that their Child's unilateral placement at the local Private School is an appropriate placement for the Child.

Parents dispute the LEA's IEP modification. They believe the IEP proposed placement for their Child, in an alternative educational setting that is disciplinary in focus, is not warranted by this incident. [8] Parents assert that the alternative setting is too restrictive for their Child. Parents claim that the disciplinary event resulting in the LEA's placement was prompted by the Child's underlying ADHD. Parents believe that their Child is frustrated because he cannot read or understand materials provided to him by the school. Parents assert that the LEA has ignored their Child's educational needs. They believe that their Child's educational issues - his inability to read, his failure to function properly at the high school level - have not been addressed by the LEA. Parents assert that the LEA's proposed removal of their Child to an alternative school setting is not warranted by the Child's disciplinary record. Thus, Parents do not believe that the LEA's more restrictive placement at the alternative

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[5] This was the Child's second attempt at the ninth grade.

[6] School Board exhibits are marked "SB."

[7] Parents' notice of intent to remove the Child is timely provided. The LEA has committed no procedural violation though the Parents and the LEA had not finalized the IEP at the beginning of the school year. It is obvious that the LEA has diligently continued to provide an IEP even if the Child no longer attends school in this district. The hearing officer questions the Parents' good faith intent, however, to pursue an acceptable IEP after they removed the Child in August 2010. Parents had already pre-enrolled their Child at the Private School in early September 2010.

[8] The security guard has clearly identified this Child as the individual who committed the trespass. Initially, Parent did not believe that her child was the individual who committed the trespass. Parent now admits the Child's guilt. Parent admitted that she has not visited the separate facility.

educational setting is appropriate for the Child.

The LEA asserts that its IEP and the placement decision made for the Child are appropriate because the alternative educational placement is warranted by the facts in this case. The more restrictive placement, the LEA asserts, suits the Child's special education needs because of his extensive disciplinary record and the Child's history of defiance, disrespect and refusals to learn in the regular, public day school setting.

Burden of Proof

In this case Parents challenge the IEP team's proposed IEP and placement decision in the LEA's placement designation for their Child at a separate, alternative educational facility. Thus, Parents allege denial of a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") for their son. In *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof, in an administrative hearing challenging an IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district. *Id.* at 537.

Accordingly, the Parents filed this due process request, and thus, I find the burden of proof is on the Parents at this due process hearing.

Findings of Fact

1. The Child is years of age. Student is now enrolled in a private day school in City, Virginia. The Child was formerly enrolled at this LEA in elementary school through two years of high school, from 2008-2009 and 2009-2010. The Child is now in grade at the private school. [9] The Child, who was evaluated and deemed ineligible for special education services in third and fifth grade, by psychological testing

[9] If the child returns to the LEA, he will be in the ninth grade for the third time.

completed in 2002 and 2004 respectively, has a composite IQ score of 76. The LEA asserts his academic performance is commensurate with his cognitive abilities. P 14a [10]

2. On May 20, 2010, the Child was determined to be eligible for special education services. The Child was close to flunking grade again and teachers complained of his consistently disruptive behavior. SB D22-32.

3. Psychological testing, completed in October 2010, indicated that there was a "significant and unusual" 26 point discrepancy between the Child's non-verbal and verbal reasoning skills. Thus, Parents allege that academic testing reflects a significant discrepancy - a split, between this Child's intellectual abilities and his overall academic achievement. Parents attribute the Child's low reading skills and poor academic profile to the discrepancy. Specifically, the Child obtained a non-verbal intelligence score of 90 which falls in the "average" range of ability, but his verbal intelligence score was 64. The Child's Composite IQ Index was deemed to be 76 which places the Child in the borderline range of cognitive abilities. SB G37.

4. The most recent reviewer, a state certified school psychologist ("High School Psychologist"), reported that the Child's ability to think and reason, without the use of words, is average. But his ability to understand verbal information is "considerably lower than his typical peers." SB G37.

5. When the eligibility committee deemed the Child eligible to receive special education services in May 2010, the team considered the Child's underlying medical issue which originates in ADHD. The eligibility team then determined that the Child fell into the special education category, "Other Health Impaired" ("OHI"). SB G35-41.

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[10] Parents' exhibits are marked with a "P" in the Decision.

6. Parent provided her consent to the IEP on June 17, 2010.

7. On June 14, 2010, the Child was involved in another disciplinary incident. The Child skipped third and fourth block and left school without permission. The LEA cited him for truancy in this incident. This incident was not the first time the Child had left school without permission. The security guard at the local school, where the Child wandered, saw this Child in line for lunch at the other school. After the school's security guard spotted this Child, having warned the Child not to trespass there, the guard pursued the Child. In the chase, the Child jumped over tables in the lunch room and ran away from the security guard. This offense resulted in a Manifestation Determination Review ("MDR") which was the second MDR convened for this Child. In the prior MDR, the committee determined that there was no nexus found between the Child's ADHD and the acts in question (four successive cell phone violations). After the June 14, 2010 trespassing incident, the MDR team again did not find a nexus. The MDR team did not deem the Child's trespass on the other school's property to be directly caused by the Child's disability or by the LEA's failure to implement an IEP for the Child. Parents have not challenged the outcome of the MDR. [11] P 124b, P 103, SB B8.

8. At the due process hearing, Parents asserted their belief that the Child's unexplained learning difficulties, coupled with ADHD, cause the Child's misbehavior at school. Parents contend that the Child acts out only at school, not at home.

9. Parents have regularly requested and received special education testing for this Child since he was in the third grade. A state certified school psychologist completed a psychological evaluation for this Child in 2002 at this school district. She determined the

[11] At all stages of the hearing, Parents asserted they do not challenge the findings of the MDR team.

Child's "...verbal reasoning skills and his non-verbal reasoning skills are equally developed." SB G4-9. Thus, the LEA asserts, there is no discrepant factor, no statistical difference, between the Child's academic performance and his mental capacity. This Child's composite IQ score was 72 which placed him in the "borderline" range of cognitive ability. SB G4-9. [12]

10. In early educational teacher rating scales, this Child's third grade teacher noted this Child's "at-risk" behaviors in a school setting. She was concerned about the Child's social, emotional and behavioral functioning. The Child's third grade teacher also deemed the Child's adaptive skills to be minimal. But she considered this Child's early study skills to be "average." The Child's early educational testing at this grade level reflected the Child's reading skills to be commensurate with his intelligence. P 14a-e.

11. At the fifth grade level, Parents again requested that the school evaluate the Child's academic performance because of his low reading skills. The Child's composite IQ score was 77 which placed the Child in the "Moderately Below Average" range of mental ability. The educational reviewer asserted, "[The Child] displays evenly developed verbal reasoning skills, non-verbal reasoning skills, and memory functions. Scores are comparable to those he earned in his previous evaluations. At this cognitive level, he can be expected to have great difficulty in competing with his same age peers in learning situations and to acquire skills at a much slower pace." P 15a.

12. The evaluator, a state certified school psychologist, reported that the Child was learning, but not as quickly as his same-age peers. She observed the Child's

[12] The evaluator utilized a battery of psychological testing instruments. The Child's IQ score was derived from the Wechsler Intelligence Scale for Children, Third Edition, (WISC III).

success in writing a paragraph on a given topic, his use of good sentence structure and details, his adherence to the topic and utilization of good punctuation skills. The evaluator then concluded in her report, "[The Child] is achieving within cognitive predictions in all assessed areas." P 15b.

13. Though earlier assessments completed in 2002 and 2004 did not result in any special education services for the Child, Parent had the Child evaluated privately by a medical doctor who provided a diagnosis of ADHD for which the Child took Adderal. When the LEA received medical documentation of the ADHD diagnosis, the LEA scheduled a Section 504 meeting and drew up an initial Section 504 plan on January 25, 2005. According to the Parent's testimony, the Section 504 plan worked satisfactorily for the Child until he reached high school. She asserted that the Child began to experience greater academic difficulty and more disciplinary issues in high school. Per the Section 504 Plan, teachers were required to redirect the Child with gestural prompts, to give him continual praise and positive reinforcement after each step, to read and clarify test instructions, to simplify language on assignments, and to allow oral responses to questions in one-on-one situations. On December 8, 2008, the LEA revisited the Section 504 Plan and the Child's classes were changed to inclusion. P 17a, b, c, P18a.

14. But the LEA's effort to educate the Child, by implementing Section 504 accommodations to assist him in school, has been hindered by his perpetually disruptive activities. Arguably, these incidents generally depict ADHD features, but the Child's behavioral needs are characterized, overall, by a sense of defiance, not uncontrollability. The Child's disciplinary record reflects this factor. In 2008, disciplinary events, mostly class disruption and teacher directed defiance, appear to subside until the Child's

activities begin anew in high school. The LEA attempted to modify the Child's behavior through detentions and suspensions. The Child's disciplinary record summarizes offenses and corrective actions from 2005 through 2008: in 2005 – four to five disruptions and five to six refusals; in 2006 – seven incidents of refusal, defiance and disrespect; in 2007 – six disruptions; in 2008 – only one disruption but the entire class had to be removed; in 2009 – eight behavioral incidents showing disruption and defiance appear on the Child's disciplinary record along with one offense involving an electrical device. In 2010, the Child's disciplinary record shows eleven offenses, at least five of which were for the Child's use of electrical devices, namely, an iPod and a cell phone. The Child's disciplinary record shows that the Child's self-control deteriorated in the 2008-2009 school year. In the 2009-2010 school year, the Child's ability to control his behavior completely eroded.

15. During the last year at the LEA's high school, the security guard noted that the Child often wandered the halls to socialize with his friends. This behavior preceded the disciplinary event that ultimately resulted in his change of placement to the alternative school. The Child's absence record appears to corroborate this fact - the number of absences for some classes is much greater than for other classes. During the fourth and fifth offense for cell phone use, Parent was required to confer with the school about the Child's cell phone use before the child could be readmitted to school. Parent met with the school on May 18, 2010. P 110e.

16. On the Child's Present Level of Academic and Functional Performance ("the PLOP"), completed on May 20, 2010, the IEP Committee stated:

> ...[The Child's] mother has consistently referred [the Child] to be tested and referred [the Child] to the Special Education

> Committee due to concerns about his reading, but the teachers have all concurred that [the Child] is capable of completing assignments and bringing his assignments, materials, etc., to class but chooses not to…

P 112g.

17. Parents were also forewarned of the Child's behavioral disintegration at the end of the school year. The PLOP states:

> … [The Child's] behavior has deteriorated further during this school year and it seems that [the Child] is only interested in socializing with friends. One teacher reported that he was mumbling negative comments directed to her under his breath and has treated her like one of the students. He has also demonstrated inappropriate behaviors to select teachers and has been late unexcused on many occasions to his classes. He is often found by security staff wandering the hallway…

P 112g.

18. When the Child testified at the hearing, this hearing officer noted the Child's respectful manner and his soft-spoken, compliant demeanor. In conformity with the above PLOP, this young man appears to be in full control of his actions and emotions. P 112g.

19. This hearing officer notes that the IEP appears to be regularly created. The initial IEP was developed during two meetings. The IEP primarily addresses the Child's ADHD related school issues – not turning in homework, not completing homework, lack of focus, and poor organizational skills. Though there is no specific reading goal, the IEP incorporates goals and objectives calculated to assist this Child's learning effort – "keep an organized notebook, bring all necessary materials to class, remain on task, complete assignments when due, seek assistance when needed…" The IEP begins to address a transition plan to assist the Child to make post high school choices. LEA personnel reported encountering a great deal of difficulty with the Parents and the Child in their refusals to comply with requests to return paperwork necessary to

20. The IEP team scheduled a behavior intervention plan ("BIP") planning meeting to address the Child's disciplinary issues in the school environment after the first MDR. The functional behavior assessment ("FBA"), completed prior to creation of the BIP, adequately addresses the Child's "target" behaviors through positive reinforcement and other measures. SB D33-87.

21. One June 29, 2010, Parent requested that the LEA complete eight additional evaluations for the Child after she endorsed the Child's IEP on June 17, 2010. SB I20.

22. The LEA Office of Student Leadership changed the Child's placement from regular day school to the alternative separate facility on June 30, 2010. The Child was given a one year suspension from school, the suspension to be held in abeyance, contingent upon the Child's completion of one year of academic instruction at the alternative, separate educational facility. SB B1, 31, 32, 33.

23. The IEP team met again over the summer months, of 2010 to address the Parents' issues prior to the beginning of the 2010-2011 school year. The IEP team concurred that the Child could be provided a FAPE in the least restrictive environment at the alternative, separate educational facility.

24. There were two Section 504 plans implemented for the Child – for the 2008-2009 school year and for the 2009-2010 school year respectively. The first set of accommodations was: 1. Redirect with gestural prompts; 2. Positive reinforcement; 3. Clarify directions on tests; 4. Read test questions 5. Simplify assignments; 6. Allow oral response when needed. The second set of accommodations was: 1. Redirect [Child] with gestural prompts; 2. Clarify directions on tests; 3. Simplify assignments that entail a lot of reading; 4. Allow oral responses when needed: 5. Read selected test items aloud as

requested by [the Child]; 6. Extended time (1 extra day) for class work; 7. SOL tests taken – audio on-line. SB E14-22.

25. On August 19, 2010, Parents rejected the LEA's proposed placement decision for the Child to attend the separate, alternative educational facility. SB D120.

26. On August 23, 2010, Parents notified the LEA that they intended to remove the Child from the LEA and place him at the Private School. Parents request reimbursement for their unilateral private placement. P 149.

27. The LEA conducted additional educational testing from September through October, 2010, notably, psychological, speech-language and audiological evaluations. The LEA notified the Parents to discuss results. A state licensed Speech-Pathologist, who completed her assessment on September 27, 2010, asserted that testing could not be completed because the Parents did not agree to give permission for the Child's classroom observation at the Private School. SB G35-47.

DECISION

Parents claim they are entitled to reimbursement for their Child's unilateral placement at the Private School in City, Virginia. Parents claim the Child is denied a FAPE by the LEA.

For the following reasons, I find that there has been no denial of FAPE to the Child in the LEA's IEP or in the LEA's placement decision.

1. The Child's Evaluation Does Not Indicate That The Child Has A Recently Revealed Processing Disorder Or A Specific Learning Disability.

The recent appearance of a "significant and unusual" intellectual discrepancy, between Verbal and Non-Verbal Intelligence on the Reynolds Intellectual Assessment

Scales (RIAS), along with a low level of achievement in reading, standing alone, does not indicate the presence of a specific learning disability or a processing disorder. The Child's academic history does not reflect a processing disorder or a specific learning disability. The Child's prior screenings for special education eligibility do not reflect the presence of a processing disorder or a specific learning disability. Without specific evidence to the contrary, there is no showing that the LEA has not fully addressed this Child's educational needs in reading skills or assessment. This Child's low reading scores on the RIAS reflect only that this Child has low cognitive abilities which have hindered the Child's reading proficiency.

An LEA expert witness, a Neuropsychologist who has extensive experience in special education eligibility at this LEA, testified credibly regarding interpretation of the RIAS intellectual functioning discrepancy. Although the RIAS validly tests the Child's composite intellectual functioning, she asserted, psychological practitioners do not identify a processing disorder or a specific learning disability solely from intellectually discrepant scores on the RIAS. The LEA expert did not discredit the RIAS as a general intellectual functioning assessment of the Child. She did not dispute this Child's special education eligibility. But the LEA's expert testified convincingly that a statistical factor analysis of the RIAS, completed after the RIAS testing manual was prepared, does not support using RIAS individual Verbal and Non-Verbal Intelligence scores alone to identify a processing disorder or a specific learning disorder.

Thus, the recent High School Psychologist's amended report, ("the report"),

completed on October 26, 2010, [13] finding a "significant and unusual" discrepancy between the Child's intellectual ability and his level of achievement in reading, is not indicative of a specific learning disability [14] or of a processing disorder within the meaning of the IDEA.

The LEA expert who testified, a licensed school psychologist and a Neuropsychologist at the doctorate level, had reviewed the recent School Psychologist's report. The Neuropsychologist testified that she has regularly reviewed learning disabilities at this LEA for special education eligibility since 1991.

The Parents also presented the opinion of their expert witness who testified at the hearing. The Parents' expert is a highly qualified Clinical Psychologist at the doctorate level. Their expert witness primarily works with children in special education needs assessment.

But it was the LEA's Neuropsychologist who provided educated insight regarding the discrepant finding on the RIAS which was completed on this Child. Her testimony was credible and convincing. This LEA expert witness is entitled to deference.

The parties disputed the import of interpreting various scores attained by the Child on the RIAS and used to determine the Child's composite IQ. The Child's scores were – a 64 in Verbal Intelligence, a 90 in Non-Verbal Intelligence, a 72 in Composite Memory

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[13] On November 3, 2010, the original report was amended to reflect the appropriate reason for referral and to correct clerical errors. The Child was referred for a psychological evaluation by the IEP team. The team sought additional information regarding the Child's present level of functioning. *See* SB G35.

[14] 34 C.F.R. 300.541 states as follows regarding interpretation of a specific learning disability: (a) A team may determine that a child has a specific learning disability if (1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels; and (2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas: (i) oral expression; (ii) listening comprehension; (iii) written expression; (iv) basic reading skill; (v) reading comprehension; (vi) mathematics calculation; (vii) mathematics reasoning...

and a 76 in Composite Intelligence (overall intelligence). The Parents' expert witness asserted that the Child's score of 90 was the most accurate predictor of the Child's intelligence. The Parents' expert opined that the LEA's evaluator utilized an inaccurate method to interpret test results. He asserted that averaging the specific scores attained resulted in "miss[ing the Child's] strengths and going for the lowest common denominator." The Parents' expert asserts that the Child's score of 90 in Non-Verbal Intelligence indicates that the Child is capable of average, not just borderline, academic functioning.

The LEA's Neuropsychologist testified that the most recent psychological testing is completely consistent with 2002 and 2004 testing. The LEA's prior testing determined that the Child's cognitive abilities fall into the borderline, not average, range of abilities. The LEA Neuropsychologist asserts that that the 26 point discrepancy on the recent RIAS ought to be "disregarded" as a split between cognitive abilities indicative of a specific learning disability or a processing disorder. Overall, she testified, his scores on oral language, written language and math are still in the low to below average range of ability and these scores reflect a consistently low range of ability. The Child's reading score of 63 places the Child in the 1st percentile on a national scale. This is predictable, she asserts, because of his cognitive ability. Although this Child has made progress in reading, she opined, the Child cannot be expected to achieve progress in reading at the same rate as his same-age, average intellect peers. Thus, the Child does not possess their same learning "trajectory." T 1118-1119.

Also, she testified, there is consistency across all academic areas. She concluded that she cannot discern a specific learning disability or processing disorder from her

statistical analysis of these scores. These scores do not indicate a processing disorder, she testified, because there is not a psychological history reflecting this Child's inability to associate sounds, symbols, or sequencing in his learning functions. T 1118.

Also, the LEA's expert witness testified, there is no reliable measurement indicating the Child's reading level by measuring his intelligence. There is no intelligence "test" from which the Child's reading level may be deduced, she asserted. Thus, she testified, "I would determine his reading level based on curriculum based assessment." T 1127.

The Parents' expert witness indicated that he had researched protocol for statistical interpretation of a discrepancy by contacting the RIAS' manufacturer. Parents' expert witness asserted that the 26 point discrepancy, noted by the report, **is** a valid discrepancy, identifying a processing disorder or specific learning disability, according to the manufacturer of the test.

The LEA's Neuropsychologist disputed the Parents' conclusion regarding the discrepancy and its inconsistency with prior data concerning this Child. The LEA's expert testified that the RIAS, which, she explained, is similar to other psychological testing instruments, contains an individual protocol for the statistical interpretation of its results. The LEA's Neuropsychologist referenced the best practice method for a statistical discrepancy interpretation on the RIAS. Discrepant scores, noted between Verbal and Non-Verbal Intelligence on the RIAS, are not to be construed to identify a processing disorder or a specific learning disability because statistical data does not support this conclusion.

The LEA's Neuropsychologist testified that each testing instrument "...has its own

statistical properties that would make one [discrepancy] invalid or valid." T 1125. Regarding the RIAS discrepancy, she testified, Jerome M. Sattler, a renowned psychologist who writes treatises on cognitive assessment of children for use by school psychology practitioners, reported a statistical factor analysis of the RIAS after the testing manual was prepared. [15] Sattler, whose intellectual assessment interpretation is widely accepted as the school psychologists' best practice method, advises against identifying a processing disorder or a specific learning disability from the split between Verbal and Non-Verbal Intelligence scores on the RIAS. T 1125-1126. The LEA's Neuropsychologist testified that Sattler's conclusion is that statistical data does not support utilizing a verbal and non-verbal index on the RIAS for the purpose of identifying a processing disorder or a specific learning disability. T 1158. The LEA's explanation of the RIAS discrepancy interpretation supports the Child's prior extensive cognitive testing.

This hearing officer does not doubt the veracity of Parents' expert witness, but the LEA's expert provided more credible authority for interpretation of RIAS Non-Verbal and Verbal Intelligence testing and the discrepant scores. Thus, based upon this hearing officer's evidentiary determination, the statistical difference between the Child's Non-Verbal and Verbal RIAS scores in intelligence testing does not represent a discrepant split between the Child's academic functioning and his cognitive abilities for the purpose of identifying a processing disorder or a specific learning disability.

2. The IEP Is Calculated To Sufficiently Provide This Child A Free Appropriate Public Education.

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[15] Sattler, J.M., Assessment of Children: Cognitive Functions, 5th ed. (San Diego, CA: Jerome M. Sattler, Publisher, Inc., 2008) 689.

Does the LEA's IEP provide a FAPE to the Child? This is a two part inquiry. First, does the LEA's IEP comply with Virginia Regulations and the IDEA? Second, if the IEP complies with procedural requirements, is the IEP reasonably calculated to enable the Child to receive educational benefits?

The record in this case does not reflect that the Child's procedural rights have been violated. There is no validity to Parents' claim that their Child's IEP and BIP were not timely developed. There is evidence that the Parents limited the LEA's access to helpful information relevant to the Child's current educational needs. Even if the LEA had committed procedural violations, these do not mean that the Child was denied educational opportunity unless the procedural flaws result in a denial of FAPE to this Child. *See MM v School District of Greenville County,* 303 F.3d 523 (4th Cir. 2002). (A procedural violation in IEP delivery which does not cause a denial of FAPE does not contravene the IDEA; *See also Gadsby v Grasmick,* 109 F.3d 940 (4th Cir. 1997).

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

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

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

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

This Child's academic success is hindered by low cognitive abilities which are constant. This attribute does not mean that this Child can't achieve academic success or that he is a dull child. His mother attested to his remarkable ability to fix broken objects. But this Child's academic success is at a slower pace and his learning effort, even at his reduced rate, requires the full extent of his mental capacity. This Child is not a bad child - he is a child who requires academic assistance to achieve success. In order to fully apply himself to his studies, the Child cannot divert his focus by behaving badly or by concentrating on electronic devices. This Child's academic difficulties are not primarily generated by the Child's inability to read his texts. This Child's academic performance is adversely impacted by his defiance and disrespect to his teachers and his refusals to comply with demands placed upon him by his teachers. This Child's disciplinary record reflects many instances when this Child's behavior has required correction. The Child's ability to exhibit self-control has virtually evaporated now that he attends high school. All of the Child's current teachers attest to the gravity of the Child's defiant attitude which

adversely impacts his educational performance. SB B10,11,12,13,14,15.

This Child has experienced behavioral issues since kindergarten. But the Middle School Psychologist attributes the Child's refusals to defiance, not to ADHD. SB B20. His Parents have requested special education services for this Child since his elementary school years. Though he was evaluated in 2002 and 2004 and considered for eligibility in 2007, he was not deemed eligible. After the 2007 eligibility refusal, the Middle School Psychologist decided to place the Child in inclusive classes and to monitor the Child's school performance.

A follow-up eligibility meeting occurred in January 2008. The Child's reading level and behavior had improved dramatically. SB F55, T 322, 323, 325. The Child's teachers reported the Child's disciplinary incidents had decreased. His mother seemed content.

Thus, in 2008, at the beginning of the statutory two year limitation period, just prior to initiation of this case, the evidentiary record reflects that the Child's academic performance seemed to be progressing on an upward spiral. At that time, the Child functioned with a Section 504 Plan, which was created to suit his needs. At the end of the eighth grade school year, the Child earned a scatter of B's, C's, D's and E's. The Child did not pass math or English that year but he earned C's in summer school. SB H33. The Child earned a score of 373 on the Reading SOL taken in his 8th grade year. SB H101.

The Middle School Psychologist recalled the mother's satisfaction with the Child's academic progress. He noted the mother's comments - the Child was more comfortable at school and she purchased computer programs to "help him out" in math and reading. T 55, 322, 323.

The Middle School Psychologist scheduled a follow-up eligibility meeting with the Parents in April 2008 to again discuss the Child's academic progress. SB F71, T 325. The Middle School Psychologist confirmed the Parents' satisfaction with the Child's educational performance, the Read 180 Program and the Title 1 Reading (PALS) assistance the Child received. In April 2008, Parent consented to continue the Child's placement in inclusion classes. Parent endorsed eligibility minutes stating, "Mother feels that [the Child] is progressing. She feels that he was a little thrown off by the spring break and his grades have suffered due to his failure to bring work home...Mother will continue to monitor [the Child's] progress." SB F83.

On March 3, 2010, the Middle School Psychologist participated again in an eligibility planning meeting concerning this Child because the Child's behavior had deteriorated and he was flunking all of his classes even with a Section 504 plan in place. A couple of teachers reported that the Child worked at the eighth or ninth grade level. Some teachers reported his reading skills to be on the fourth or fifth grade level. The Middle School Psychologist noted that the Child had received Read 180 interventions since kindergarten. T 371. The Middle School Psychologist testified:

Q. And so at that point your eligibility committee decided to find him eligible under IDEA?

A. That's correct.

Q. Any evaluations prior to finding him eligible in 2010 besides [the] 2002 and 2004 [psychologicals]?

A. We asked for a clarification from Mom to bring in what she had. Adverse impact from ADHD was identified as a failure to bring in homework, [disorganization].

These seemed to be the main topics. T 373, 374.

The Middle School Psychologist testified that the eligibility meeting participants then generally reviewed the Child's disciplinary record containing thirty-six offenses. The Middle School Psychologist testified that he does not remember if the team specifically reviewed each conduct offense when the team crafted the original IEP. T 374, 375, 376.

The Clinical Psychologist, testifying as the Parents' expert, candidly admitted at the hearing that he had not personally evaluated this Child and he is not familiar with the Child's school performance. But the Parents' expert offered enlightening testimony regarding the mindset of a Child with ADHD. He stated that the problem with children who have ADHD is that they are "disregulated." T 489. He explained this concept to mean that this Child, who has ADHD, has difficulty with "inner control." T 489. He asserted that a child who has ADHD is "controlled" more by "circumstances." T 489. "That's why they're impulsive," he testified. T 489, 490.

Parents' expert also asserted that the Child, even with his ADHD, is capable of controlling himself. He stated, "ADHD is not an inability to focus, it's not an inability to have good behavior, it's a performance problem. It's doing what you know you need to do at the time." T 459, 460. Thus, Parents' expert appears to agree that the Child's behavior is correctable even if his disability originates in ADHD. The Clinical Psychologist testified as follows at the hearing:

> ... So [the Child's] being told over and over again to stop talking and it's not happening... if you keep doing the same thing and telling him to stop and ten times it ain't working, how do they [LEA personnel] think it's going to work the eleventh time? At some point, you have to say, "Oh, my intervention

> is not working. Hey, [Child], what's going on? We need to try and do something different here."

T 459, 460.

The Parents' expert also testified credibly regarding his extensive experience in devising BIP's to control behavior. He also testified that he defers to educators to fill in the specific behavioral requirements for students. T 459, 460.

Parents' expert witness then asserted that the BIP developed by the IEP team for this Child is defective. Parents' expert stated that he does not believe the BIP adequately addresses the Child's targeted behaviors because the BIP does not specify exactly how the behaviors will be prevented or extinguished. Also, the Parent's expert witness emphasized that the BIP needs to be positive in tone, not punitive.

But when the LEA asked the Parent's expert witness to review the BIP and Section 504 plans provided for this Child, the Parents' expert stated that he did not object to any of the accommodations or strategies listed. He did question whether or not these procedures are actually implemented for this Child in the school setting. SB E38, T 494, P 113c.

This hearing officer noted the Parents' exceptions to the BIP. But the Parent's expert witness admitted he never evaluated or interviewed the Child. Parents' expert witness also admitted that he completed only a record review of the Child's file. He has not conducted a class observation or observed the Child on school grounds. Parents' expert has not interviewed any of the Child's teachers. There are numerous instances in the LEA's evidentiary record reflecting that these accommodations and strategies **were** followed.

In addition, the Parents prevented classroom observations by LEA personnel at

behavior at home was documented. Thus, it is not the LEA preventing implementation of the BIP, it is the Parents who prevented the BIP's implementation. The Parents removed the Child in August 2010. Thus, there has been no actual opportunity for the LEA to implement new strategies for the Child. T 403, 404, 480-482.

Parents' expert also asserted that the IEP developed for this Child was defective because there was no reading goal contained in it. The Parents' expert asserted that the Child could not take notes in his world history class because he could not read, write or spell. T 463. These assertions are not substantiated by the Child's academic record at this high school. The Child earned a 395 Reading and Writing score on his SOL in 2009 and he nearly passed all other SOL's with scores in the 300's. This Child performs academic functions somewhat slower than his peers, and he may show some deficits on certain subtests, but the Child's overall academic record shows that this Child can read, write and spell commensurate with his abilities. Also, this hearing officer noted the testimony of the Child's current Private School Teacher. The Private School Teacher reports that the Child is successfully reading texts at the 10th grade level. [16]

The Child's Study Hall Teacher testified that the Child was often offered tutoring which he refused. The World History Teacher testified that she also offered tutoring to the Child and he continually refused her assistance. At times, the Child laughed at his teachers when they asked for documents to be returned or school work to be completed. His Study Hall Teacher testified that the Child was not interested in his studies. His World History teacher stated that the Child constantly tinkered with a cell phone or an iPod. SB I3. Sometimes, the Study Hall Teacher testified, the Child danced in study

[16] This hearing officer also noted that the Child did not begin the Private School until nearly three weeks had elapsed in the 2010-2011 school year.

hall. The Child occasionally had to be removed from the vicinity of the other children and often had to be sent to the principal's office.

There is no evidence that either one of these teachers "berated" the Child as the Parents' expert stated in his testimony. T 463. The record does not support the Parents' assertion that the LEA did not accommodate this Child's needs even when he perpetually distracted other children.

This hearing officer noted also that the Parent executed consent to the original IEP. Parent did not assert deficiencies with the Child's IEP until later after she became aware of the placement change to an alternative separate setting for delivery of the Child's services. When the IEP team informed the Parent of their agreement with the placement decision, Parent and her special education advocate refused to discuss the alternative placement and abruptly left the IEP planning meetings of July and August 2010.

Parent admitted during her testimony that she is unfamiliar with the separate facility. Parent adamantly insists that the Child does not "belong" at the separate facility. At the hearing, Parent asserted, "I will do what I have to do to keep my son at [the private school] ...[The Child] will not go back to the [LEA]." T 844, 845.

A student receives a free appropriate public education through the IEP process. *MM v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002). This hearing officer has reviewed the IEP for its appropriateness on the basis of whether or not it is reasonably calculated to confer some educational benefit. *Rowley*, 458 U.S. at 206-207. The LEA is not required to provide the best education or an ideal education in order to provide a FAPE to the Child. *Id.* at 200. Parents have not shown that this IEP is

to provide a FAPE to the Child. *Id.* at 200. Parents have not shown that this IEP is inappropriate or that it is not reasonably calculated to provide this Child a FAPE through the IEP.

3. The LEA Made Appropriate IEP Decisions For This Child. Parents Are Not Entitled To Reimbursement For Private School Placement.

It is the LEA's duty to address this Child's behavioral needs to enable him to receive a FAPE in the least restrictive environment ("LRE"). [17] Parents have asserted that the Child's school problems emanate from the LEA's failure to evaluate the Child and to address his ADHD and learning deficits in his educational environment. But the evidentiary record did not substantiate this theory. The record documents a different factual scenario. This Child has a difficult time in school because educational testing shows that his cognitive abilities are limited. Parents requested and received special education evaluations in 2002 and 2004. The Child was deemed ineligible. The Child was considered for special education services again in 2007. When he was refused IDEA eligibility, the LEA placed him in inclusion classes anyway. The Child has been enrolled in the READ 180 program and Title 1 reading services since he attended kindergarten.

The LEA elected to independently monitor the Child for special education eligibility in 2008. Even though he did not qualify for services, the Middle School Psychologist entered him into inclusion classes where he progressed, at this rate, until he

[17] The Virginia Regulations at 8 VAC 20-81-130(A)(1)(a) & (b) (2010) state, with regard to LRE: 1.Each local educational agency shall ensure: (a) That to the maximum extent appropriate, children with disabilities, aged 2 to 21 inclusive, including those in public or private institutions or other care facilities, are educated with children without disabilities: and (b) That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *See* General requirements for least restrictive environment" at 8 VAC 20-81-130(A)(1)(a) & (b) (2010).

grade and the Parents again endorsed them in 2009 and 2010. After flunking ninth grade for the second time, the LEA elected to assist the Child by providing special education services to him.

An initial IEP was developed in May 2010 in order to expeditiously provide services to the Child. The LEA developed a BIP for the Child at that time without much assistance from his Parents. On June 14, 2010, the Child trespassed on another school's property. The adjoining school's security guard had to chase the Child over lunchroom tables to nab him. The Child knew he was not to be on the other school's property because he ran away from the security guard. This incident does not originate in ADHD, but in defiance because the MDR committee reached this conclusion.

By the end of the 2009-2010 school years, the Child had incurred approximately 36 disciplinary infractions. On November 3, 2010, the High School Psychologist revealed that intellectual testing showed a "significant and unusual discrepancy" on one of this Child's IQ tests. LEA experts, consisting of the High School Psychologist, a Speech-Language Pathologist and a Neuropsychologist, independently agreed that the discrepancy amounts to nothing more than an "outlier." LEA experts testified, and this hearing officer is persuaded, that the best professional practice dictates disregarding the discrepancy for the purpose of identifying a processing disorder or a specific learning disability. LEA experts provided convincing arguments against deriving grade level criteria from subtests because these tests do not accurately measure academic functioning.

Thus, all of the above events show that the placement decision, providing for educational service delivery at the separate placement facility, is appropriate for the

Child. The LEA's proposed placement will provide the Child the disciplinary structure he requires to be successful in a regular day school setting at this LEA if he returns to school from a one-year suspension and completes placement at the separate facility. If Parents choose not to send the Child to the separate facility to receive his FAPE delivery there, that is certainly their unilateral choice to make. But it does not mean that the LEA is financially liable for the Private School because the LEA's IEP provides a FAPE to the Child.

This hearing officer gives deference to the LEA's educators for the decisions made on behalf of this Child. The IDEA does not deprive educators the primary role in IEP creation. *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996 (4th Cir. 1997); *See also, Springer v. Loudoun County School Board*, 134 F.3d 659 (4th Cir. 1998). The court may not substitute its own notions of sound educational policy for those of local school authorities. *MM by DM and EM v. School District of Greenville County, Id.* at 531 (4th Cir. 2002).

In order to be successful in a claim for reimbursement by a parent for private tuition placement, the fact-finder must first determine that the public school failed to provide the child with a free appropriate public education and then that private placement is appropriate under the IDEA. *See County School Board of Henrico Co. v. R.T.*, 433 F. Supp.2d 692, 697 (E.D. Va. 2006); *See also School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 371-372 (1985); *Tice v. Botetourt Co. Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990).

I find that FAPE has been provided to the Child in the LEA's IEP development and

placement decision. The IEP provides the least restrictive environment (LRE) for the Child. Thus, the second inquiry, regarding the appropriateness of the Parents' private placement, is a moot issue.

Tuition reimbursement is not appropriate unless the parents prove the LEA's program is not appropriate. Reimbursement in this case is not appropriate because the LEA provided an appropriate IEP for this Child and the Parents' private unilateral placement is not required. *See Burlington Sch. Comm. v Dept. of Education.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v Carter,* 510 U.S. 7 (1993). Parents who make a unilateral placement run the significant risk that a court will find against them and they will be left bearing the cost of the placement. *See Linkous v. Davis,* 633 F.Supp. 1109 (W.D.Va. 1986).

Parents did not prove that the LEA had failed to provide student with a FAPE in the IEP. Parents' request for tuition reimbursement of private placement under the IDEA is DENIED. The Section 504 Plans and accommodations appear to be adequately serving the needs of this Child. The LEA has not exhibited gross misjudgment in any of its educational decisions. The Section 504 issue is DENIED. The Child's disability does not appear to interfere with life functioning and the LEA's effort toward transition is adequate. [18] This hearing officer DENIES any claims made on behalf of the ADAAA or Section 504 of the Rehabilitation Act of 1973.

The LEA is the prevailing party in this due process hearing.

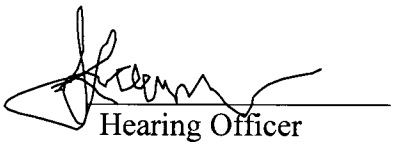
Right of Appeal Notice

This decision shall be final and binding unless either party appeals in federal

[18] LEA personnel explained that the transition plan cannot be completed until the Parents and the Child provide essential information.

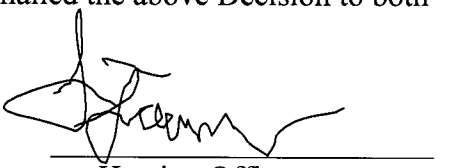
district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.

Date of Decision: December 13, 2010



Hearing Officer

I do hereby certify that I have mailed the above Decision to both counsel on this date.



Hearing Officer

Sarah Smith Freeman, Esquire, VSB# 21354
210 East Road
Portsmouth, Virginia 23707
(757) 399-8105 (757) 399-2004 Facsimile
esqfreeman@aol.com