

**COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

Re: G, by and through her guardian Ms. S v. LEA

Child & Parent(s)/Guardian:
G, child
Ms. S, parent(s)/guardian

Administrative Hearing Officer:
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Child's Attorney Advocate:
M., Esq.
Ms. H

of Public Schools' Attorney
DM, Esq.

Superintendent of LEA:
Dr. SJ

DECISION

I. PROCEDURAL HISTORY¹

The advocate and parent filed a request for a due process hearing on December 18, 2009. LEA received the request on the same day. (HO Exh. 7). I was appointed as the hearing officer in the matter on January 4, 2010. (HO Exh. 5). On January 4, 2010, I scheduled the initial telephonic pre-hearing conference ("PHC") to be held on January 7, 2010, at 9:30 a.m. The parties agreed to this scheduling. (HO Exh. 6). On January 7, 2010, I held the PHC and the parties estimated the hearing would take no more than one

¹ Throughout the decision, I will use the following abbreviations:

February 4, 2010 Transcript
February 5, 2010 Transcript
Parent's Exhibit
Hearing Officer Exhibit
of Public School Exhibit

Feb. 4, 2010 Tr.
Feb. 5, 2010 Tr.
P-Exh.
HO Exh.
LEA Exh.

day. To allow for the unanticipated need for more hearing time, the parties agreed it would be prudent to schedule a two day hearing. I scheduled the hearing for February 2 and 4, 2010, a scheduling to which the parties agreed. (HO Exh. 4).

I held a subsequent PHC on January 28, 2010, and encouraged the parties to narrow their witness lists because prior representations indicated that 29 witnesses would testify on the parent's behalf and 31 witnesses would testify on the LEA's behalf.

I held the hearing on February 4, 5, and 15, 2010. Due to inclement weather on February 2, 2010, the hearing was unable to commence on that date. Exhibits admitted during the hearing included hearing officer's exhibits 1 through 18, parent's exhibits 1 through 11, and LEA's exhibits 1 through 30. The decision is set forth herein.

II. ISSUES

1. Is the IEP appropriate if it fails to (i) reflect that the child's behavior is related to her disability; (ii) establish behavior, social, emotional, and reading/writing goals; and (iii) accurately reflect the child's progress?
2. Was any designed BIP implemented?
3. Should the child be placed at R Academy?

III. STATEMENT OF FACTS

A. Eligibility and Placement

1. G is years old and a grader at School. She has been retained twice. (LEA Exh. 19).

G's parent referred G for evaluation for special education and related services and the LEA conducted an evaluation to determine G's eligibility. A psycho-educational evaluation conducted November 16, 2006 and November 30, 2006, included

administration of the Wechsler Intelligence Scale for Children Fourth Edition (“WISC-IV”) to determine G’s cognitive ability. The WISC-IV measured G’s Full Scale IQ at 65, which fell within the extremely low range. Her Perceptual Reasoning measured 61, which fell within the extremely low range. Her Verbal Comprehension Index measured 71, which fell within the Borderline range. Her Perceptual Reasoning measured 61, which fell within the extremely low range. Her Working Memory measured 83, which fell within the low average range. And her Processing Speed measured 75, which fell within the borderline range. (LEA Exhs. 19, 20).

The psycho-educational evaluation also included the administration of the Wechsler Individual Achievement Test Second Edition (“WIAT-II”) to measure G’s academic achievement G’s total Composite Score was 69, which fell in the extremely low range. G’s Reading Composite score was 67, which fell within the extremely low range. Her Mathematics Composite Score was 71 and her Written Composite was 70. Both fell within the borderline range. G’s Oral Language Composite was 80 and it fell within the low average range. Results from Behavior Rating Scales used in conjunction with the evaluation showed G’s behaviors fell in the at risk range. (LEA Exhs. 19, 20).

After considering G’s assessments, the eligibility committee found G eligible for special education and related services on January 17, 2006. The committee identified her disability category as educable mental disability.² (LEA Exhs. 19, 20).

The LEA’s most recent psycho-educational evaluation of G is dated November 16

² Under current law an educable mental disability or mental retardation is identified as intellectual disability. 34 C.F.R. 300.8 (c)(6); 8VAC 20-81-10.

and 30, 2005. The LEA has not reevaluated G or considered reevaluation of G. The LEA has not conducted a triennial review of G's eligibility. (Feb. 5, 2010 Tr 50; LEA Exhs. 19, 20).

2. For the 2009-2010 school year G is enrolled in collaborative math, collaborative science, collaborative social studies, resource, collaborative English, and collaborative reading, and physical education classes. Some meet daily during the school week, others meet every other day. Each collaborative class is held for 90 minutes. A regular education teacher teaches the class during the entire period and is assisted for 45 minutes by a special education teacher who provides services to the special education students in the class. (Feb. 4, 2010 Tr. 131, 137-138; P Exh. 6).

3. Ms. P is G's case manager. She is also G's special education collaborative science teacher. Materials in the collaborative science class are usually presented on a seventh grade level. Ms. P sees G every other day for 45 minutes in G's collaborative science class. Eleven students are enrolled in the class; four are special education students, including G. As G's case manager, Ms. P is responsible for scheduling and holding G's annual IEP review and taking an instrumental role in G's performance in her classes. G's other teachers report to Ms. P any behavior problems they encounter with G. (Feb. 4, 2010 Tr. 82-84).

4. Ms. A is G's general education teacher in G's collaborative reading class. Approximately 18 students are enrolled in the class and five (5) students, including G, are special education students. The class also has a special education teacher for half the period, or 45 minutes. Materials are generally presented on a seventh grade level. The

2009-2010 school year is Ms. A's second year teaching at Middle School. (Feb. 4, 2010 Tr. 137-138).

5. Ms. W is G's general education teacher in G's collaborative writing class. The class also has a special education teacher that is present for 45 minutes during the 90 minute class period. The class meets every other day. Since January 2010, an aide is present in the class to assist Ms. W when the special education teacher leaves. The 2009-2010 school year is Ms. W's fourth year teaching. (Feb. 4, 2010 Tr. 171-172).

6. Ms. K is one of G's two (2) resource teachers. Ms. K was also G's case manager during the 2008-2009 school year. Ms. K has been a resource teacher for 11 years. Students can use the resource period to make up missed work and complete homework. (Feb. 4, 2010 Tr. 187-189).

7. Ms. E is G's general education teacher in G's collaborative pre-algebra class. She teaches G seventh grade math and pre-algebra five (5) days a week during the 90 minute class period. Ms. E has taught for over 30 years and is the Math Department chairperson at Middle School. During the first semester of the 2009-2010 school year, 18 students were enrolled in the class. (Feb. 5, 2010 Tr. 171-172).

8. Ms. H is G's counselor. Ms. H works with G to help her address behavior and school problems. She assists G with homework and has met with G's current teachers at least once and her case manager several times regarding G's school work, behavior, and IEP. Ms. H is also G's advocate in the present due process proceeding. The LEA has telephoned Ms. H numerous time about G's behavior at school in November 2009 and December 2009. (Feb. 4, 2010 Tr. 31-37).

9. G's grades during the 2008-2009 school year are as noted below:

Class Name	Quarter (Qtr.)	Qtr.	Qtr.	Qtr.	Final Grade
	1	2	3	4	
Co SKL/R6C (English)	D	E	D	C	P
Co SKL/R6 (English)	E	C	C	D	P
HPE (Health)	D	E	C	D	P
Pre-Algebra 6 Co-Teach	C	C	B	C	P
Resreged (Resource)	A	A	A	A	P
Science 6 C	C	C	C	C	P
Social Study 6 A	D	C	C	B	P

(Parent Exh. 6, PE 176).

10. G's interim and first quarter grades for the first semester of the 2009-2010 school year are as noted below:

Class Name	Int. 1	Qtr. 1	Int. 2
Pre-Algebra 7	E	D	D
Science 7	B	C	D
Social Studies 7	D	C	E
PE/Health 7	D	D	D
Resource Regular Ed.	B	C	A
English 7 (Communication Skills)	E	E	B
Reading 7	E	D	E

(Parent's Exh. 6, PE 17a; LEA Exh. 2, R-2a, p.1).

G's second quarter grade for the 2009-2010 school year in pre-algebra was a D.

In reading she also received a D. In writing she received a B and in science, she received a C or D.³ (Feb. 4 Tr. 105, 148, 178; Feb. 5 Tr. 212)

³ As the due process hearing G's teacher testified she made a D or C for the second quarter. (Feb. 4, 2010 Tr. 105).

11. G's GPA as of January 20, 2010 is 1.9286. (Parent's Exh. 6, PE 17c).

12. Dr. TM is director of the Children's Specialty Group, LLC, Division of Neurodevelopmental Pediatrics. He evaluated G on November 24, 2009 and administered the Wide Range Achievement Test - 3 Academic Achievement Test ("WRAT-3"). Test results revealed the scores and grade level equivalents set forth below:

Test	Score	Grade Level
Reading	60	Beginning 2 nd grade level
Spelling	71	Beginning 3 rd grade level
Math	70	mid-3 rd grade level

(LEA Exh. 17).

12. Standardized testing in reading on September 29, 2009, shows G's reading comprehension level is at grade three and six months and her vocabulary level is at grade two and seven months. (LEA Exh. 15).

13. The Wilson Assessment of Decoding and Encoding ("WADE") test administered on January 12, 2010, shows G has significant deficiencies in decoding and spelling. (P Exh. 3, PE 13).

14. G's score on the Virginia Algebra Readiness Diagnostic Test ("ARDT") is below the seventh grade standard scoring. (LEA Exh. 14).

15. G has exhibited behaviors during the 2008-2009 and 2009-2010 school years that have caused her to receive disciplinary notices. (P Exh. 6).

On October 7, 2008, the LEA issued a suspension notice suspending G for three (3) days for harassment - encouraging or boosting a fight on October 7, 2008. A

description of the student misconduct as it appears on the notice appears below:

[G] and another student were i [sic] a verbal confrontation in the classroom. When the teacher intervened, [G] refused to follow the directive of the teacher. While the teacher removed the other student, [G] followed the teacher and went after the other student. When security intervened, [G] resisted and continued to go after the other student in a confrontational manner. Security finally had to physically escprt [sic] [G] from the scene. (P Exh.6, PE 18d).

On October 23, 2008, the LEA issued G another suspension notice suspending her for 5 days for fighting students and causing no or minor injuries. A description of the student misconduct as it appears on the notice appears below:

On the way home after school, G and another student were in a physical altercation off school grounds. Both students exchanged a series of hits to each other's body. (P Exh. 6, PE 18e).

On October 1, 2009, the LEA issued G a suspension notice suspending her for four (4) days for harassment-other. A description of the G's misconduct appears below:

During classroom instruction, G got into a verbal altercation with a male student. G got up out of her seat and went over to the male student (P Exh. 6, PE 18e) and began stabbing at the student's arm. It was reported that she stabbed him about three times and during the final stab the pencil led broke and it was sticking out of his skin. [G] admitted to stabbing the student in the arm with the pencil. (P Exh. 6, PE 18c).

16. The October 1, 2009, incident occurred in G's collaborative reading class. (Feb. 4, 2010 Tr. 162-164).

17. G received a detention notice from Ms. W on October 20, 2009, for

disrupting class by arguing with another student. (LEA Exh. 9, R9).

18. G becomes frustrated with learning and shuts down at school. She can show frustration by making loud emotional outbursts such as, "I can't do this," "You get on my nerves," and "I hate this school." She then often takes action such as pushing her papers away or on the floor, stomping, and putting her head down on the desk. Once G shuts down, she often fails to reengage herself in class work activities. (Feb. 4, 2010 Tr. 33, 91-92, 99-101; LEA Exhs. 17, 20; P Exh. 3, PE 9). (Feb. 4, 2010 Tr. 175, 143).

19. G experiences frustration with learning at home also while attempting to complete homework assignments. She shuts down and leaves homework undone. (Feb. 4, 2010 Tr. 43-44; (Feb. 5, 2010 Tr. 7-9).

20. In reading class, G becomes frustrated usually when she is working independently and she seeks assistance on an assignment from the teacher and the teacher is not available. The unavailability is usually because the special education collaborative teacher has not arrived. (Feb. 4, 2010 Tr. 142). The frustration can be accompanied with a loud outburst and then G shutting down. G's frustration with learning can also be directed at other students when she makes a verbal outburst to a student or students.

G also has made verbal outbursts to other students in reading class when they have teased her. G teases other students in the class also. She may also make a verbal outburst to other students when she overhears another student's comment. The comment may not be about G or directed to her, but she responds anyway. G's outburst directed at another student can lead to a back and forth exchange of words between G and the other student. G's teasing and outbursts unrelated to her being frustrated are typical of seventh

graders. (Feb. 4, 2010 Tr. 143-145).

21. G can be easily offended and when she is offended she argues. (Feb. 4, 2010 Tr. 150).

22. At the beginning of the 2009-2010 school year, G was sent to time out on 3 occasions for her verbal outbursts in reading class because they interfered with other's learning. (Feb. 4, 2010 Tr. 151-152, 161). G regularly has verbal outbursts in reading class and they are usually ignored by the other students. (Feb. 4, 2010 Tr. 166).

23. In reading class, G does not have a problem working in groups or with others. (Feb. 4, 2010 Tr. 160).

24. G's reading class is scheduled for 90 minutes every other day. Thus, some weeks her reading class meets two (2) days out of the week and other weeks, her class meets 3 days out of the week. G becomes frustrated and has a "shut down" experience on a weekly basis during at least one of the class periods. (Feb. 4, 2010 Tr. 143).

25. G and her classmates tease each other in G's writing class and resource class. (Feb. 4, 2010 Tr. 182, 204-205).

26. G's frustration and shut down behavior impedes her learning. (Feb. 4, 2010 Tr. 225).

27. In January 2010, G was involved in an argument in resource class that could have escalated to a fight. (Feb. 4, 2010 Tr. 231-232).

28. G has become frustrated with learning, completing makeup work, or completing homework in resource class and has shut down. Her resource teacher Ms. K has taken G to Ms. P when G has not resumed working on assignments. (Feb. 4, 2010 Tr.

233).

29. G has arguments with friends in her resource class. To remove G from the situation, Ms. K has taken G to guidance or for a walk. (Feb. 4, 2010 Tr. 204-205).

30. G displayed verbal aggression at the beginning of her pre-algebra class in December 2009. The incident caused G to miss her entire math class. While out of the classroom another teacher assisted G. G also displayed verbal aggression in her pre-algebra class early fall 2009. (Feb. 5, 2010 Tr. 175-176). Her outbursts in class have disturbed others. (Feb. 5, 2010 Tr. 196).

31. G's pre-algebra class meets five (5) times per week for 90 minutes. G becomes frustrated with the work and shuts down frequently. This can be several times during the week when the teacher introduces a topic. Frustration and shutdowns occur less often when G is familiar with a topic addressed in class. (Feb. 5, 2010 Tr. 177-178).

32. In pre-algebra class, G works well in groups. She dislikes working alone. (Feb. 5, 2010 Tr. 186-187).

33. Students at Middle School can stay after school and make up work. (Feb. 5, 2010 Tr. 190).

34. G's behavior has improved in her pre-algebra class since the teacher met with G's counselor, Ms. H. Prior to then, G exhibited more verbal aggressive outbursts. G directed some at Ms. E. (Feb. 5, 2010 Tr., 198-199).

35. When G has had shutdown experiences in her classes, she has often been unable to resume working on assignments during the respective class period. (Feb. 4, 2010 Tr. 33, 101).

36. As case manager for G during the 2008-2009 school year, Ms. K wrote G's Behavior Intervention Plan ("BIP"). The IEP team reviewed the BIP on March 13, 2009. Ms. K made amendments to it on that date and the IEP team made it a part of the IEP on March 13, 2009. (LEA Exh. 3, R-3a, Feb. 4, 2010 Tr. 187, 245).

37. The BIP targeted 2 behaviors - fighting and verbal aggression toward peers and adults - and required the case manager, G's regular education teachers, and administrators to monitor G's behavior and collect data regarding it. Further, the BIP required those individuals to review the BIP every two months. (LEA Exh. 3, R-3a).

38. The targeted behaviors were determined based on G's misconduct identified in her October 2008 suspension notices. (Feb. 4, 2010 Tr. 220-221).

39. G displayed verbal aggression prior to January 2010.

40. The LEA implemented the BIP January 6, 2010. (LEA Exh. 10, R10).

41. R Academy is a private day school. It serves students who cannot be served in the public school setting. Students enrolled at R. Academy usually have severe behavior problems, mental health issues, or autism spectrum disorder. Students transitioning from a residual placement or to one are also served at R Academy. (Feb. 5, 2010 Tr. 136-137, 147).

42. The LEA did not allow Ms. H, G's counselor, to observe G in the classroom. (Feb. 4, 2010 Tr. 60).

IV. APPLICABLE LAW AND ANALYSIS

A. Applicable Legal Principals

The crucial purpose of the Individuals with Disabilities Education Act ("IDEA")

is to ensure that students with disabilities have available a free appropriate public education ("FAPE"). See *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 179-81, 200-01 (1982). A FAPE includes special education and related services planned to meet the student's unique needs and provided in conformity with a written IEP. 34 C.F.R. Section 300.17(d) and 34 C.F.R. Section 300.320. This centerpiece of FAPE must be reasonably calculated to provide the student with "some educational benefit." The LEA, however, is not required to maximize a student's abilities. *Id.* at 198-200. But trivial advancement under the IEP is insufficient to satisfy the *Rowley* standard of "some benefit." *Polk v. Central Susquehanna Intermediate Unit 16*, 441 IDELR 130 (3d Cir. 1988).

The IEP should target all of the student's unique educational needs, to include academic, social, emotional, communication, physical, and vocational ones. *Lenn v. Portland School Committee*, 998 F.2d 1083, 1089 (1st Cir. 1993) Thus, among other requirements, IDEA requires the IEP to contain measurable goals, including academic and functional goals. These goals should be designed to (i) meet the child's needs that result from the disability to enable the child to be involved in and make progress in the general education curriculum and (ii) meet each of the child's other educational needs that result from the child's disability. 20 U.S.C. Section 1414 (d)(1)(A).

The IDEA also instructs the IEP team that it must consider developing a behavior intervention plan ("BIP") for a student when the student's behavior impedes his learning or the learning of others. 34 C.F.R. Section 300.324 (a)(2)(I). If the LEA fails to properly or consistently implement the behavior interventions identified in a student's BIP, it may amount to a denial of the FAPE.

B. Determination of Issues

1. Is the IEP appropriate if it fails to (i) reflect that the child's behavior is related to her disability; (ii) establish behavior, social, emotional, and reading/writing goals; and (iii) accurately reflect the child's progress.

a. Is the child's behavior related to her disability?

During the 2008-2009 school year, G's behavior problems included fighting, verbal aggression, verbal outburst, and shutting down. During the 2009-2010 school year she was involved in no fights; however, incidents of assault or battery and verbal aggression have occurred. Also, on a regular basis, G continues to shut down and display verbal and emotional outbursts. The parent asserts that G's behaviors are related to her intellectual disability and that the IEP should contain goals addressing G's behavior, as well as her social and emotional needs.

I examine pertinent sections of the record to determine if the parent's allegation has merit.

The record includes the report of the LEA's most recent psycho-educational evaluation of G. It is dated November 16 and 30, 2005, and shows G has cognitive and academic deficiencies. During the evaluation, the examiner - a school psychologist - measured G's cognitive ability by administering the WISC-IV. That testing measured G's full scale IQ at 65. Such scoring indicates she has an extremely low range of cognitive ability. Other composite scores discussed previously herein revealed her perception reasoning fell within the extremely low range, her verbal comprehension and processing speed fell within the borderline intelligence range, and her working memory

fell within the low average range. Administration of other testing -the WIAT-II - by that school psychologist measured G's academic achievement. It revealed G's composite score of 69 fell within the extremely low range. In addition to listing and discussing G's cognitive and academic testing results, the psycho-educational evaluation also reported that G is unable to do her schoolwork and becomes frustrated and angry due to her academic weaknesses. It noted further that G had been retained twice. (LEA Exh. 20).

The record also includes a March 22, 2004 psycho-educational evaluation conducted by another school psychologist. It too makes similar assessments. In pertinent part the 2004 evaluation states the following:

When observed in the classroom, G appears to be experiencing considerable difficulty and frustration and seems to seek and to need a great deal of support from her teacher. Even with support she appears to make very slow progress and her accompanying frustration causes the teacher to have to switch her to another task. Even when attempts are made to use peer tutors, she still requires much individualized assistance and support from the teacher.

(P Exh. 3, PE 9).

I note the previously mentioned psycho-educational evaluations are over four and five years old, respectively. Even so, a more recent evaluation dated November 24, 2009 by Dr. TM of G's neurodevelopment and cognitive functioning reports likewise. When evaluating G, Dr. TM administered the WRAT-3 Academic Achievement Test to measure G's academic functioning. Test results as previously mentioned herein revealed G is reading at a beginning second grade level, spelling at a beginning third grade level, and performing math at the mid third grade level. In his report, Dr. TM noted that G is

functioning with significant delays in her overall learning and cognitive functioning. He also reported in the "History" section of his evaluation that G is in an inclusion class with resource assistance and is given tasks at the seventh grade level. He reports that her current educational placement is causing serious emotional and behavioral difficulties with anger, frustration, acting out, and multiple suspensions for biting. (P Exh. 3, PE 7).

While Dr. TM was not a witness at the hearing and therefore was not examined regarding his report's contents, I find his assessment regarding G's intellectual deficiencies and related behavior - frustration, anger, and acting out - is substantiated by other evidence of record. Thus, I find it credible.

Additional evidence includes, but is not necessarily limited to, the LEA's own psych-educational evaluations, discussed above, and the testimony of school personnel. For instance, Ms. P, G's case manager and special education teacher in G's collaborative science class, testified that G's disability involves G having mental issues that hinder her ability to process information. (Feb. 4, 2010 Tr. 85). She testified that G becomes frustrated with learning, becomes very upset, and shuts down. The shut down is often accompanied with or followed by a loud outbursts such as "I can't do this" or strong expressions of G's anger toward her teachers who continue to tell G that she can do the work when G believes she cannot. (Feb. 4, 2010 Tr. 92). Also, Ms. A, G's collaborative reading teacher, acknowledged that G shuts down in her class at least one out of two class periods a week or one out of three class periods a week.⁴ Ms. A noted

⁴ Ms. A's collaborative reading class meets for 90 minutes every other day. Thus, generally one week it meets twice and the next week three (3) times. (Feb. 4, 2010 Tr. 138, 142)

that the shut downs occur usually when G is working independently and cannot receive the teacher's help on an assignment. Ms. A's employment of scaffolding - altering the teaching assignment by slowing the pace, changing the assignment format or lowering the reading level - has not precluded G's frustration with learning and ensuing shut downs. By Ms. A's own testimony, they persists at least weekly. (Feb. 4, 2010 Tr. 142-143, 155). Further, Ms. E, G's collaborative pre-algebra teacher testified that G regularly shuts down when new material is being taught and that the shut downs can occur several times a week. What is more, G shuts down sometimes when class activities involve familiar topics. (Feb. 5, 2010 Tr. 178).

In addition, G's counselor's testimony substantiates that G's behavior is related to her disability. Ms. H, G's counselor, testified that when she has attempted to assist G with homework, G has become frustrated, shuts down, and expresses she is unable to read and understand the work. What is more, Ms. H testified that G expressed her frustration also results from G's teachers failing to grasp that G does not understand her assignments or class material. (Feb. 4, 2010 Tr. 43-44).

I have had an opportunity to observe the demeanor of the above-mentioned witnesses who are school personnel and I find the portion of their testimony regarding G becoming frustrated with learning and shutting down credible. I do note that Ms. H performed dual roles at the hearing as an advocate and witness for G. Having considered her dual function and her demeanor as a witness, I also find her testimony regarding G's frustration and shut down behavior credible.

Considering the psycho-educational evaluations, Dr. TM's assessment, and the

testimony of both school personnel and Ms. H, I find G's shut down behavior, to include related emotional verbal outbursts, is related to her intellectual disability.

b. Should the IEP contain behavior, social, and emotional goals?

This shut down behavior adversely affects G's progress in the general educational curriculum. G's case manager has received what she deemed credible reports from G's teachers that G becomes frustrated with learning, shuts down, and often fails to resume working on assignments during the class period. (Feb. 4, 2010 Tr. 101). The case manager's report of G's shut downs causing her to miss work is corroborated by Ms. H's testimony. Ms. H testified that all G's teachers informed her that G becomes frustrated with learning, shuts down, and will not complete her class work and therefore receives zeros for undone assignments. (Feb. 4, 2010 Tr. 33). Further, when G's shut downs necessitate removal from class, G misses class work, instruction, and the opportunity to learn in an environment with her peers. (Feb. 4, 2010 Tr. 97).

The LEA contends that G can make up missed assignments and complete homework assignments after school. The evidence shows G has stayed back and received help. Yet she continues to not understand assignments. I make particular note of her staying back after school to receive help in her reading class. However, she continues to have a substantial number of missed assignments in the class. (Feb. 4, 2010 Tr. 153-154; Feb. 5, 2010-Tr. 11). Consequently, her interim and quarterly grades in reading class for the first semester of the 2009-2010 school year are either failing or near failing. I do note that Ms. A, G's reading teacher, testified that G has missing assignments because she does not focus in class and is easily distracted. (Feb. 4, 2010 Tr. 148-49). I give little

weight to this testimony. This is so after I have considered the class material is generally above G's reading level, G frequently becomes frustrated in the class and shuts down, and the teacher's report that G works extremely slow.

Further, the LEA contends G can make up assignments and complete homework in her resource class. I note that the evidence shows G has made up some assignments in her resource class. But even after taking advantage of this service which provides for extra help and time to complete school work, G has a substantial number of missing class or homework assignments resulting in her receiving failing or near failing grades. (Feb. 4, 2010 Tr. 148, P Exh. 9, PE 22). Further, I take note that in the resource class, which according to the LEA affords G the opportunity to make up work, she experiences "shut downs" and has even been removed from that class to allow her time to deescalate her frustration or defuse verbal arguments with her peers. (Feb. 4, 2010 Tr. 202, 204, 233).

After considering the above, I find that even utilizing these supplemental services G remains unable to complete a substantial number of assignments, continues to be frustrated with learning, and shuts down.

Also, the LEA asserts G would receive full credit for some homework assignments if she would simply make the effort to do them at home and submit them. (Feb. 5, 2010 Tr. 187). As noted earlier herein, Ms. H, G's counselor and a certified special education teacher, testified that she has provided G with homework assistance. But G becomes frustrated, shuts down, and does not always complete homework assignments because they are on a seventh grade level which is above G's second/third grade reading level and she is unable to understand them. (Feb. 4, 2010 Tr. 43-44). Her

testimony is corroborated by G's parent, Ms. S. (Feb. 5, 2010 Tr. 8-10). As previously noted, I find Ms. H's testimony regarding G's frustration with learning and ensuing shut downs credible. I am not persuaded by the LEA's argument. Accordingly, I find G's frustration and "shut downs" have precluded her from completing homework assignments.

Applicable law requires the IEP to contain annual measurable goals to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. 34 C.F.R. Section 300.320 (a) (2). The child's behavior is related to her disability. The behavior has substantially impeded G's progress in the general education curriculum. She becomes frustrated frequently, shuts down, and does not complete assignments. In core classes she has failing or near failing grades and her GPA is 1.9286. (P Exh. 6, PE 18a). I find the IEP must contain a behavior goal addressing G's frustration, "shut downs," and verbal outburst.

I am mindful also that some of G's teachers testified that G's shutdowns last only about 15 minutes and G is able to reengage the academic process after that time period. I note the parent presented contrary evidence. Ms. H testified that when she met with G's teachers all of them reported that G shuts down, does not resume working on class assignments, and receives zeros. This testimony was corroborated by reports made by G's teachers to G's case manager. G's shut downs at home when attempting to do homework also support G not reengaging in assignments after she has zoned out. Considering the evidence mentioned above, I find Ms. H's testimony credible.

I also note a concern that when Ms. H, G's counselor and a qualified expert in this case, attempted to observe G in her classes, the LEA denied the request.

I am mindful evidence was presented about G teasing other students and being teased and her arguing with friends and classmates. I also note the evidence established that G works in groups with her peers and enjoys it. Thus, I do not find the parent by a preponderance of the evidence has shown the need for social and emotional goals.

c. Does the current IEP accurately reflect the child's progress?

The parent contends that the LEA has no way of knowing G's current level of academic achievement and functioning performance because it has not conducted a more recent psycho-educational evaluation or reevaluated G since November 2005. Thus, the parent argues that the LEA could not have accurately stated G's PLOP. The LEA argues I have no authority to consider this allegation because it raises an issue not presented on the due process complaint before me. I find the parent raises this concern in argument not as a new issue and I have the authority to address it in determining if G has received a FAPE.

The LEA found G eligible for special education and related services January 17, 2006. Her most recent psycho-educational evaluation is dated November 30, 2005. 20 U.S.C Section 1414(a)(2)(B)(ii) requires the LEA to re-evaluate a child with a disability at least every 3 years unless the LEA and parent waive the requirement. No waiver exists. The LEA failed to conduct any triennial review of G's eligibility nor has the LEA reevaluated G. (Feb. 5, 2010 Tr. 49-50; LEA Exh. 19). Thus, when the LEA drafted G's current IEP in February 2009, it did not have on hand current assessments to determine

G's current level of academic achievement and functioning performance and her needs. Thus, the PLOP on the current IEP is faulty and any goals derived and services employed because of the current PLOP are defective. Further, I find the current PLOP does not state the extent of G's frustration and shut down experiences and their effect on her accessing the general educational curriculum. Neither does the PLOP state G's most recent standardized testing results. Accordingly, I find the IEP has not accurately stated G's PLOP.

d. Should the IEP Contain a Reading Goal?

G has an intellectual disability. She is years of age, has been retained twice, and is a grader. Standardized testing in September 2009 showed her reading vocabulary at a 2.6 grade level equivalent and her reading comprehension at a 3.6 grade level equivalent. Further standardized testing in November 2009 showed G reading on a beginning second grade level. Primarily, she receives class work and assignments on a seventh grade level. Her reading grades for the first semester of the 2008-2009 school year are interim 1, E; quarter 1, D; interim 2 E; quarter 2, D. As discussed before herein, G frequently becomes frustrated in reading class and shuts down. By teacher report, she is extremely slow in completing assignments.

A review of G's current IEP shows no annual measurable goal for reading in spite of her assessments showing marked deficiencies in reading and her failing or nearly the course.

The LEA contends the IEP contains a reading goal. It points to page 5 of the IEP. That page states the following as an annual measurable goal:

Given adaptations and accommodations to the general education curriculum, G will demonstrate mastery of 80% of curricular objectives.

On that same page, under the heading Short Term Objectives/Benchmarks, seven statements are listed regarding what G will do. The LEA contends three of those short term objectives are in effect reading goals. Those statements are

- i. G will use different materials to research appropriate subjects and complete long-term projects such as written essays and research projects;
- ii. G will use questioning to clarify information when necessary and seek assistance when needed to maintain materials in interactive notebooks; and
- iii. G will actively participate in teacher-led and student-initiated class work activities such as note-taking and group work projects.

The LEA further points to page six (6) of the IEP to support its claim that the IEP contains a reading goal. Page 6 states an annual measurable goal which reads as follows:

Given adaptation and accommodations in the general education curriculum, G will demonstrate mastery of at least 85% of grade level work.

As on page 5 of the IEP, short term objections/benchmarks are listed further down the page. The LEA points to the short term objective - "G will participate in additional activities to improve reading level and comprehension" and claims it to be a reading goal in G's resource class. I am unconvinced by the argument.

Short term objectives/benchmarks described by the LEA as reading goals do not

adequately address the child's severe reading deficiencies. These alleged goals are too general. Also, they lack criteria for measuring progress as no baseline of G's reading level is given in the alleged goals and no level is given where the child should be in a year. Further, the evidence shows G has not advanced in reading under the alleged reading goals as shown by (i) her Es and Ds in reading this school year and (ii) her standardized reading test scores indicating G has lost ground or had no progress in reading. (Feb. 4, 2010 Tr. 207; LEA Exh. 17).

Moreover, under these alleged "current reading goals" generally G's assignments in her classes are given on the seventh grade level. She is unable to read them and others like her case manager have to read them for G when scheduling and time permits.⁵ Further G cannot read homework assignments given to her on a seventh grade level so she often shuts down and does not complete the work. (Feb. 4, 2010 Tr. 43-44). As discussed previously, the missed homework assignments adversely affect her grade.

I find G's reading deficiencies affect her involvement and progress in the general curriculum. Applicable law requires the IEP to contain annual measurable goals to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. 34 C.F.R. Section 300.320 (a) (2). Because the current IEP fails to adequately address her reading needs, G is denied access to the general educational curriculum; that is, she is unable to read assignments given to her on the seventh grade level, unable to complete class assignments and

⁵ G's case manager and special education science teacher testified that she found it challenging to service all the special education students she is responsible for servicing during the class period. To corroborate her testimony, Ms. H testified that G's teachers admitted they did not have the time to service G as she needed to be serviced. (Feb. 4, 2010 Tr. 44).

homework for this reason also. Thus, the IEP should contain an annual measurable goal to meet G's reading needs.

Having found the current IEP is inappropriate in the ways noted above, I am mindful of the courts directive regarding deference to the judgments of professional educators in *MM Ex Rel. DM v. Schl. Dist. Of Greenville County*, 303 F.3d 523, 531-533 (4th Cir. 2002). In the case before me I have carefully considered the record and determined the LEA has failed to meet as identified herein the mandates of IDEA regarding certain requirements of the IEP.

I also note that I am mindful of the parent's contention that the IEP should contain a writing goal. I find the evidence insufficient to make that determination.

2. Was any designed BIP implemented?

The LEA conducted a Functional Behavior Assessment ("FBA") and drafted a BIP in October 2008. Ms. K, G's case manager, amended the BIP March 10, 2009, and the IEP team made it a component of the IEP on March 13, 2009. Targeted behaviors listed on the BIP were fighting and verbal aggression. The BIP required designated school personnel to document incidents of the behaviors and to meet and review the BIP every other month. (LEA Exh. 3, R-3a, 3b; Feb. 4, 2010 Tr. 245).

The LEA claims it implemented the BIP March 13, 2009, but because G exhibited none of the targeted behaviors it collected no data. Further, the LEA contends that without data no need existed to meet and conduct a review. In support of its assertion, the LEA attempts to define "verbal aggression" in such a manner that the definition excludes certain behaviors of G from being identified as targeted ones. The LEA's effort

fails for reasons discussed below.

Ms. E, G's pre-algebra teacher, testified that on two occasions prior to January 2010, G displayed verbal aggression toward another classmate. Usually the situation involved G and another student yelling at each other in class. On one of those occasions, G was removed from class at the beginning of the class period and did not return. (Feb. 5, 2010 Tr. 199). Also, the testimony of Ms. E indicates that before she met with G's counselor in November 2009, G displayed verbal aggression toward Ms. E. According to Ms. E's testimony G would enter the class yelling at Ms. E and make comments such as "I'm tired of you," and "Get out of my face." (Feb. 5, 2010 Tr. 199).

Also, Ms. A testified that in October, 2009, at the beginning of the class period, G stabbed another student with her pencil lead. She was removed from the class and the LEA suspended G 4 days for the incident. (P's Exh. 6, PE 18C). What is more, Ms. A testified that she has seen G display verbal aggression and described her as talking back to students when she hears something she does not like. Ms. A further testified that at the beginning of the year G made 3 verbal outbursts in class that interfered with the learning of others. Ms. A then placed G in timeout. (Feb. 4, 2010 Tr. 142-143, 150, 152, 161). In addition, Ms. K, G's resource teacher, testified that she has sent G to guidance on several occasions as a result of G arguing with friends. (Feb. 4, 2010 Tr. 204).

Moreover, school staff telephoned Ms. H numerous times and allowed Ms. H to speak with G to "calm her down." On several occasions, school personnel expressed to Ms. H that G was about to fight. (Feb. 4, 2010, Tr. 72). On two occasions Ms. H could not calm G's emotions over the telephone. Thus, Ms. H visited G at school. During one

of those visits, G was out of class for 1.5 hours. (Feb. 4, 2010 Tr. 39, 62, 70, 72). G's parent, Ms. S, also testified to receiving similar calls from the LEA and being summoned to school for similar behaviors of G. (Feb. 5, 2010 Tr. 16, 33, 37).

The LEA did not document G's behaviors prior to January 2010. Neither did it meet to review the BIP or implement it until after the parent filed a due process complaint on December 18, 2009. Thus, I find the LEA did not implement the BIP until January 6, 2010, even though it was made a part of the IEP almost a year earlier.

Next, I examine whether the failure to implement the BIP denied G a FAPE.

This case mandates a different finding than the one in *Houston Indep. Sch. Dist. V. Bobby R.* 31 IDELR 185 (5th Cir. 2000) where the court found the LEA's failure to implement certain provisions of the child's IEP did not deny the student a FAPE. In *Houston*, the court noted the LEA had provided significant provisions of the student's IEP and the student's test scores and grade levels improved over time and demonstrated the student received more than a trivial benefit.

In this case the LEA failed to implement the BIP for ten (10) months⁶ even though G exhibited targeted behaviors which often resulted in her being removed from class. I find this failure material. Further, the child's standardized reading scores have virtually remained the same or show G's reading ability has regressed. Also, G's ARDT math test indicates deficiencies. In addition, interim and quarterly reports show G has mostly failing or near failing grades. Considering the above, I find G received, at best, a trivial

⁶ I note the ten months include summer-time when school presumably was not in session for G.

educational benefit and the LEA's failure to implement the BIP constitutes a denial of FAPE.

3. Whether G should be placed at R Academy?

The parent requests I order the LEA to place G at R Academy. In support of that requests Ms. H testified that R Academy is appropriate placement for G because it has small class sizes; caters to children that are misfits in society; has trained psychologist who can deal with emotional needs of students; can provide one on one reading, speech, and occupational therapy; and provides social skills training. Ms. H qualified as an expert in special education and disabilities. She has personal knowledge of R Academy because her daughter attended the school. (Feb. 4, 2010 Tr. 29-30).

Ms. FM testified that R Academy is a school for students who cannot be served in the public school and who have severe behavior issues, mental health issues, or autism spectrum disorders. She reviewed G's discipline record and noted that G's discipline record fails to demonstrate a severe discipline problem and neither would G's frequent frustration and shut down behaviors. She testified that in her experience, a student would not be placed at R Academy unless he or she could not be placed anywhere in PS. (Feb. 5, 2010 Tr. 136-137, 147). I give greater weight to the testimony of Ms. FM. I note Ms. FM qualified as an expert in intellectual disability and emotional disturbance. She also qualified as an expert in identifying appropriate placement for disabled students. Ms. FM holds a bachelor of arts degree in emotional disturbance and mental retardation (currently intellectual disability). She has taught for eight (8) years. Also, she is familiar with R Academy and visits the school weekly. (Feb. 5, 2010 Tr. 124-125, 134-135).

Accordingly, I find the parent has not met her burden in showing R Academy is an appropriate placement for G.

V. DECISION AND ORDER

I have reviewed and considered all the evidence of record whether specifically mentioned in the decision or not and I find the following:

- (i) G's verbal outburst and shutting down behavior due to her frustration with learning are related to her intellectual disability;
- (ii) G's reading deficiencies affect her involvement and progress in the general curriculum;
- (iii) the current IEP fails to accurately state G's progress;
- (iv) the LEA failed to implement G's BIP;
- (v) the parent failed to show R Academy is an appropriate placement for G;
- (vi) the current IEP is inappropriate because it fails to accurately state G's progress and contain reading and behavior goals;
- (vii) the LEA has denied G a FAPE since February 4, 2009, because the LEA implemented the current IEP then and failed to accurately state G's progress;
- (viii) the current IEP denies G a FAPE because it does not contain reading and behavior goals; and
- (ix) the LEA has denied G a FAPE because it failed to implement the BIP.

Accordingly, I order the LEA to take the following action:

- (i) provide additional assistance of an aide in all G's collaborative classes during the time the special education teacher is not scheduled to be in the class;
- (ii) immediately evaluate G to determine her current level of academic achievement, functional performance and needs;
- (iii) once the evaluation has been completed, without delay, reconvene an IEP meeting to review and consider the evaluation and all relevant information and draft an

IEP that accurately reflects G's current level of academic achievement and functional performance and, at a minimum, contains measurable annual goals in reading and behavior addressing G's behavior caused by her frustration with learning;

(iv) permit, with the permission of the parent, G's independent expert or counselor to observe the child in the classroom at a reasonable time and manner; and

(iv) review the BIP, modify it as deemed appropriate, and implement any resulting BIP.

I have further denied the LEA's motion to strike the parent's case on the issues set forth in the due process complaint because at the conclusion of the parent's case it was not conclusively apparent that the parent had proven no cause of action against the LEA. *See, Williams v. Vaughan*, 214 Va. 307, 309, 199 S.E.2d 515, 517 (1973) (quoting *Leath v. Richmond, Fredericksburg & Potomac R.R. Co.*, 162 Va. 705, 710, 174 S.E. 678, 680 (1934).

Moreover, I note the parent's attorney raised issues at the hearing regarding the transition provisions of a draft IEP and bullying. I have determined I do not have jurisdiction over those issues because the parent did not raise them in her due process complaint. Thus, I have granted the LEA's motion to strike evidence presented during the hearing regarding those issues.

I also find all requirements of notice to the parent have been satisfied and that the school reports G is a child with a disability as defined by applicable law 34 C.F.R. Section 300.8 and is in need of special education and related services. I also find the LEA has failed to provide G with a FAPE since February 4, 2009, as previously noted herein.

VI. PREVAILING PARTY

I have the authority to determine the prevailing party on the issues. I find the prevailing party on each issues one and two stated herein is the parent. The LEA prevails on the third issue as the parent has not shown that R Academy is an appropriate placement for G.

VII. APPEAL INFORMATION

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

ENTERED THIS 3rd day of March, 2010.


Ternon Galloway Lee, Hearing Officer

Cc: Parent
Counsel for LEA
Counsel for Parent
Ms. H, Advocate
Ms. KG, Assistant Admin. Dir. of Special Education for LEA
VDOE Coordinator of Due Process Services, Dispute Res. and Admin. Services

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