

CASE CLOSURE SUMMARY REPORT

Date: JUN 15 2010
Hearing Officer: [Signature]

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

Public Schools
School Division

Mr & Mrs.
Name of Parents

Name of Child

6-11-10
Date of Decision or Dismissal

John F. Cafferky, Esq.
Counsel Representing LEA

Pro Se
Counsel Representing Parent/Child

Parents
Party Initiating Hearing

Pro Se
Prevailing Party

Hearing Officer's Determination of Issue(s):

ps failed to provide FAPE in regard to OT services in the 2007-2008 school year.

Hearing Officer's Orders and Outcome of Hearing:

12 hours of compensatory services ordered.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Frank Aschmann
Printed Name of Hearing Officer

[Signature]
Signature

RECEIVED

JUN 15 2010

Division of Special Education
Administrative Services

DUE PROCESS HEARING
COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re:

represented by his mother,

Public Schools represented

by
John F. Cafferky, Esq.
Patricia C. Amberly, Esq.

DECISION

This matter came to be heard upon the Request For A Due Process Hearing (complaint) filed by _____ s () parents pursuant to the Individuals with Disabilities Education Act, 20 USC § 1400 et seq. (IDEA) and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81 (the regulations).

The Parents' complaint alleges _____ Public Schools (PS) have failed to provide _____ with a free appropriate public education (FAPE). As the moving party the Parents assume the burden of proof in this matter. Schaffer v. Weast, 546 US 49 (2005). The standard of proof is upon a preponderance of the evidence. 8 VAC 20-81 O. 13.

Issues Presented

1. Did PS fail to find _____ eligible for services in the proper disability categories and deny him services for the 2007-2008 school year?
2. Did PS fail to provide services to _____ such as to deny him FAPE for the 2007-2008 school year?
3. Did PS fail to provide services to _____ in the least restrictive environment for the 2007-2008 school year?
4. Did PS violate the procedural requirements of IDEA in the 2007-2008 school year such as to deny _____ FAPE?
 - A) By failing to provide prior written notice of a denial of requested services?
 - B) By failing to provide progress reports in the 2007-2008 school year?
 - C) By putting Ms. _____'s signature on an Individual Education Plan (IEP) for Summer 2008?

Findings of Fact

Extensive documentary evidence was presented by both parties. The exhibits were moved into evidence en masse. PS exhibits are hereinafter identified as FX and Ms. 's exhibits as T. Thirty-two witnesses testified at the hearing. Two de bene esse depositions were admitted into evidence. Ms. was allowed to submit her testimony as a written statement as it was her intention to simply read the written statement into the record. PS was allowed to cross-examine her on the testimonial statement. The following findings of fact are made by a preponderance of the evidence above listed.

1. was born November 21, . (FX #1)
2. has Down Syndrome. (FX #27,#28,#45,#46)
3. 's cognitive ability falls in the extremely low range and below the first percentile. (FX #27, #46; T vol.2)
4. has a long history of vision issues. (T vol. 1; Ms. statement)
5. was born with a cataract in his right eye and had surgery as an infant to remove the lense. (FX #31,#32; T vol.1)
6. has myopia and amblyopia in his left eye. (TR, p68)
7. has had numerous vision assessments, both for medical analysis and for educational functionality. (FX #25,#31,#42; T vol. 1 & 2)
8. has displayed self stimulating behaviors in school, such as fidgeting and finger flicking. (TR, pp203,384-385, 628-629, 735-736, 777-778)
9. On January 11, 2006, was found eligible for special education services under the category, mental retardation. (FX #1)
10. On December 12, 2007, Ms. refused to give consent for evaluations to determine 's eligibility status. (FX #6)
11. On May 4, 2005, PS proposed an IEP for and Ms. endorsed it. (FX #11)
12. On August 31, 2006, PS proposed an IEP for and Ms. did not accept it. (FX #12)
13. On April 10, 2007, PS proposed an IEP for and Ms. did not accept it. (FX #13)
14. On May 14, 2007, PS proposed an IEP for and Ms. did not accept it. (FX #14)
15. On May 31, 2007, PS proposed an extended school year (ESY) IEP for to provide services during the Summer of 2007 and Ms. endorsed it as "partially" agreed. (FX #15)
16. On October 23, 2007, PS proposed an IEP for and Ms. did not accept it. (FX #16)
17. On November 2, 2007, PS proposed an IEP for and Ms. did not accept it. (FX #17)
18. On February 28, 2008, PS proposed an IEP for and Ms. endorsed it as "conditional/partial agreement." (FX #18 & 19)

19. On April 17, 2008, PS proposed an addendum to 's IEP that would provide compensatory education services to him in the Summer of 2008 and Ms. endorsed it. (FX #20)
20. Ms. placed in a facility on June 6, 2005, where he received intensive instruction in a "sensory-cognitive" program for ten weeks. (FX #24; Ms. statement; TR pp158, 1177)
21. Ms. placed in a facility again from approximately February to July, 2006. (TR p1200)
22. Ms. refused to allow to participate in the Community-Based Instruction Program (CBI) for the 2007-2008 school year. (FX #91; TR p1095-1099)
23. Ms. did not allow to participate in the Work Awareness & Transition (WAT) program. (FX #3; TR p1095-1098)
24. 's IEP from September until February 28, 2008 for the 2007-2008 school year was the IEP from May 2005. (TR p115-116)
25. 's May 2005 IEP contains appropriate goals and objectives, classroom accommodations, related services including four hours per month of occupational therapy (OT) for at that time. (FX #11)
26. 's disabilities required that the services listed in the May 2005 IEP be provided in a special education setting as the least restrictive environment (LRE). (FX # 11).
27. 's February 2008 IEP contains appropriate goals and objectives, classroom accommodations, related services including four hours per month of occupational therapy (OT) for , at that time. (FX #19)
28. 's disabilities required that the services listed in the February 2008 IEP be provided in a special education setting as the LRE. (FX # 19)
29. took the Theatre Arts 1 class in the 2007-2008 school year, a regular education class. (FX # 60, 85; TR 197-198)
30. received one to one mental retardation services fifteen hours per week for six weeks in a special education setting in the Summer of 2008. (FX # 66, 105, 106; TR pp774,783,792)
31. The services received in the Summer of 2008 were compensatory services provided to compensate for any educational opportunity that was lost for procedural violations of failing to provide prior written notice after a November 2007 IEP meeting and failing to provide progress reports as required by the 2005 IEP. (FX # 20, 100; TR pp129-131, 297-319, 332, 338, 395-397, 774, 792-793)
32. has not been found eligible under the categories of autism and visual impairment. (FX #1)
33. Ms. disagreed with the eligibility committee's finding that was not eligible under the categories of autism and visual impairment in 2006 but did not make a formal complaint for personal reasons. (TR p1092-1093; Ms. statement)
34. Ms. knows about the right to file a request for a due process hearing and has done so prior to 2006. (TR p1093-1095; Ms. statement)
35. attended School(S) for the 2007-2008 school year. (FX #49; TR pp621,624)

36. S has a comprehensive service model for students with IEPs. (TR p107)
37. suppresses the vision in his left eye and sees 20/50 in his right eye. (TR pp68-69, 488)
38. needs glasses to adjust his vision. (TR p69)
39. needs minor accommodations to ensure that he is able to see clearly and be able to conceptualize what he is seeing. (TR pp73-74)
40. The Best Buddies was a program which matched up special needs children with general education children who wanted to help them at S. (TR pp98-99,119, 206-208, 216)
41. participated in the Best Buddies Program during the 2007-2008 school year. (TR p99)
42. Ms. provided OT as a related service to in the 2007-2008 school year. (deposition p4)
43. Some OT sessions were missed in the 2007-2008 school year. (deposition p43)
44. Dr. evaluated in 2005. (T vol. 1)
45. Dr. evaluated in 2010. (T vol. 1, TR pp59-60)
46. Ms. provided speech and language services in the 2007-2008 school year to . (TR pp424-426)
47. participated in Special Olympics. (TR p99)
48. Ms. requested type services as a goal in 's IEP for the 2007-2008 school year. (FX #17, TR p698)
49. PS refused to put the goal requested by Ms. in 's IEP. (FX #17)
50. PS and Ms. had extensive communication about 's IEP in 2007-2008. (T vol. 1 & 2, TR p1292)
51. PS issued a Prior Written Notice to Ms. on February 14, 2008. (FX # 35)
52. Ms. filed a complaint with the Virginia Department of Education alleging procedural violations of IDEA by PS in January 2008. (TR p297-319. 395-397)
53. has demonstrated his ability to move through S. (TR pp133, deposition pp40-41)
54. Service providers observed appeared to enjoy the social environment and be happy at S; and he was generally cooperative with them. (FX #33, 35, 51, 54, 58, 62. deposition pp16-17, 19, TR pp 112, 119, 133, 205-206, 211-214, 217-218, 357-358, 360-363, 400-401. 425, 432, 667, 684, 745, 760-770, 1117, 1122-1123, 1128, 1135, 1302)
55. Ms. taught in the 2007-2008 school year in her class for autistic children at Ms. 's request. (TR p284, 287-288)

Application of Law

1. Did PS fail to find eligible for services in the proper disability categories and deny him services for the 2007-2008 school year?

Ms. [redacted] argues that [redacted] was denied vision services and services for autism when he was not found eligible in those categories. [redacted]'s eligibility under IDEA was reevaluated on January 11, 2006, as per the three year reevaluation cycle mandated by the act and regulations. 8VAC20-81-70 F.1.c. [redacted] was found eligible in the category of mental retardation and not in autism or visual impairment. Ms. [redacted] did not file for a due process hearing at that time or at any time prior to the instigation of this action in October 2009. Ms. [redacted] was aware of her right to file a complaint and pursue a due process hearing. Ms. [redacted] chose not to pursue the issue for personal reasons. IDEA has a two year statute of limitations. 20 USC 1415(b)(6)(B); 8VAC20-81-210 E.1. Ms. [redacted]'s complaint falls outside the two year statute of limitations period. The personal reasons for not filing a claim stated by Ms. [redacted] do not meet the statutory exceptions. 8VAC20-81-210 E.1. a & b.

During the 2007-2008 school year PS was willing to reevaluate [redacted] for eligibility. Ms. [redacted] refused to allow [redacted] to be reevaluated at that time. An LEA should not be presumed to be responsible for providing compensatory education services for lost educational opportunity which is directly attributable to the actions of the parent. Hogan v. Fairfax County School Bd., 645 F. Supp.2d 554 (ED Va. 2009). Thus any services which may have been lost in the 2007-2008 school year because of the eligibility determination in 2006 would be directly attributable to Ms. [redacted]'s failure to cooperate in permitting a reevaluation in the 2007-2008 school year.

Ms. [redacted]'s challenge to [redacted]'s eligibility is untimely and to the extent it was an ongoing cause of action it was her actions which directly blocked PS from reevaluating [redacted] in the relevant time period of this action. Therefore, the claim that [redacted] was not found eligible in the proper categories and denied services can not be sustained.

2. Did PS fail to provide services to [redacted] such as to deny him FAPE for the 2007-2008 school year?

Ms. [redacted] argues that PS failed to provide FAPE for [redacted] because it did not provide proper vision accommodations in the 2007-2008 school year. Ms. [redacted], further argues in this regard, that [redacted] was thus unable to access the educational material and was therefore denied FAPE. [redacted] has many vision issues which diminish his ability to see. [redacted] has been given many vision functional assessments and medical assessments. In these assessments it has been determined that [redacted] does have visual perception. [redacted] needs accommodations to best access educational materials. Many accommodations were provided to [redacted]. [redacted] was provided with posture improving equipment and a slant board to allow him to get a good view of materials instead of having them lay flat on a desk. [redacted] was provided materials which were enlarged and simplified to be appropriate for his level of vision. [redacted] was provided with a keyboard and computer. [redacted] was given assistance with directions and shortened instructions. [redacted] was given extended time to perform tasks and opportunities to respond orally. [redacted] was given preferential seating, frequent feed back and assistance as needed when in transition. [redacted] was encouraged to wear his glasses. These accommodations allowed [redacted] to access the educational material used in

his educational program in the 2007-2008 school year. The teachers who worked with [redacted] indicated he was able to see the material they provided for him to work with.

Ms. [redacted] relies heavily on a functional vision assessment from 2002 by [redacted]. In questioning witnesses and in arguing the matter, Ms. [redacted] misconstrues the report. Ms. [redacted] consistently puts forth the assertion that Ms. [redacted] recommended 28 point type for [redacted] to access written material. This is incorrect. Ms. [redacted] only references 28 point type once in the report and it is in the sentence, “He is able to read 18pt. print, but appears to read larger print (about 28 pt. print) with more comfort and fluency.” Ms. [redacted] also relies on this report to assert that [redacted] was found eligible by Ms. [redacted] for vision services. This is also incorrect. Ms. [redacted]’s recommendation in the report is that, “Although [redacted]’s visual acuity is best corrected to 20/60, it does appear that his near vision may be having an effect on his academic progress. For this reason, it appears that [redacted] may be eligible to receive vision services from the Vision Program.” Subsequent functional vision assessments were performed in 2004 and 2005, all done independently. Both of the subsequent assessments found that [redacted] was able to access written material and did not qualify for vision services. Ultimately, all three functional vision assessments done prior to the 2007-2008 school year found that [redacted] could see and read classroom materials. The medical assessments indicate a number of vision problems but ultimately indicate that [redacted] does have sufficient visual acuity to see written material.

The evidence presented by both Ms. [redacted] and PS demonstrate that while [redacted] has vision problems he was able to access the educational materials used to provide services in his IEP. [redacted] was not denied FAPE because of insufficient or ineffective vision accommodations at S in the 2007-2008 school year.

Ms. [redacted] argues that PS denied [redacted] FAPE because he was not provided with [redacted] method instruction. Ms. [redacted] has advocated for this methodology of teaching for [redacted] and presented evidence from the director of the Washington, DC [redacted] Center ([redacted]), Ms. [redacted], and an instructor, [redacted]. Both indicated they had seen [redacted] make progress. [redacted] was also administered many standardized tests by [redacted]. In those tests [redacted] showed very little improvement in his reading and comprehension skills. The anecdotal observations of Ms. [redacted] and Mr. [redacted] are diminished in value by the results of the testing. Ms. [redacted] and Mr. [redacted] also have a financial interest in presenting the positive aspects of [redacted] and lack any substantial credentials in the field of education beyond the [redacted] methods. Ironically, Ms. [redacted] argues on page 34 of her Closing Argument that when she finally received an IEP progress report on 1/31/2008, it showed [redacted] had made minimal to no progress on his IEP goals since 5/14/2005, a period that encompassed both periods of intensive services by [redacted].

[redacted] is not a school, has no general curriculum and only provides specialized services in its own program of sensory-cognitive training. [redacted] provides services in a one on one setting which may have some benefits in the intensity of instruction but provides no opportunity for social interaction with peers and is a highly restrictive educational environment. PS has

opposed ... as inappropriate for ... because of its limitations in curriculum and because PS personnel do not believe it is an appropriate methodology for ... given his severe intellectual disability and poor language foundation. The PS witnesses were all credentialed teachers, most of whom had a great deal of experience with special education. ... has been described by virtually all the witnesses and reports as a friendly person who seems to greatly enjoy the company of others. The isolation of ... does not foster any relationship but that with the instructor.

An LEA must offer a program which provides educational benefits but the choice of a particular educational methodology is left to the judgment of the school system. Hendrick Hudson Central School District Board of Education v. Rowley, 458 US 176 (1982); Springer v. Fairfax County School Bd., 134 F3d 659 (CA4 (Va) 1998); Barnett v. Fairfax County School Bd., 721 F. Supp. 757 (ED Va. 1989). An LEA which offers an appropriate teaching methodology does not need to offer every possible program. Barnett, supra. 's IEPs offered extensive services designed to provide him with educational benefit. PS used a variety of specialized and proven techniques in an attempt to find methods which would help make educational progress. Ms. ... would substitute her judgment for that of the school's experts and asks the Hearing Officer to do the same but that is not appropriate under the law. Courts have ruled many times that education is the province of educators and their judgment should not be disturbed simply because one disagrees with their chosen methodology. Rowley, supra; MM ex rel. DM v. School District of Greenville County, 303 F3d 523 (4th Cir. 2002); Springer, supra.; Tice v. Botetourt County School Bd., 908 F2d 1200 (CA4 (Va) 1990); County School Board of Henrico County v. RT, 433 F. Supp. 2d 657 (ED Va 2006); Barnett, supra. ... has not been denied FAPE because PS personnel believe ... is inappropriate for ... and have disagreed with Ms. ... 's insistence that such services must be provided.

Ms. ... argues that ... has been denied FAPE because he is autistic and was denied services to treat the syndrome. ... has never received a diagnosis of autism and none was presented in the evidence. Ms. ... bases this claim on the report of Dr. ... from 2005. In the report Dr. ... makes a diagnosis of:

“AXIS 1 1. Dementia Due to Specific Medical Condition (Global Neurocognitive Deficits secondary to Downs Syndrome/Static Encephalopathy)
A. Pervasive Developmental Disorder Not Otherwise Specified
(Atypical Autistic Spectrum Disorder/Characteristics Co-Existing With Moderate Mental Retardation)” (PDD/NOS)

Ms. ... supplements this with observations of ... fidgeting and making finger motions. Dr. ... 's diagnosis is based upon the same observations, noting that the self stimulating behaviors raise a question regarding co-existing PDD/NOS. Dr. ... 's diagnosis of PDD/NOS is suspect since in the body of the report his analysis is that the behaviors which cause him to believe there may be PDD/NOS only raise a question. Additionally, Dr. ... is the only professional to reach the conclusion that ... is only moderately mentally retarded. All others have found him to be functioning in an extremely low range. Yet, Dr. ... concludes

that [redacted] is “trainable” but not “educable.”

PS personnel have consistently found [redacted] as not meeting the criteria for autism. Many of the people who have worked with [redacted] have noted his self stimulating behavior, however, almost universally they encountered the behavior when [redacted] was idle between tasks. Even Mr. [redacted] made this same observation. None of the [redacted] PS teachers that worked with [redacted] made any indication that his fidgeting or finger movement behaviors in any way interfered with his education. Ms. [redacted] has stated that if [redacted] had been found autistic he could have received ABA services (applied behavioral analysis method for teaching autistic children). Ms. [redacted], however, presented no evidence which made any showing that ABA services were appropriate for [redacted]. At Ms. [redacted]'s request [redacted] was placed in the class for autistic children at [redacted] S with Ms. [redacted] as his teacher for the 2007-2008 school year. The class consisted of three students where [redacted] got a great deal of attention and individualized instruction. Thus [redacted] was provided with services which were used for autistic children and further individualized for him. [redacted] S maintained a comprehensive service model for students with an IEP. Thus once [redacted] was found eligible, services were based upon his individual needs rather than any particular category. [redacted] appears to enjoy social contact, a characteristic unusual in autistic children, making programs like [redacted] which isolate the child of questionable value for [redacted]. Ms. [redacted] has not demonstrated that [redacted] was deprived of any service which was necessary to make educational progress related to autism. [redacted] was not denied FAPE on the basis that he was denied autism or services.

Ms. [redacted] argues that [redacted] was denied FAPE because the Theatre Arts 1 class that he took was not adapted to his educational level as required by the February 28, 2008 IEP. The February 28, 2008 IEP contains a page for Curriculum/Classroom Accommodation and Modifications. In this section “other” is marked and written beside it is, “modified instruction in all of his classes.”

Theatre Arts 1 was taught by Mr. [redacted] in the 2007-2008 school year at [redacted] S. It is a general education class which had approximately 30 to 32 students. [redacted] took the class from September 2007 through the end of the school year and received a grade of A for the year. Mr. [redacted] indicated that he graded the students based upon them performing to the best of their ability. His impression of [redacted] was that he enjoyed the class, understood what was expected of him, participated and met the daily goals of the class. [redacted] had a friend in the class who was associated with [redacted] through the Best Buddies program at [redacted] S. [redacted]'s Best Buddy assisted at times keeping [redacted] on task. At other times Mr. [redacted] checked on [redacted] to make sure he was on task and understood what he was supposed to be doing. The class frequently worked in small groups preparing various aspects of larger projects. Mr. [redacted] indicated that [redacted] did not need any additional modifications to participate in the class and that he was as involved as the other students.

Ms. [redacted]'s assertion that it could not have been possible for Mr. [redacted] to adapt his class to meet [redacted]'s needs without an aide is just argument with no support in the evidence. Mr.

presented as a sincere and dedicated teacher with many years of experience. He seemed genuinely pleased to have had [redacted] as a student and presented a credible account of [redacted]'s participation in the drama class. This class provided [redacted] with a rare opportunity, given his intellectual disabilities, to mix with general education students at [redacted] S in an educational setting. The evidence indicates [redacted] enjoyed the social interaction and was able to work on communication skills in a mainstream environment. The evidence does not demonstrate any denial of FAPE because of the manner in which the Theatre Arts I class was taught to [redacted].

Ms. [redacted] argues that [redacted] was denied FAPE because [redacted] PS speech therapy services are inadequate. Ms. [redacted] bases her argument on the testimony and evaluation of Dr. [redacted]. Dr. [redacted] testified that he prepared his evaluation in 2010 and had nothing to do with the 2007-2008 school year. The formation of an IEP can not be reviewed with hindsight and must be viewed with the information available at the time. County School Bd. of Henrico County v. RT, supra.

The February 28, 2008 IEP called for six hours of speech and language services per month as a related service. Ms. [redacted], a highly qualified speech pathologist, provided the services using a word study approach. The word study approach is an accepted form of teaching in the field and Ms. [redacted] indicated [redacted] made progress during the 2007-2008 school year.

PS was entitled to select a methodology for speech services so long as it was designed to provide educational benefit. Barnett, supra. [redacted] was entitled to services which were designed to give some educational benefit and not necessarily what is best. Rowley, supra. Even if there are other services which might help [redacted] the school is not obligated to provide every option. Barnett, supra. The evidence does not show that [redacted] was denied FAPE because of inadequate speech therapy.

Ms. [redacted] argues that OT services were not provided as designated in [redacted]'s IEP and failed to address his visual motor integration deficits. Both the May 2005 IEP and the February 2008 IEP contained provisions for four hours per month of OT services as a related service. Ms. [redacted] provided OT services to [redacted] in the 2007-2008 school year. She admits in her deposition testimony that some time was missed in providing OT sessions.

PS exhibit number 57 is a calendar which notes service dates and times. The calendar shows sessions missed because of student absence and school closings as a result of bad weather. The calendar does not show how weeks or months are calculated nor does it show what days are holidays, teacher work days when students are excused or even when school started that year. The notations of time spent on services do verify Ms. [redacted]'s testimony that OT sessions were missed because the amount of service time noted is significantly less than that called for in the IEPs. Comparing the therapist's notes with the calendar there are some inconsistencies but generally the documents match up fairly well to indicate the time spent on services. There was no evidence which presented a clear picture of the services missed. Time spent on services was noted in minutes per session and not in hours per month. PS admits services were missed in its closing argument but presents no calculations and points to no evidence for a total. Ms. [redacted]

argues services were missed but presents no calculations and points to no evidence for a total.

Working from the documents, this Hearing Officer estimates the missed services as follows:

IEP calls for 4 hours per month of services which translates to 60 minutes per week. 40 weeks of school times 60 minutes per week of services equals 2400 minutes of services for the school year (also attends ESY). Services provided equals 1285 minutes. Services missed because of absences and weather equals 420 minutes. Total minutes of service missed equals 695.

Total minutes per IEP	2400
Services provided	(1285)
Services missed (not school's fault)	<u>(420)</u>
Services missed (school's fault)	695

Converting minutes back to hours to compare with the IEP; 695 divided by 60 equals approximately 11.6 hours out of 40 missed.

Ms. has requested compensatory services and PS does not pose much of a protest to this request but rather argues for the manner in which services should be provided. Compensatory services may be appropriate under IDEA to compensate for a past deficient program. G. Ex rel. Rg v. Fort Bragg Dependent Schools, 343 F.3d 295 (4th Cir. 2003); Hogan v. Fairfax County School Bd., 645 F. Supp. 2d 554 (ED Va 2009). Compensatory education may be provided when there is a failure to implement an IEP. Hogan, supra. While, 's IEPs for the 2007-2008 school year were reasonably calculated to enable him to receive educational benefit, failure to provide the enumerated services could deny him FAPE.

In 2004, was evaluated for OT services by PS. OT services were recommended and subsequently written into his May 2005 IEP. The 2004 evaluation noted that needed OT for written work, task behavior/completion and safety. was evaluated for OT services in September 2005 by Good Beginnings. The 2005 evaluation recommended OT services to help functional skill development. In December 2007, PS did an OT progress update, noting continued to qualify for OT services without further testing. In January of 2008, a progress report on shows he had deficits in handwriting, tying his shoes, identifying dangerous situations with hot and cold water, areas previously identified as needing OT services. was evaluated for OT services in March of 2010 by PS. continues to show significant deficits in motor and process skills. OT services were recommended for to help him develop useful functional skills and work related behaviors. These evaluations and reports show a consistent pattern of need for OT services to enable to develop functional life skills which will allow him to operate with greater independence in his educational environment and the outside world. A deficiency in the PS program is measured by its own 2008 progress report. The report shows at the middle of the school year, in which the services were not provided in full,

failed to perform well in the specific areas of need which had been previously identified. This failure to provide services is a denial of FAPE. A denial of FAPE can make compensatory services an appropriate remedy. Hogan, supra. Because of [redacted]'s ongoing need for the services he did not receive, compensatory services are an appropriate remedy.

An award of compensatory services must consider the child's circumstances and not simply apply a formula which allocates the number of missed hours of services quid pro quo. Hogan, supra. [redacted]'s evaluators have consistently recommended OT services which would provide him with functional skills. This is an area of continuing need for [redacted] and will serve him both to promote academic education and practical life skills.

3. Did PS fail to provide services to [redacted] in the least restrictive environment for the 2007-2008 school year?

The purpose of IDEA is to provide FAPE to disabled children in the least restrictive environment. School Bd. Of Prince William County Va. v. Malone, 762 F2d 1210 (CA4 (Va) 1985); Hogan, supra.; Barnett, supra. The least restrictive environment provision of IDEA is not an absolute duty but rather one consideration in the formulation of an appropriate IEP. Barnett, supra. PS placement for [redacted] in the 2007-2008 school year was at S. S is a mainstream public high school which provides educational services to general education students and special education students when appropriate. PS felt S was an appropriate placement for [redacted] because it could provide the services designated in [redacted]'s IEP in a mainstream environment.

[redacted] demonstrated that he could maneuver through the school building, go up and down stairs and deal with the "hubbub and the crush of the students in the hall" ([redacted] p41). [redacted] was able to participate in an adapted physical education program which allowed him to interact with non-disabled children in the educational setting of S. [redacted]'s physical limitations did not require a more restrictive placement than S.

[redacted] had opportunities available to him at S which he might not have in a more restrictive environment and certainly would not have at [redacted] or in homebound services. [redacted] was able to participate in the Best Buddies Program which matched him up with a non-disabled student who assisted and interacted with [redacted] in a variety of educational settings. [redacted] was also able to participate in Special Olympics. The school does not have to offer every possible option for extra curricular activities or modify every program to suit the needs of one student. Barnett, supra. [redacted] was provided with many opportunities to interact with non-disabled students.

Ms. [redacted] suggests that S is not a proper placement for [redacted], because he came home in a sullen mood at times during the 2007-2008 school year and suffered stress there. The evidence does not support Ms. [redacted]'s theory. [redacted] was observed to enjoy the social interaction available at S. [redacted] appeared happy at most times and was a willing participant in many

activities the school had to offer.

Because of [redacted]'s severe intellectual disability and physical disabilities many of the educational services in [redacted]'s IEP needed to be provided in special education classrooms. The specialized nature of [redacted]'s educational program was inconsistent with most general education programs, however, [redacted] was able to participate in the Theatre Arts 1 class, a general education elective. [redacted] was able to interact with general education students in this class and participate to the best of his ability for which he received high marks. IDEA's least restrictive environment provision was met by this mix of special education settings and general education settings at S for the 2007-2008 school year.

4. Did PS violate the procedural requirements of IDEA in the 2007-2008 school year such as to deny [redacted] FAPE?
 - A) By failing to provide prior written notice of a denial of requested services?
 - B) By failing to provide progress reports in the 2007-2008 school year?
 - C) By putting Ms. [redacted]'s signature on an Individual Education Plan (IEP) for Summer 2008?

IDEA provides numerous procedural safeguards for parents of children with disabilities. Rowley, supra.; Burke County Bd. Of Ed. v. Denton, 895 F2d 973 (CA4 (NC) 1990); Hall by Hall v. Vance County Bd. Of Educ., 774 F2d 629 (CA4 (NC) 1985); AK ex. Rel. JK v. Alexandria City School Bd., 409 F. Supp. 2d 689 (ED Va 2005); Prince William County School Bd. v. William T. Hallums, et al., (Record No. 02-1005-A, US Dist. Ct., ED Va. (Lee) 2003). A procedural violation of IDEA can be sufficient to deny a student FAPE. Rowley, supra.; Hall, supra.

A. On November 2, 2007, PS proposed an IEP for [redacted]. Ms. [redacted] rejected the IEP because she wanted a goal included which provided [redacted] type instruction. PS was unwilling to put this goal into the IEP. Discussion over [redacted]'s IEP continued, as it had for years since Ms. [redacted] agreed to an IEP in May 2005 and PS requested the IEP team meet again. Numerous emails were exchanged between Ms. [redacted] and PS about the IEP over the next few months. Included in the emails was a demand from Ms. [redacted] to know why PS would not include the goal she wanted. In January 2008 Ms. [redacted] filed a complaint with the Virginia Department of Education (VDOE) alleging procedural violations including failure by PS to issue a prior written notice (PWN) as required by the regulations. On February 14, 2008, PS issued a letter constituting a PWN. On February 28, 2008, an IEP was agreed to in part by Ms. [redacted] which did not include the goal she had requested. The regulations require that a PWN shall be given within a reasonable time before an LEA refuses to change the provision of FAPE for a child. PS was unwilling to put Ms. [redacted]'s proposed goal in [redacted]'s IEP and was aware of the demand, relative to the IEP, in November 2007. PS did not issue PWN even upon Ms.

's demand because it felt the IEP process was still going on. While, the IEP process was still going on, it was PS obligation under the regulations to issue a PWN when it would not accept her goal and had no intention of doing so, within a reasonable time. What constitutes a "within a reasonable time" has never been specifically defined, intentionally, to allow flexibility for individual circumstances. The evidence does not indicate that PS ever intended to issue the PWN and planned to continue to try and negotiate an IEP as it had been doing since 2005. Only when Ms. filed her complaint with VDOE did PS decide to issue a PWN. Thus waiting from November 2007 to February 2008 to issue the PWN is not within a reasonable time.

PS committed a procedural violation by not issuing the PWN close in time to when it decided to refuse to make the changes to the IEP goals Ms. wanted.

B. 's 2005 IEP contains form language at the bottom of every annual goal section which reads, "A copy of this form, indicating the student's progress toward this annual goal will be reported to parents at regular scheduled PS reporting periods. The progress codes are: M The student has met the criteria for this goal..." PS admits it deviated from using the standard form in 's case. PS provided teacher narratives of 's progress in Autumn 2007.

PS justifies this action on the basis that 's IEP was so out of date by the time he was at S that the narratives provided much more detail and accurate information than the standard form would for out dated goals. These reports were not sent with the regular report cards. Scrutiny of 's educational progress was intense during Autumn 2007 and was routinely evaluated but not on the standard form. In January 2008, Ms. filed a complaint with VDOE alleging procedural violations including failure by PS to produce progress reports as required by the regulations. In January 2008, PS began using the standard form and codes to report 's IEP progress. The regulations state that an IEP shall contain a statement:

When periodic reports regarding the child's progress toward annual IEP goals must be provided; (1) The child's progress toward the annual IEP goals must be reported at the end of each nine weeks marking period or unless otherwise specified by the student's IEP. (8 VAC 20-80-62.F.7.b.)

's IEP does contain a statement which complies with the regulation as above noted. PS was permitted to design its own reporting requirement under the regulation as long as it was specified in the IEP. This is what PS has done using a standard format for IEPs. It is clear from the evidence that PS did not comply with the reporting provision it designed and placed in 's IEP. This, however, is not a procedural violation of the regulations which only require the statement be in the IEP but rather a substantive violation for failing to provide what is required by the terms of the IEP.

C. 's Summer 2008 IEP is signed by Ms. . Her allegation that someone put her signature on the document is unsubstantiated. Ms. signed the document on April 17, 2008.

PS continued to discuss the IEP with her. An additional IEP meeting was held in June 2008. In that meeting the IEP was adopted in final form and the signed page from the April 2008 meeting was used. IEPs frequently contain pages generated from different meetings and different

dates. Ms. [redacted] effectively affirmed her signature when the IEP was adopted. Ms. [redacted] cites no regulation which has been violated by this procedure.

A procedural violation must seriously infringe on a parent's opportunity to participate in the IEP process or result in an actual loss of educational opportunity to deny a student FAPE. Rowley, supra.; Denton, supra.; AK, supra.; Hallums, supra. Neither can be said of the procedural issues raised in this matter. Ms. [redacted] was steadily involved in the process of developing [redacted]'s IEP. Failure by [redacted] PS to issue her a PWN in no way prevented her from participating in the development of the IEP which she agreed to in February 2008. The almost constant stream of communication between her and [redacted] PS shows her involvement. Her agreement to the IEP, which did not contain the goal she wanted the PWN about, shows that the delay in delivery of the PWN until approximately two weeks before the February IEP meeting ultimately had no effect on the outcome. [redacted] received the same services in the 2007-2008 school year he would have received even if Ms. [redacted] had gotten the PWN in November 2007.

Not receiving a form progress report for the first quarter of the 2007-2008 school year did not prevent Ms. [redacted]'s involvement in the IEP process. She participated in the process and steadfastly insisted on the goals she wanted in the IEP throughout this time period regardless of how [redacted]'s progress was measured. [redacted] PS narrative method of reporting [redacted]'s progress did not alter the services that were provided to him in the 2007-2008 school year.

Ms. [redacted] participated in the process of developing the Summer 2008 IEP. The services in the IEP were provided. Ms. [redacted] claims these services were not effective and that she had wanted the [redacted] reading program for [redacted]. A review of the IEP reveals that the plan calls for 15 hours of "MR" services. A specific reading program is not specified. The evidence showed that some [redacted] strategies were used as part of a program adapted specifically for [redacted]. The evidence also showed that services were provided in a one on one setting and [redacted] received some educational benefit from the services. As previously discussed in this decision teaching methodology is determined by the educators. Ms. [redacted]'s preference for the [redacted] method did not override [redacted] PS choice of methodology for providing MR services. [redacted] PS choice to use alternative methodology did not deny [redacted] FAPE in his educational program for the Summer of 2008.

Conclusion

Ms. [redacted] has the burden of proof in this matter and presented a large body of evidence which details the vision and motor skills deficits [redacted] has. However, ultimately, with accommodations, [redacted] is able to access his educational materials at [redacted] S. [redacted] is able to see his worksheets, keyboards, computer screens, manipulatives, food, clothing and structures. [redacted] is able to find and move objects, move through the school building and classrooms and participate in physical activities. [redacted] needs accommodations for his vision and motor skills deficits. Thus, [redacted]'s vision and motor skills deficits play a role in [redacted]'s educational needs and related services are appropriate. These are available to him at [redacted] S.

s physical deficits, however, are not his primary disability. has a severe intellectual disability which significantly limits his ability to participate in the general education program at S. requires a special education program to make educational progress.

PS have properly categorized as intellectually disabled and addressed this disability in his IEP. PS have not overlooked any of 's areas of disability. The record shows extensive review of all areas of both physical and intellectual capability. Ms. 's vigilance in pursuing testing and evaluations for has "left no stone unturned." PS has considered her requests time and time again. Viewed in a broad picture, what becomes apparent is that PS and Ms. simply disagree in objectives and methodologies for educating .

Ms. has an ambition for to perform office work. Therefore, it is necessary for him to reach a fairly high level of reading, writing and communication skills. These skills are the focus of the education she wants for . Ms. has pursued this objective for many years and believes services will allow to achieve this level of success.

PS maintains that needs to concentrate his education on practical life skills which will help him become more independent. Reading and writing are a component of these skills but PS has sought a broader approach which includes learning everyday tasks, social communication and vocational skills PS programs such as WAT and CBI offer these opportunities in addition to special education in academic subjects.

Ms. and PS have been in conflict over how to properly educate for many years. It is a fundamental difference of opinion which they have not been able to resolve even with many attempts at resolution and mediation. The conflict has resulted in this due process procedure. Ms. requested a due process hearing open to the public thereby waiving any privacy concerns.

Having found PS failed to provide FAPE in regard to the provision of OT services in the 2007-2008 school year and it being appropriate to correct the deficiency in 's educational program with compensatory services I find it is appropriate for PS to provide with 12 hours of compensatory educational services. I find these compensatory services should be OT services which provide with functional skills in his areas of need. I find that needs to learn skills which will facilitate his ability to perform routine daily tasks, vocational endeavors and basic educational tasks such as using tools (ie: pencil, paper, hole punch, binders, etc.). I find that should be provided these services in the least restrictive environment which is appropriate for him. I find that environment is S. I find that should have these services provided in an environment which provides with the opportunity to use these services in a practical and social setting, not in isolation from other students. To achieve this objective I find that the compensatory services should be rendered during the 2010-2011 school year when other students are attending S.


ORDER

IT IS HEREBY ORDERED that Public Schools shall provide with twelve (12) hours of compensatory services in accord with the above findings. All other requested relief is denied.

Right of Appeal Notice

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.

June 11, 2010
Date


Frank G. Aschmann, Hearing Officer