

AUG 24 2007

Dispute Resolution &
Administrative Services

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

CASE CLOSURE SUMMARY REPORT

Public Schools

School Division	Name of Parents
8/20/07	
Date of Decision	Name of Child
John Cafferky	Ellen Douglas Dalton
Counsel Representing LEA	Counseling Representing Parents
Alan Dockterman	Parents
Hearing Officer	Party Initiating Hearing

Hearing Officer's Determination of Issues: District not provide FAPE: procedural violations render IEP deficient for 2006-2007 school year. Child entitled to compensatory education at private school for 2007-2008 school year. See decision of 8/20/07.

Hearing Officer's Order and Outcome of Hearing: Parents prevailing party. District required to fund placement at _____ School and pay for or provide transportation to school. See decision of 8/20/07.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing.

8-21-07
Date

Alan Dockterman
Alan Dockterman

Received

AUG 24 2007

**Dispute Resolution &
Administrative Services**

COMMONWEALTH OF VIRGINIA:

DUE PROCESS EDUCATIONAL APPEAL

&)
)
Appellants)
)
) In re:
)
PUBLIC SCHOOLS)
Respondent)

DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

Public Schools (PS) received a request for a due process hearing from Ellen Douglas Dalton, Esq. counsel for the parents of , and , on June 4, 2007. They appealed the decision of the committee established by PS that proposed a placement within the school system as part of the individualized education plan (IEP) for .

The parents objected to the placement based on the manner in which it was decided as well as its failure to provide with the education or services she needed. A hearing was scheduled to determine whether the placement was appropriate, and, if not, what relief would be appropriate.

I was appointed as the hearing officer from a list supplied by the Supreme Court of the Commonwealth of

Virginia and certified by the Virginia Department of Education. John F. Cafferky, Esq. represented PS; Ms. Dalton and Jessica M. Smith, Esq. represented the parents. Thirteen witnesses, one of whom was examined via the telephone, testified. PS also examined one witness by *de bene esse* deposition videotaped on July 25, 2007, which I subsequently viewed.

On June 19, 2007, a pre-hearing conference was conducted in my offices. The order of witnesses, issues in the appeal, exploration of settlement, and procedures for the conduct of the hearing were among the matters discussed. (See letter of June 20, 2007). We also rescheduled the date for the hearing to commence from August 7, 2007 to July 31, 2007. A Prehearing teleconference took place on July 24, 2007.

The parties participated in a resolution meeting but were unable to settle their differences. The parents declined mediation in their request for a due process hearing. Ms. Dalton stated that her clients decided that the hearing should be private.

The hearing began on July 31, 2007 in room 301A/B of the Education Center located at VA and concluded on August 3, 2007.

The parties elected to submit post hearing and reply briefs in lieu of closing arguments at the hearing. They had also already provided memoranda in conjunction with prehearing issues, which they had resolved without my intervention. I issued subpoenas without opposing counsel objection and the parties timely filed their exhibits and list of witnesses.

References in this Decision refer to the transcript for each of the four consecutive days of the proceedings.

(TRI-IV). The transcript for the final day of the hearing was delivered on August 13, 2007. The parents filed eighty-four exhibits and PS filed ninety-two exhibits. References to those exhibits are identified as those from PS (A.) and those from the parents ().

II. FINDINGS OF FACT

The following represents findings of fact based upon a preponderance of evidence derived from the testimony of the witnesses and the documents admitted into evidence. Additional findings will be found in other portions of this decision.

A. Factual Background Prior to Preparation of 2006 IEP and Early Diagnosis of 's Disability.

was born in Russia on May 1, 1996. She was adopted by Dr. and Mr. at approximately five months of age. Little of her medical history in Russia is known, though at birth she weighed only about four and one-half pounds. (.1,7; .19; TRI-57). Numerous educational professionals found to be an unusually sweet, friendly, and cooperative child (See, e.g., Exh.92, p. 71; TRIV-1157, 1225).

began kindergarten at her neighborhood school in , VA, Elementary School, in the fall of 2001. When did not pass the speech/language screening established for kindergarten students, she was evaluated for special education services. (.1). According to the diagnostic educational evaluation conducted during kindergarten, 's verbal IQ score placed her in the low

average range and her performance IQ in the bottom of the low average range. She was described by staff as impulsive, distractible, inattentive, and hyperactive. (.1). On February 15, 2002, a special education eligibility committee concluded from the assessment information that she had a disability requiring a special education program and related services. The committee determined that the disability was "other health impairment/developmental delay." (.1).

The first IEP was developed for in the spring of 2002. On March 20, 2003, another IEP was prepared. The IEP team found that was working at grade level in math and reading, with strengths in computation skills, reading (decoding) and gross motor skills, and with weaknesses in written language (formation of letters, process), attention and social interactions. (.8, p.2). On December 16, 2003, the team modified the IEP by deciding that math, reading and writing would be provided in the pull-out setting, with science, social studies and health remaining in the general education classroom. (.8).

Dr. , a special education consultant with a doctorate in special education with special emphasis on learning disabilities, prepared a diagnostic education evaluation on February 4, 2004 (. 3; TRI-191). At that time, the parents were investigating transferring to a private general education school. Dr. advised against transfer, concluding that would be a more appropriate placement. (TRI-195-197). She recommended full-time special education. (.3).

During 's second grade year, the IEP committee met on June 17, 2004 and developed an IEP for the next school year. They noted that as the school year had

progressed [redacted] needed more support to stay on and complete tasks and to understand new concepts. She worked in such a rapid fashion that she was unable to assimilate what she read or follow necessary steps for solving math problems. She had serious problems in identifying social cues and in forming friendships with her peers. (.9, p.2). This IEP set one hour each of occupational therapy, speech therapy and social skills per week. It also provided for seven and one-half hours of language arts and five hours of math in a special education setting. (.9, p.1). As in the first grade, [redacted] had difficulty relating to her peers and exhibited a high level of anxiety. (TRI-63-65).

In reviewing her records, Ms. [redacted], a special educational coordinator for [redacted] PS who had been involved with multiple IEPs for [redacted] and had extensively discussed her educational situation with teachers and other staff members, concluded that at that time she had been making educational progress. (TRIII-639, 649-650). She relied on report cards and teacher comments as well as notes in the progress reports, the progress goals and the objective updates in the IEP. (TRIII-652-660; .9).

On October 7, 2004, the parents obtained a comprehensive neuropsychological evaluation from Dr.

[redacted], a licensed psychologist and pediatric neuropsychologist at the Children's National Medical Center in Washington, D.C., because of their growing concern about [redacted]'s anxiety, ability to make friends, and failure to focus on and complete school work. Dr. [redacted] diagnosed her as having a nonverbal learning disorder. She concurred in a prior diagnosis of attention deficit hyperactivity disorder, which fit [redacted] because of her impulse control deficits. (TRII-400, 403). She found that [redacted] had

significant weaknesses in executive function, including focusing attention, inhibiting impulses, organizing and holding information in her working memory, and responding flexibly. She struggled with visual-spatial skills and with those tasks involving organizational abilities. She also demonstrated weaknesses in social cognition relating to missing social cues and the normal exchanges in conversation and body language. (TRII-400-403; .7, p.6).

's strengths included strong support from her parents, ability to learn through small chunks of information, verbal knowledge, her eagerness to please, and her desire for social interaction. (.7, p.6). In the educational setting, she was at particular risk of becoming over-stimulated and overloaded with complex material and situations, resulting in her becoming anxious and inattentive. Reading comprehension, math, and written expression needed to be taught in a "highly structured and routine way with specialized attention," according to Dr. . (.7, p.7).

Her problems in interaction with other children needed to be addressed initially in a one-to-one setting targeting discrete skills first with a supportive adult and then with one other peer, branching out slowly to group settings as she learns social skills. (.7, p.7).

Dr. made a recommendation on school placement. She determined that 's learning disability and social needs were so "severe and pervasive" that she needed education in a small contained classroom with peers of her intellectual level and with a small student-teacher ratio. (.7, p.7). She recommended placement in a self-contained pulled-out classroom where she would not be with general education kids during the day. Social skills and

executive functioning were to be integrated into the curriculum throughout the day. (TRII-404).

Dr. _____, PS psychologist, prepared a psychological report on September 27, 2004. She reported that _____ "exhibited significant deficits in her social/emotional functioning" and appeared oblivious to much of what was occurring around her. She was not interested in or able to relate to her peers. Dr. _____ thought she had many attributes which would suggest that she might fall within the autism spectrum. On the Wechsler Intelligence Scale for Children, she did well on verbal thinking and reasoning tasks, but poorly on visual perceptual skills and memory tasks. She further stated that although the scores indicated she had normal intellectual potential, she was not functioning at that level in academic skills or productivity. (.5).

In November of 2004, _____, Speech-Language Pathologist for PS, noted that _____'s spoke at a rapid rate, which was difficult to understand. She had receptive and expressive language skills in the low average range compared to her peers. (.8).

The IEP committee met again at the end of _____'s third year at _____ to formulate an IEP for the period of June 23, 2005 to June 23, 2006. (.10, p.34). The present level of performance described in the IEP many of the same problems recognized in the prior IEP and in Dr. _____

_____ 's report. (.10, p.1). It continued the breakdown of special and regular education services from the IEP for the prior year.

_____, _____'s special education teacher at _____ for first grade, the second half of second grade, and third grade, provided background with regard to

's early education. During third grade, received between fourteen and one-half and fifteen hours of special education of the thirty hours of instruction per week (TRIV-1224-1228, 1257-1258). Various staff members worked with on her social and peer needs, with frequent communication between the school and the parents. (TRIV-1231-1234). Ms. testified that had made steady progress in third grade, seemed happy, and interacted appropriately with peers and adults. She believed that had been placed in an appropriate educational program. (TRIV-1240-1245,1247).

Dr. observed in her classroom during two occasions in May of 2005. She wrote that generally did not socialize, acted passively, failed to interact with other children, and did not seem to know how to relate to them. (.10). Mr. testified that her baseline study was not provided to them at the May IEP meeting (TRI-68-70). The Special Education Review Committee (SERC), with whom the parents had met after they felt that the program had not been working, followed her recommendations.

staff told SERC that was a normal third grader, yet also said that they had assigned her a full-time aide even though it was not in the IEP. (TRI-71, 74-76). The parents objected to the aide because they believed it annoyed and further isolated her. They also considered the placement inappropriate because her special education class of three students had one physically disabled student and another mentally retarded student. (TRI-72-74).

Dr. and Mr. decided to transfer to Elementary School under a discretionary pupil placement process, also known as an instructional transfer.

, her younger sister who had been attending , transferred as well. (TRI-76-77, 147; TRIII-986-987).

Fourth grade for at began well, but by winter break, she was completely shutting down. According to Mr. , she had no friends in the neighborhood, at , or from . (TRI-89-90).

In October of 2005, took the Degrees of Reading Power (DRP) test which measured reading comprehension. She received a "36", which was at a 3.1 grade level and substantially below the nationwide average for a fourth grader of 45. (.25; .27, p.4). This result contrasted with her score of "34" in April of 2004, when her instructional level was placed slightly higher than the average of 32 for second graders. (.33). had passed Virginia's standard of learning tests at the end of third grade except for English which she barely missed passing, but did not pass the reading and mathematics tests for fourth grade. (TRIII-750-752, 926-927, 953-954; TRIV-1239).

was 's special education teacher and case manager at for fourth grade. He testified that the staff provided greater support for social skills than the one hour a week contained in the IEP (TRIII-869). She was working on grade level in science, social studies and reading, somewhat lower than grade level in math, and well below grade level in reading. He concluded that made educational progress and improved her social skills during the year, participating in an appropriate program for her. (TRIII-898-901, 906-908, 914; .10, .25). His conclusion was supported by the testimony of the special education coordinator at , Dr. . (TRIII-980-981).

was often late to school; in the fourth quarter she was absent ten times and tardy twenty-nine, though it did not adversely affect her progress. (TRIII-901-904; .25). Mr. rendered the opinion that the program at was appropriate and was making progress. On July 18, 2006, he prepared a teacher narrative basically setting forth his views that she had made educational progress for submission to SERC. (.25; TRIII-928-929).

On November 28, 2005, the team met to revise the IEP, resulting in receiving one and one-half hours of language arts and two hours of work habits instruction in the general education classroom. The team's recognition of her high level of anxiety, weak executive function, and low reading comprehension did not vary markedly from prior years. (.11, p.28; TRIII-882). The revised IEP extended the program until November 28, 2006. (.11, p.30).

On February 5, 2006, Mr. sent Ms. , the principal at , a letter outlining the parents' concerns. Tardiness had become an issue, occasionally vomited from her distress about school, and her anxiety level had never been higher. He argued that the curriculum was inappropriate for non-verbal learning disabled students such as . The letter also offered a number of concrete suggestions to improve 's educational performance. (. 36).

On February 7, 2006, Ms. sent an e-mail to Dr. , Assistant Superintendent for PS, stating that though and were "thriving," the parents were rude and appreciated little of the accomplishments of 's teachers. (.37). The record also includes an e-mail from Ms. to Mr. sympathizing with his having to respond to the minutiae in the parents' e-mails

and stating that she refused to support any new IEP. (. 38).

On March 27, 2006, the parents sent Ms. another letter asking that be placed in a regular classroom for all her classes. They wrote that had to "interact with too many people and to move around to too many rooms, which...[contributed] to her anxiety." (. 41; see also . 36). They also complained that she was not being educated with her peers in the special education classroom.

On April 5, 2006, Ms. set up a meeting with Mr. in response to his request for another IEP meeting. (. 42). At the meeting, she told the that she wanted the children to leave the school the following week, stating that all they did was criticize the school, (TRI-91-93, 147) and that the relationship had broken down. (TRI-311-312). Ms. exercised her right as the principal to insist that the parents transfer their children to another school. (TRI-309). finished the school year there, however. (TRI-147,339).

B. 2006 IEP Process

1. June 8, 2006-October 18, 2006 IEP meetings.

The first of a series of IEP meetings began on June 8, 2006 and eventually the conferences extended to 25-30 hours. (TRI-93, 331-332). At the first meeting, PS staff questioned whether was properly classified and said they believed she should be classified within the Autism Spectrum Disorder Syndrome (ASD). (TRI-93,316). The participants also discussed present levels of her performance and goals. (TRI-98; TRIIII-993).

Another meeting was held on June 20, 2006, at which they resumed their discussion of the levels of performance, obtained background information from 's fourth grade general education teacher, and began a determination of goals for . (TRIII-674-678).

The IEP team reconvened on July 10, 2006. At the meeting the parents and Dr. were joined by Dr. , who has a PH.D in program development and special education, with thirty years of experience in special education; , who has a masters degree in special education and was the director of special education for PS from October of 2004 to August of 2006; and , who has been a special education coordinator for thirteen years at PS, is now the coordinator for , and has a masters degree in special education. (TRI-306-308,381; TRIII-639, 644, 671-674, 970-972).

The committee began by reviewing the present level of performance and 's goals. (TRIII-679). Then the committee moved to discussing 's placement. According to Dr. , Dr. gave an impassioned speech, "about poor ," and about how she needed a private placement. (TRIII-995). Ms. recalled that after five hours of discussion in which only Ms. had lunch, she and the parents left the room. Mr. testified that Dr. recommended that the parents leave the room with her so that PS could confer privately.

Ms. testified that she told the other two staff members that they should try and build a consensus. Ms. stated that Ms. had said that they needed to present a united front and needed to do something

for the child. They agreed they could support private placement and when the parents and Dr. returned, the three staff member informed them of their decision. (TRI-318-322, 336; TRIII-684-685). Dr. felt that did not need private placement but felt pressured by Ms. to go along with the group. (TRIII-995-996). When the meeting reconvened, according to Mr. , Ms. said that they had tried everything without success. Ms. observed that if were retained, she would have to make successive transitions, first to then to middle school for the following year. It would therefore be preferable to get situated in the same school for the next few years. (TRI-99-101). Ms. did not recall but did not deny Ms. 's testimony that she had said that she would concur with whatever Dr. and Ms. decided. Ms. also admitted that she had told the parents that could benefit from a private placement. (TRIII-728-730) The placement continuums had been discussed at the meeting (TRI-112-113, 322), and the services and least restrictive environment page (.13) had been filled out but not discussed. (TRIII-682-684).

Ms. testified that Ms. was her supervisor and she felt she was "really in a rock and a hard place at that point because, first of all, when your immediate supervisor is-I was feeling pressured, and I just, I caved at that point," (TRIII-685-686), and had allowed herself to be "steered." (TRIII-733). In support of contract placement, Ms. noted that would be transitioning back to for only one year and then need to transition to middle school, which, Ms. agreed, would be a lot of major transitions for

. Ms. stated she felt bad soon afterward and was conflicted because she believed she always tried to do what was in the best interests of the child. (TRIII-686-687).

The team member also discussed the need to refer the matter to SERC. Ms. testified that referral would be necessary because the team had decided upon a private placement as the least restrictive environment and SERC would recommend private schools for the team to review and the parents would visit. (TRI-324-325, 372). Another meeting was scheduled to "tie up loose ends... but all substantive discussion had taken place for development of an IEP", according to Ms. . That view was shared by the two other staff members then as well. (TRI-378). Ms.

stated that they understood that part of the process for private school placement was proceeding to SERC. She did not believe the IEP process had been completed because they still needed to discuss whether there needed to be evaluations and it had not been signed or rejected and the service page had not been completed. (TRIII-688-689). Ms. conceded that no prior notice to the parents of private placement had been issued and no final IEP had been prepared. (TRI-348-351). She further stated that she had no doubt that a placement decision had been made. (TRI-326).

Ms. recounted that after a few days she met with Dr. , explaining that she was uncomfortable with the placement decision. Since she agreed, they decided to speak to , who was the person who sets up and chairs SERC. She is also the PS supervisor for special programs. It was "not unusual when a student is coming to SERC to be giving her a heads-up and

talking to her about the case a little bit, giving her background. And she just gave us guidance and said, you have to do what you think is right." (TRIII-690-691,738-740). Ms. [redacted] was also a supervisor of Ms. [redacted] for contract services. (TRIII-739-740).

Dr. [redacted] testified that she saw Ms. [redacted] without Ms. [redacted] on July 11, 2006, and was told her it was her responsibility to say what she believed about a child's needs and not to be influenced by others. (TRIII-998, 1004-1005). Dr. [redacted] went to Ms. [redacted] rather than Ms. [redacted] because she felt she could not go to her and Ms. [redacted] gave good advice and was second-in-command. (TRIII-1006).

Ms. [redacted] recalled that Ms. [redacted] came to her office a day or two after July 10, 2006, and told her that she had spoken to Ms. [redacted] and Dr. [redacted] about the decision for private placement and appeared irritated. Dr. [redacted], Assistant Superintendent Student Services, also asked what had happened. Ms. [redacted] and Dr. [redacted] informed Ms. [redacted] they had changed their minds. (TRI-326-329).

Ms. [redacted] denied pressuring anyone to make a private placement. She felt it unethical for the others to change their mind and doing so "made a mockery of the IEP process." (TRI-331).

Dr. [redacted] answered the question whether she had made up her mind not to support private placement prior to the meeting on July 24, 2006, as follows:

I had made up my mind to say I had had second thoughts, and I really didn't think that was right. That I support-that I was the person representing [redacted] at that meeting. That nobody else from [redacted] was there any more. Not Mr. [redacted], and not Mr. [redacted].

who had never been there, not
Nobody was there.

I was the only voice for saying, we got this child, and she did well with the program that we offered her, and I think she can do well if she is in another public school next year. (TRIII-1027-1028).

Ms. testified that Ms. and Dr.

came to her office and indicated that they had felt coerced about the decisions they made at the IEP meeting. She told them it was going to SERC and that they should do what was right. (TRIII-1037).

The parents received a placement document after the meeting which stated the team had "recommended that the case go forward to [SERC] for a recommendation back to the IEP team for placement." There was no indication of any disagreement within the team and Mr. concluded that referral was for contract services. (TRI 104-106).

The next IEP meeting was held on July 24, 2006. Once the parents received copies of the proposed IEP, they noticed it did not provide for a private placement. The parents and Dr. reacted with "shock" and anger when Ms. and Dr. said they had changed their mind. (TRIII-1000, 1025). Ms. testified that she told the committee that had been making social and educational progress in PS, that there would not be role modeling or peer models at a private school, and that there would be children at a different part of the autism spectrum with significant acting-out behaviors which she would tend to follow. (TRIII-691-693). Dr. told the team that she believed that had benefited from her year at and private placement was not required. (TRIII-999).

There were additional IEP meetings, but the parents did not make any additions or changes since the parties were in agreement on the levels of performance, accommodations, and the substantive part of the IEP (TRIII-694). The eligibility committee on July 23, 2006 changed the nature of the disability to Autism Spectrum Disorder and Specific Learning Disability from Other Health Impairment." (.3).

2. Special Education Review Committee.

Twenty-three days after the July 24, 2007 meeting, on August 16, 2006, Ms. [redacted] submitted a written referral to SERC. She wrote that the IEP team had not come to agreement with regard to appropriate placement and that the team members with one exception believed that [redacted]'s needs could be met within the school system while the parents and another person believed she required support in a specialized private day school. (.41). The referral appears to have included, as part of the draft IEP language in the "services and least restrictive environment" page, the language that the team concurred that, "although [redacted] had made progress and had not moved completely through the continuum of lesser, restrictive options, the level of anxiety and number of eminent (sic) changes [redacted] will experience will likely have a negative impact on educational performance. The team members therefore recommended that the case go forward to SERC for a recommendation back to the IEP team for placement." (-49; TRIII-741-748).

SERC does not regularly meet in August. The parents remained hopeful that SERC would recommend private

placement, so decided to home-school for two-three weeks, pending the decision. (TRI-113-114, 122). On September 12, 2006, Ms. , notified the parents of a meeting to discuss 's placement on September 19, 2006 (.42), although, unbeknownst to the parents, SERC had already met on September 12, 2006. Ms. did not believe that they discussed placement, but they did develop questions and recommendations. (TRIII-1069-1070).

The undated summary of the committee stated that it recommended additional testing and training in social skills and therapy, but otherwise does not explicitly deal with the conflict between the team members on whether private school placement should be made. (.45; TRIII-1067). Although the IEP had decided that no new evaluations were necessary (TRI-337), SERC recommended an updated neuropsychological examination.

There are no formal regulations or directives from PS regarding how SERC operates. (.47; TRI-382-383; TRIII-1077-1078). The procedures for referral to SERC identify three purposes of referral: (1) to make recommendations for placements in the Interlude program; (2) to recommend contract services placements; and (3) "to mediate differences between parents and the local school when a disagreement occurs on matters relating to ...IEP, educational placement, or provision of [FAPE]." (.62). Dr. responded to Mr. 's inquiry concerning the purpose of SERC by stating that it was an internal process for when there is a difference of opinion between the school and the parents or for recommendations. He assured Mr. that SERC was consistent with the spirit of the reauthorization of IDEA and encouraged early resolution of disputes. (.47).

Ms. testified that the committee is used when the IEP team believes that a student is a candidate for private placement and SERC is part of the process to ensure that PS has utilized all their resources before moving to a more restrictive environment. She added that they make recommendations to the IEP team which is not bound by the recommendation. However, in response to questions on cross examination, she stated that SERC can inform the IEP team that they are not accepting its determination that private placement is appropriate and ask them to reconsider the decision. (TRIII-823-825, 842-845). This conflicted with the testimony of Ms. that SERC cannot override an IEP decision. (TRIII-1062).

Ms. stated that in theory SERC did not have power to reverse the IEP determination, though in the past it had sent recommendations to another IEP team who would then reverse a prior IEP decision. (TRI-385-386).

All members of the committee were employees but none were employed in the home school of the child. (TRIII-1042-1043). After hearing from the parents and Dr.

and discussing the issues themselves, the team made a number of recommendations, including rejection of private placement because was making steady and good progress and a private school was not required. (TRIII-1044-1048).

3. The final IEP of November 17, 2006.

More than five months after the first IEP meeting, the committee finalized the IEP for . (.14) Ms. reviewed its major features. There would be two hours of counseling, three day advance notice of and breaks during tests, a special staff member whom could meet with

when she needs support, opportunities to work in small groups on common tasks to promote social skills and reduce anxiety, and utilization for strategies to decrease anxiety and allow increased self-monitoring. (.14, pp.28-29; TRIII-710-715). The academic classes would be in a self-contained classroom, though there would be opportunities to interact with general education students and staff. Lunch, physical education, art, and music would be in a general educational setting, though the autism specialist would be available to assist her in these situations. (TRIII-719).

Ms. rendered an opinion that the IEP would have provided even more support and services than the prior IEP during a time when she was consistently making academic and social progress and that the placement would be appropriate and would allow access to her peers. She also thought the counseling would be beneficial for 's social skills and anxiety. (TRIII-724-725). According to Ms. , the proposed IEP did not stipulate that placement would be at , but it was implicit as the zoned school. (TRIII-828).

, the autism coordinator for PS during the last six years who has a masters degree in speech-language pathology and extensive training and experience in autism and non-learning verbal disorders, testified by telephone since she was on vacation outside the Commonwealth (TRIV-1108-1115). She was asked to attend the SERC meeting because the case would return to the IEP team. (TRIV-1125). Her role at the IEP on November 17, 2006 was to assist on the social skills section. It was her opinion that the proposed IEP was appropriately written. She approved the decisions to add counseling and place social skills under special education. Her prior involvement with

occurred when she observed her in a classroom several years ago and helped draft social skills goals. (TRIV-1124-1125).

Ms. described the program at for if she had returned there for fifth grade in the fall of 2006 under the proposed IEP. She would have been taught by a new teacher, , in a class with six or seven children, none of whom had behavioral problems. She believed that could have implemented the proposed IEP and could have benefited from the program. (TRIII-1250, 1252-1253). She had had no relevant contact with since her third grade year. (TRIII-1272).

Dr. rendered the opinion that PS could offer an appropriate, educationally beneficial program for at in the least restrictive environment for fifth grade. (TRIII-1001-1002).

Dr. , a psychologist and assistant professor at Children's National Medical Center, George Washington School of Medicine, Washington, D.C. has been treating primarily for anxiety since September of 2006. She was qualified as an expert in the field of clinical and developmental psychology, specializing in Autism Spectrum Disorders.

Upon reviewing the proposed IEP, she expressed concerns about 's adaptability to a general education setting since she so quickly became overwhelmed and over-stimulated and became anxious so easily. (TRII-590-592).

Dr. also objected to such limited social skills training, provided in a general education setting, because a much better response occurs when infused throughout the day. Finally, she was concerned about

attempting to cope with a crowded, loud building, which was likely to cause her to shut down. An appropriate program, she believed, would have provided for 's placement in a small classroom with no more than five or ten children with rigorous academic expectation and instruction and support throughout the day for executive functioning skills. (TRII-595-597).

Dr. repeated her earlier recommendation that be taught outside the general education setting. She believed that had not make the kind of progress she would have had her education programming recommendations of 2004 been followed. She observed that transition to middle school would be particularly difficult for her. (TRII-417-421).

Dr. reviewed the IEP proposed by PS (. 63) and, in her opinion, it did not comport with her recommendations in 2004 because there was no integrated program within a single classroom separate from the general education (TRII-407). She criticized the time allotted for social skills, stating that four hours per week rather than throughout the day would not be sufficient. (TRII-474-475). Dr. expressed concern that if had lunch, recess, and other contacts with general education students, as called for in the proposed IEP, she would put at particular risk of becoming over-stimulated and over-loaded by noise and large groups. (TRII-456-457, 462).

Dr. acknowledged that had made some growth and improvement in social skills between 2004 and 2006, but it was not "adequate in any way, and not adequate for her to survive educationally in the mainstream," (TRII-459-463).

On May 10, 2007, Dr. observed the program would have been in at had the family accepted the proposed IEP. The principal of , , pointed out that that her observation would be incomplete because would have been in a unique program which could not have been observable in its entirety due to the specific services she would have received. (. 63). Dr. visited general education classes and concluded that was a "terrific" school, but not right for . In her professional opinion the program set forth in the IEP was not appropriate. She also concluded from her review of all the records, evaluations and statements from those at the IEPs that had made no educational progress with regard to her social-emotional skills and needed full-time special education for both 2006-2007 and 2007-2008 school years. (TRI-239-246, 251-252, 257-258).

C. Placement for the 2007-2008 School Year and 2006-2007 Evaluations.

Numerous other witnesses testified regarding appropriate placement for the 2007-2008 year. Such testimony would be relevant only if the parents prevail on their claim that was not offered FAPE for the 2006-2007 school and, therefore, should be entitled to compensatory education through private placement at the School, as the parents urge, or at an middle school, as PS maintains.

Soon after the IEP was completed, Dr. prepared a second evaluation of on November 30, 2006. (. 64). She testified that her overall findings were

consistent with her prior report. "The nonverbal learning disability was still very apparent, as were the components of that, including the visual-spatial problems, the executive dysfunction which was largely affecting some of the same areas, the social learning disorder, the anxiety, and the motor problems." (TRII-410-411). She also made an Autism Spectrum Disorder diagnosis, explaining that such disorders are behaviorally based. In 's case, she focused on 's difficulties with social reciprocity, problems in communications and, to a lesser extent, repetitive behavior. Because she did not exhibit repetitive behavior typical of Asberger Syndrome children, the diagnosis of Pervasive Developmental Disorder Not Otherwise Specified was made as well. (TRII-410-414, 434, 620).

Dr. again recommended that be taught outside the general education setting. She also believed that did not make the kind of progress she would have had her education programming recommendations of 2004 been followed. She concluded that transition to middle school would be particularly difficult for her. (TRII-417-421).

In Dr. 's testimony she provided a more current view of 's diagnosis than Dr. . She explained that the autism spectrum is a range of disorders affecting children who function from low to high levels, with autism in the center. The children have core difficulties but each may differ substantially from the others on the spectrum.

is in the high functioning range. Students like her have particular difficulty fitting in current educational systems because they are often too high functioning for special education classrooms, but are often a few years behind their current grade placement, so they did not fit in there either. (TRII-578-590).

She believed that since [redacted] had begun to exhibit compulsive behaviors, which was not so apparent when Dr. [redacted] evaluated her in 2006, she would now qualify for the diagnosis of Asperger's Syndrome. (TRII-619-621)

Dr. [redacted] testified regarding the extraordinary problems a child within the autism spectrum has adjusting to middle school and concluded that she would be overwhelmed in a public school. (TRII-598-600).

Dr. [redacted], an PS psychologist with a doctorate in clinical and school psychology, testified regarding a Comprehensive Psychological Assessment she prepared on June 27, 2007. She said that her findings were basically in line with the evaluation of Dr. [redacted] and prior evaluations. In the Woodcock Johnson Cognitive Battery, [redacted]'s general intellectual ability score was 88, placing her in the low average range. (TRIV-1159-1160; [redacted] .80, p.5). The Children's Manifest Anxiety Scale was administered and she was found to have a slightly elevated anxiety level, but it was not clinically significant. (TRIV-1162, 1190-1191; [redacted] .80, p.7).

Dr. [redacted] offered her opinion that "[redacted] would benefit from an educational setting that provides structured and direct instruction in a small class setting with opportunities to access general curriculum activities and to build academic and social skills." (TRIV-1162-1165; [redacted] .80, p.8). She believed that [redacted] had enough strengths that she might be able to benefit from learning from her peers in a regular classroom setting. (TRIV-1165-1166). Dr. [redacted] had neither observed [redacted] in a classroom nor seen the social skills goals proposed in the IEP that was being developed for 2007-2008. (TRIV-1182-1183).

, a speech-language pathologist for PS with a masters degree from George Washington University in speech-language pathology, prepared a report based on her evaluation of on June 29, 2007. (.79). In terms of her communication skills, she engaged well in conversations, had no fluency or articulation problems, but she needed to work on speaking more slowly, choosing and initiating topics more appropriately and working on conversation repair strategies when she got off topic. (TRIV-1206-1208, 1216).

Ms. offered the opinion that an appropriate placement would be in a special education setting with a small classroom setting. She added that she believed would do equally well in a setting which included general education students where, with proper support, she could interact successfully with non-disabled students at, for example, lunch or in physical education classes. (TRIV-1210-1213). Ms. had never observed in a classroom. (TRIV-1216).

, who is a special education coordinator and has a masters degree in special education and learning disabilities, conducted an evaluation on June 28, 2007. (.78). She testified that she believed was academically capable of receiving academic benefit from a special education class in the public schools. She noted that the district had many students with similar issues whose needs the school system had been quite capable of meeting. Given 's good skills and strong abilities, there was no reason why she could not benefit from the district's program. (Exh. 92, pp. 43-48). Ms. met for the first time during the assessment and had not spoken to any of her teachers. Ms. did not determine

that there were any disabilities based on her test, though she changed her mind after attending an IEP meeting and reviewing the reports. (Exh. 92, pp. 50-52).

The parents remained hopeful that SERC would recommend private placement, so they decided to home-school for a few weeks, pending the placement decision. (TRI-113-114, 122). When no private placement was offered, they continued to home school for the 2006-2007 school year. PS developed a service plan for as a private school student, which was ultimately accepted by the parents. (.59-62). In early summer of this year, the parties began preparing another IEP, which is still in the early stages of development. (TRIV-1183-1184).

For the 2007-2008 school year, was accepted at School in , MD after the school staff met with her family and Dr. , observed her in the program, and spoke with Dr. . (TRII-513-514).

, the program director of the Asperger's program at School, described the services they offered. It is a separate program designed for students with Asperger's Syndrome and related disorders, who have at least average or above average cognitive ability, but also have "significant difficulty with social engagement, executive function, social reciprocity." (TRII-490-492).

is a state-certified, special education private day school, which has also aligned all academic curricula with Virginia and the Washington, D.C. criteria. (TRII-493-494, 509). In the class for children in grades five-seven, there is one head teacher and two assistant teachers, with a maximum of eight students. (TRII-500). There had been serious behavioral problems with many of the

students, but the intervention plans the school employed had substantially improved their behavior. (TRII-555-556).

Ms. , who has case management responsibilities for students, stated that there were three in her caseload: one is classified as Asperger's and has been at for one year, having done well and made social and academic gains; another is also classified as Asperger's and will enroll in September; and the third has been there for three years and has multiple disabilities. (Exh. 92, pp. 7, 60, 62-66).

A team of professionals work closely on a student's IEP goals, in an integrated setting, tailored to the individual needs of the students, and with no more than ten in a classroom. Social skills training is integrated throughout the day. (Exh. pp.64-66).

Dr. stated that she was on the advisory board of the Asperger's program at . It is designed for children with nonverbal learning disorders and based on her observations of the program and her testing and observations of , she concluded that the program there would be an appropriate placement for her. (TRII-477-478).

Ms. visited the program in February of 2007. She thought it was behaviorally-based, with much good structure and a high teacher-student ratio. For , she was concerned about the absence of interaction between her and non-disabled peers and the presence of students with significant behavior problems who would be poor models for her. In addition, there was no program for seventh grade. (TRIV-1132-1138). Ms. had not spoken with Dr. or was aware of Dr. 's second report. (TRIV-1140). Nor had she evaluated or observed in the classroom. She further stated that the student from who

would be in 's class had major behavior problems but, according to his mother, was doing very well in the spring of this year. (TRIV-1154).

Dr. was familiar with the Asperger's program at . She characterized it as a program designed to create an environment with support for social and executive functioning with academically vigorous instruction. She believed it would be an appropriate program where would receive educational benefit. (TRII-604). She did not think that the fact that would be in a class with seven boys was a matter of special concern and that she would likely get along better with boys than girls. (TRII-624-625). She would also be less likely to imitate poor behavior than a non-disabled child. (TRII-615).

Dr. believed would receive educational benefit at and it would be an appropriate placement because of the small classes and the high ratio of staff providing services within an integrated model in the classroom throughout the day. (TRI-248-250).

III. BASIC LEGAL FRAMEWORK

The Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (IDEA) requires states, as a condition of acceptance of federal financial assistance, to ensure a "free appropriate public education" (FAPE) to all children with disabilities. 20 U.S.C. §1400(d), §1412(a)(1). Virginia has agreed to participate in this program and has required local education agencies to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., §22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. §1415. See also *Board of Education v. Rowley*, 458 U.S. 176 (1982). The safeguards guarantee "...both parents an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think inappropriate". *Honig v. Doe*, 484 U.S. 305, 311-312 (1987).

The primary safeguard to protect the child's rights is the IEP. The educational program offered by the state must be tailored to the unique needs of the handicapped child by means of the IEP. 20 U.S.C. §1414. IDEA directs that local school districts, in consultation with parents, the child, and teachers, develop an IEP for each handicapped child. 20 U.S.C. §1414(d)(1)(B). Should there be any complaints regarding the content of a child's IEP, the parents have the right to an "impartial due process hearing" 20 U.S.C. §1415(f); See also *Barnett v. Fairfax County School Board*, 927 F.2d 146, 150 (4th Cir. 1991).

An IEP satisfies IDEA's requirement of FAPE so long as it "consists of education instruction specially designed to meet the unique needs of the handicapped child ...supported by such services as are necessary to permit the child to 'benefit' from the instruction." *Rowley, supra*, at 188-189. Each year the IEP sets out a curriculum to address the child's disabilities, with appropriate objective criteria and evaluating procedures and schedules for determining whether the instructional objectives are being achieved. 20 U.S.C. §1414(d).

IDEA does not require the school system to provide the best possible education or to achieve outstanding results. *Rowley, supra*, at 187-192, 198. An appropriate education

is one that allows the child to make educational progress. *Martin v. School Board*, 3 Va. App. 197, 210, 348 S.E.2d 857, 863 (1986). The goal is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley, supra*, at 192.

"Congress did not intend that a school system could discharge its duty under the [ACT] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985). The Supreme Court has determined that an IEP meets the requirements of IDEA if it is "reasonably calculated to enable the child to receive educational benefits." *Rowley, supra*, at 207.

Hearing officers ordinarily engage in a two step inquiry to decide whether FAPE has been provided under IDEA. First, they determine whether school officials have complied with the procedures contained in the Act and, secondly, whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Rowley, supra*, at 181.

The Act imposes significant procedural requirements on the parties to safeguard the rights of the student to receive a FAPE. 20 U.S.C. §1415. *Rowley, supra*, at 207. These safeguards "guarantee the parents an opportunity for meaningful input into all decision affecting their child's education." *Honig, supra*, at 311-312 (1988).

Parents are required to be members of the group that makes the decision on educational placement. 20 U.S.C. §1414(f). Under 34 C.F.R., §300.345, (2006), the school district is required to ensure that parents are present or have had an opportunity to participate at each IEP meeting.

Procedural deficiencies alone are insufficient to set aside an IEP unless there is a rational basis to conclude that the defects hampered the parents' opportunity to participate in the decision making process, thereby compromising the child's ability to receive an appropriate education and depriving him of educational benefits. *O'Toole v. Olathe District School Unified School District*, 144 F.3d 692, 707 (10th Cir. 1998); See also *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990). A child is denied FAPE where the procedural defects have caused a material and inherently harmful impact on the IEP committee's ability to develop a plan reasonably calculated to enable the child to receive meaningful educational benefits under the *Rowley* standard. See *M.L. v. Federal Ways School District*, 394 F.3d 634 (9th Cir. 2005); *Amanda J. v. Clark School District*, 267 F.3d 877 (9th Cir. 2001); *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004).

Procedural flaws do not automatically require a finding of denial of FAPE. However, procedural inadequacies that result in a loss of educational support, See *Burke County Board of Education V. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) or which seriously infringe on the parent opportunity to participate in the IEP, result in a denial of FAPE. *Hall ex rel Hall, supra*, at 635.

Hearing officers have the authority to grant relief as deemed appropriate based on their findings. Equity practices are considered in fashioning a remedy, with broad discretion permitted. See *Florence County School District Four v. Carter ex rel Carter*, 510 U.S. 7, 17 (1993).

Courts have determined that compensatory education is an appropriate remedy, sometimes based on the reasoning

from tuition reimbursement cases. See, e.g., *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986). The purpose of compensatory education is not to punish the school district, but to replace the educational services that the child was deprived of in the first place. The Fourth Circuit has held that compensatory education can be ordered for a child to provide prospective relief where the program had been found to be deficient. *G, by his Parents v. Fort Bragg Dependent Schools*, 343 F.3d 295 (4th Cir. 2003).

The burden of proof on the issue of whether the IEP is deficit and whether [redacted] was denied a FAPE rests with the party challenging the IEP. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this appeal, that is the parents.

Hearing officers are to give appropriate deference to local educators. *Hartmann v. Loudoun County School Board*, 118 F.3d 996, 1000-1001 (4th Cir. 1997, cert. denied, 522 U.S. 1046 (1998)). However, that does not relieve them of the responsibility to determine as a factual matter whether the IEP is appropriate. *County School Board of Henrico v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005).

IV. LEGAL ANALYSIS

A. Procedural Defects in the Development of the IEP Denied the Opportunity of the Parents to Meaningful Participation in the IEP and Denied their Child FAPE.

Turning first to the question of procedure, the parents contend on page 15 of their Closing Argument and Legal Authority, (hereafter, [redacted] Op. Brief), that PS violated [redacted] 's rights when they "failed to adhere to the IEP team's previously agreed upon decision that [redacted] 's educational needs required her to be placed in a full-time

non-public special education day school," and, in their related argument, that PS violated 's rights and denied her FAPE by "engaging in placement discussions outside of the IEP team and without the parent's participation, after the IEP team had reached a consensus..." on private placement. (Op. Brief, p.9).

These contentions pertain to both the decision of two of the three PS IEP committee members to change their minds about private placement and to the creation of SERC and its role in the IEP process.

In response, PS maintains in its Post-Hearing Brief (hereafter, PS Op. Brief) that there was nothing improper about the reversal of opinion, that the IEP had never been finalized, that the role of SERC in the process was proper, and that procedural violations, if any, did not deny FAPE. (PS Op. Brief, 3, 8-10, 22-24).

In Section IIB.1, I have reviewed in some detail the testimony of the father, his advocate, and the three PS representatives on the IEP board about what transpired in the critical July 10, 2006 meeting. I find all their testimony credible. It appears to me that the parents' representative was a forceful, even intimidating, voice on behalf of the child; after all, that is what advocates are supposed to be. I also find credible the testimony from the two special education coordinators that they felt pressured by the director of special education to reach a consensus in support of private placement, but conclude that such pressure was neither intended, excessive nor coercive, particularly in light of the over half century of experience that the two educators had in the field of special education. At most, it reflected the usual robust

give and take that often occur in a group's attempt to reach a difficult decision.

I also find that a team decision had been reached in support of private placement on July 10, 2006 and that the IEP, for all practical purposes, was completed--and believed to be completed by the participants on July 10, 2006--, with the understanding that it was going to SERC solely for private placement. In fact, one of the documents which was sent to SERC reflects the private placement determination.

Soon after the July 10, 2006 meeting, two of the members changed their mind and met together with the chair of SERC to discuss placement. The Assistant Superintendent of Schools also became involved. The parents did not learn about the team members' reversal of opinion until fourteen days later at the July 24, 2007 meeting. Nor did they receive notice of these ex-parte meetings. It is abundantly clear from the testimony of one if not both of the coordinators that they had made up their mind to reject private placement by the time they arrived at the July 24, 2006 meeting. It is also instructive that one of the coordinators implied that she was motivated in part by her concern for what a decision in favor of private placement would indicate about the competency of the school system rather than what would be the appropriate placement for

SERC met without notice to the parents on September 12, 2007, and then with the parents and their advocate the following week. Nearly two months had passed since the July 24, 2007 meeting because of delay in the submission of the request and because of its policy not to convene in August.

SERC rejected private placement and ordered additional testing.

I can accept, as PS maintains, that SERC was established to help resolve disputes within the IEP team and provide it additional expertise. No doubt the committee often does, as it did when the parents appeared before it in early 2005. Yet despite its potentially profound role in the IEP process, SERC functions under no state or federal regulations; the entity is not referred to as part of the IEP team or at all. See 34 C.F.R., §300.321 (2006). Moreover, at least in this case, the group operated as an additional bureaucratic layer that deferred a decision of placement for additional months so that even if the parents had been persuasive in urging private placement, a decision might well have been too late for the 2006-2007 school year.

More importantly, SERC can and does effectively override decisions by the IEP team, as evident from testimony in the record by the former director of special education and the special education coordinator. I find that, in addition to the meeting in which the two IEP members met with the chair of SERC, the meeting held on September 12, 2006 without the parents was improper as well. SERC's prescribed role as a mediator was seriously compromised by the private discussions held outside the presence of the parents. In this instance, SERC deprived the IEP team of its proper role and usurped its power.

The parents suggest that SERC had an unofficial policy of rejecting placements of students who did not exhibit severe behavior problems. (Op. Brief, p. 16). Although this inference is not unreasonable based on the evidence, I nevertheless find that the parents were

unable to proffer sufficient evidence to establish their suspicion. However, the fact that important discussions and meetings adverse to the goals of the parents took place outside their presence and the fact that SERC became involved in the IEP in a manner detrimental to the parents, so seriously undermined the right of the parents to participate in a meaningful fashion in the development of the IEP that their child was denied FAPE.

An administrative review committee which reversed the determination of an IEP team that the student needed residential placement was found to be improper in *Diamond v. McKenzie*, 602 F. Supp. 632 (D.D.C.1985). PS, in its Reply Brief, pp. 7-8, seeks to distinguish that case on the basis that the review committee in the District of Columbia served as a mandatory level of appellate review that exercised veto power. In the situation here, however, I have found that SERC also exercises veto power.

I conclude from the evidence that the parents' rights had been violated in the period subsequent to the July 10, 2006 meeting since a decision against private placement had been made by members of the PS team and by SERC without providing the parents an opportunity to meaningfully participate. Predetermination has been found to constitute a procedural violation of IDEA. *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004).

The failure of PS to furnish the parents an opportunity to attend necessary meetings rendered the IEP incomplete and insufficient. *W.G. v. Board of Trustees of Target Ray School District*, 960 F.2d 1479 (9th Cir. 1992) (school district independently developed the IEP without parental input); See also *M.L.*, *supra*, where the failure to allow the participation of the general education teacher

was found to be a critical structural defect, fatally compromising the integrity of the IEP, and *Amanda J. v. Clark County School District*, 267 F.3d 877, 890-891 (9th Cir. 2001), where the refusal to permit the parents the right to see school records denied FAPE. As the Ninth Circuit observed: "IDEA imposes upon school districts the obligation to conduct meaningful meeting with the appropriate parties." *W.G. supra*, at 1485.

The procedural defects in this appeal are not trivial. Had the initial decision for private placement been implemented or had SERC not improperly interfered in the IEP process, could have been placed in an appropriate private school for the 2006-2007 school year instead of being home schooled. And even if there had been no final decision by the IEP team at the July 10, 2006 meeting, the failure to include the parents at important meetings thereafter had a significant and deleterious impact on their ability to influence the IEP team and SERC to approve a program that they believed was appropriate for their daughter's educational needs. In either case, suffered substantial harm and loss of significant educational benefits by the flawed IEP process.

B. Assuming, Arguendo, that the Actions of the School District Did not Render the IEP Invalid and Deprive the Student of FAPE, the IEP Offered by the School District was Reasonably Calculated to Offer the Student Educational Benefits under the Rowley Standard.

I have found that the IEP was deficient and that the student was denied FAPE. We cannot know conclusively whether observations and arguments of the parents and their advocate at the various discussions and meetings that excluded them would have affected the decision for public

school placement. The question of whether the IEP, flawed in its development, offered educational benefits though the proposed public school placement, could be considered irrelevant and rather beside the point. That was the view taken by two appellate courts who decided not to review an IEP once procedural inadequacies had been found. See *W.G.*, *supra*, at 1485; *Amanda J.*, *supra*.

I have decided, nevertheless, to address this issue inasmuch as review of much of the extensive testimony and documentation on whether the 2006 IEP offered educational benefits is also relevant to the claim for compensatory education. Further, it may well be important for development of a full record should the appropriateness of the IEP arise in further proceedings.

The IEP team incorporated the additions written by SERC, including public school placement. It provided for twenty-eight hours a week in the special education setting and two in the general education setting. The special education coordinator, the autism coordinator for PS, and 's former special education teacher at all testified that the program was appropriate, that it would provide her educational benefits and that it would enable her to make educational progress. The record is also clear that despite deficits in social skills and increasing anxiety, had made some educational progress from year to year in the school system. She had performed at grade level each year and remained in the average to low-average range in her subjects. The testimony of Mr. and the written comments of other teachers attest to her progress during her year at . (PS, Op. Brief, pp. 5-8).

The parents deny that made meaningful progress at and argue that the IEP for the following year

was not reasonably calculated to confer education benefits. They stress that her scores on the SOLs had fallen substantially, that she had continued to relate poorly to peers and been unable to form friendships, and that she had been excessively tardy due to increasing stress at school. (Op. Brief, pp. 3-8). Drs. , , and objected to the failure of PS to include full-time special education without exposure to general education student peers. Four hours of social skills training per week instead of social skills training throughout the day in a self-contained special education setting, they insisted, had failed in prior years and would had likely failed again.

Dr. observed and concluded that would had been overwhelmed and unable to survive academically there. The parents' expert witnesses and the erstwhile director of special education maintained that that required a full-time special education environment.

The time period relevant to the inquiry is the fall of 2006, the time the IEP is drafted. *Fuhmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3rd Cir. 1993). I find that all the witnesses who testified on this issue were highly competent and dedicated professionals. The parents' witnesses, except for Dr. who began treating in September of 2006, had been involved with for a number of years and were fully knowledgeable about 's disabilities and her educational progress and deficits. The PS witnesses, particularly Ms. , Ms. , and Mr. , were collectively fully knowledgeable about the program at , 's disabilities, and her educational progress and deficits.

I am required to grant great deference to the local educators and cannot substitute my judgment and notions of sound policy for that of the school board. See, generally, *A.B. v. Lawson*, 354 F.3rd 315, 325 (4th Cir. 2004). To the extent relevant, given that I have already determined that the IEP was prepared in a deficient manner, I find that the parents did not meet their burden to establish that the IEP was not reasonably calculated to provide educational benefits.

I recognize that the proposal in the IEP to return for fifth grade to the same elementary school which her parents and her expert witnesses considered inappropriate after third grade, and where there was strong evidence that it had been unable to deal with her social impairments despite some educational progress, might very well have proven to have resulted in an unsuccessful placement. I think these risks were understood by the entire IEP team on July 10, 2006 when it opted for a private school. PS refers to the frequently cited language in *JSK v. Hendry County School Board*, 941 F.2d 1563, 1572-1573 (11th Cir. 1991), that the "courts must only determine whether the child has received the basic floor of opportunity." (PS Op. Brief, p.18). That floor appears here to be well below sea level.

C. Compensatory Education through Placement at School for the 2007-2008 School Year is the Appropriate Remedy for the Failure of the School District to Provide FAPE in the Prior School Year.

was denied FAPE in the summer and fall of 2006. Since that time she has been home-schooled and is now on summer vacation. She has not been a student in schools since June of 2006. The evidence that was relevant

to findings made with regard to the development and appropriateness of the 2006 is different from the evidence applicable to what relief should be granted for the 2007-2008 school year. In this appeal, the parents do not seek reimbursement for the costs of unilateral placement for the 2006-2007 school year, presumably because [redacted] was home schooled. Rather, they seek compensatory education through placement at the [redacted] School for the pending school year.

We look at the student's changed educational needs rather than the situation that existed the prior year. See *Connecticut Unified School District v. State Department of Education*, 699 A.2d 1077, 1090 (Conn. Super. Ct. 1997). For [redacted], The IEP in 2006 was a snapshot at that time. *Roland M. V. Concord School Committee*, 910 F.2d, 983, 992 (1st Cir. 1990). In *Reid ex rel Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005), the court noted that hearing officers may award "educational services...to be provided prospectively to compensate for a past deficient program." The remedy, then, must be the replacement of educational services [redacted] should have received in the first instance.

It is not sufficient for the school district to show that it would meet the "some benefits" standard set forth under *Rowley* for review of IEPs; "it must do more-it must compensate." *Reid, supra*, at 525. Rather, the inquiry needs to be "qualitative, fact-intensive, and above all tailored to the unique needs of the disabled child." *Branham v. District of Columbia*, 427 F.3d 7, 9 (D.C. Cir. 2005).

Four witnesses from [redacted] PS testified regarding the appropriate placement for [redacted] for the 2007-2008 school

year: Dr. , Ms. , Ms. and Ms . All but Ms. prepared written evaluations in June of this year for this hearing and for the 2007-2008 IEP which is in the early stages of development at this time. None had ever seen in a classroom, except for Ms. who had observed her several years ago. Thus I conclude that, unlike the PS witnesses who testified regarding the 2006 IEP and were fully knowledgeable about , the PS experts had limited knowledge beyond their meetings with and review of her file, apart from Ms whose earlier knowledge was dated.

The school experts believed that would benefit from special education classes in a general educational setting which would provide support for her to participate in the general curriculum and that PS could provide such a setting. Their focus was on whether PS could provide educational benefits rather than on what compensatory education would be necessary to remedy a defective IEP from the prior year.

The testimony of Ms. and Ms. regarding the 2006 IEP has limited relevance to the 2007 IEP since they had had little, if any, contact with during the last year. Further, her educational needs now differ from when she was in elementary school.

In contrast to the PS witnesses, the parents' experts had far greater familiarity about and experience with . Although none had seen in a classroom recently, Drs. and had been involved with her education for years and Dr. , her treating psychologist, had the most current knowledge except for the father. Drs. , and all recommended that full-time special education was necessary for .

I find that the argument in favor of private placement is stronger at this time than in 2006 because [redacted] will be entering sixth grade. The transition will be harder than to another elementary school, the school setting more overwhelming, and the peer pressure greater. Moreover, she has lost one year of instruction and social interaction with students in a school setting.

I further find that [redacted] PS had not been able to adequately address [redacted]'s social and emotional needs in the past even though it had tried many approaches within its programs. I determine that the testimony of the parents' experts is entitled to greater weight than that of the school district's experts with regard to the appropriate compensatory education because of their greater knowledge of the student and her disabilities, the impact of those disabilities on her educational performance, and her history in the [redacted] School system.

[redacted] needs to learn social skills and reduce her anxiety to enable her to make educational progress and to compensate for the year where a defective IEP was in place. I find persuasive the expert testimony that [redacted] needs social skills training throughout the day within a private school setting and that a public school setting would not be an appropriate placement and would not provide compensatory education.

The testimony of Ms. [redacted], Dr. [redacted], Dr. [redacted] and Dr. [redacted] establishes that [redacted] has a program well designed to provide compensatory education for [redacted]. Unlike the program at [redacted], [redacted] would be assured of being in a class with her intellectual peers, where social skills would be provided throughout the day in

I conclude that placement at _____ is necessary for _____ to receive compensatory education to make up for the year of educational deficiencies she experienced in her educational program during the 2006-2007 school year. Placement for the 2007-2008 school year at _____ middle school where she would be exposed to the general education curriculum and atmosphere and receive inadequate support in social skills training would not be compensatory or appropriate.

V. ISSUES

1. Whether the procedural defects in the development of the IEP denied the opportunity of the parents to meaningful participation in the IEP process and if so, whether such defects were of such importance that the student was denied FAPE.

2. Assuming the IEP is not invalidated on procedural grounds, whether the IEP was reasonably calculated to enable _____ to receive educational benefits under IDEA.

3. Assuming the IEP is invalidated on procedural grounds, whether compensatory education is appropriate and, if so, whether the proposed placement in the School is the proper relief.

VI. CONCLUSIONS OF LAW AND FINAL ORDER

1. _____ is a student with the disability of Autism Spectrum Disorder and Specific Learning Disability

under 34 C.F.R. §300.8(a) (2006) and qualifies for services under IDEA.

2. Public Schools failed to provide FAPE to for the 2006-2007 school year under the November 17, 2006 IEP for the reason that the parents were denied an opportunity to meaningfully participate in the development of the FAPE where critical ex-parte meetings and discussions took place about placement outside the IEP process and therefore these procedural violations invalidated the IEP.

3. Public Schools failed to provide FAPE to for the 2006-2007 school year under the November 17, 2006 IEP for the reason that a review committee improperly became involved in the IEP process in such a manner as to violate the procedural protections granted to parents in IDEA and invalidated the IEP.

4. is entitled to compensatory education for the denial of FAPE for the 2006-2007 school and placement at School for the 2007-2008 school year is the proper equitable relief to compensate her for the loss of educational benefits in the 2006-2007 school year.

5. Public Schools is ordered to fund the placement of at the School for the 2007-2008 year and to pay for or provide transportation for her to attend the school.

6. This decision is final and binding unless either party appeals in a federal District Court within ninety

calendar days of the date of this decision, or in a state Circuit Court within one year of the date of this decision.

Date: 8-20-07



Alan Dockterman, Esq.
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have, this 20th day of August, 2007, caused this Decision to be sent via first-class mail, postage prepaid, and by e-mail to Ellen Douglas Dalton, Esq. and Jessica M. Smith, Esq., 1008 Pendleton St., counsel for Mr. _____ and Dr. _____, and to John F. Cafferky, Esq. counsel for _____ Public Schools, 4020 University Drive, Suite 300, Fairfax, VA 22030; and to be sent via first-class mail, postage prepaid, to Dr. _____, Director, Special Education, _____ Public Schools, _____, VA _____ and to Judy Douglas, Director, Dispute Resolution/ Administrative Services Department of Education, Commonwealth of Virginia, P.O. Box 2120, Richmond, VA 23218-2120.



Alan Dockterman