07-065

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OCT 10 2007
Dispute Resolution &
Administrative Services

CASE CLOSURE SUMMARY REPORT

(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	Name of Parents
	9/5/07
Name of Child	Date of Decision or Dismissal
J.T. Tokarz, Esq.	Pro Se
Counsel Representing LEA	Counsel Representing Parent/Child
Parents	LEA
Party Initiating Hearing	Prevailing Party

Hearing Officer's Determination of Issue(s):

See Attached Hearing Decision.

Hearing Officer's Orders and Outcome of Hearing:

Case not proven but independent Educational Evaluation 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.

Robin S. Gnatowsky	
Printed Name of Hearing Officer	Signature

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Dispute Resolution &
Administrative Services

VIRGINIA: SPECIAL EDUCATION DUE PROCESS HEARING

EN RE: (Public Schools – The School Board of , Virginia)

The record of this case shows, for whatever cause, a child with profound disability. Two large exhibit-book binders and the verbatim transcripts of several hearing sessions reveal a long and significant history of the student's condition and educational progress. See Tr. 24:1-10. Counsel for the school system explained that the large number of exhibits to be reviewed is because the student's educational needs are "extremely complex and difficult", and the school system acknowledged the parents' concern that the student make educational progress. Tr. 30:1-7. The parties have been in due process before and a great deal of the student's early disability history is summarized in a hearing decision rendered by John V. Robinson, Esq, Hearing Officer, dated March 8, 2004, which is joint exhibit 36 in this current case. See also discussion at Tr. 61 for the parents' belief that a willingness for them to go to due process has been significant in getting the school system to try new approaches and see their points of view, even in regard to matters not made the direct subject of a due process hearing. This Hearing Officer stated that the focus in this case would be the issues in this case, while acknowledging the parents' perspective. Tr. 62:15-23. See also Tr. 108:11-20 for the parents' discussion of their decision to seek due process to object to the 2007/2008 proposed IEP.

The current record describes a now nearly eight year old female child who is diagnosed with autism (See Tr. 32) and has a developmental delay placement (see Tr. 79:5 "DD waiver"). She is non-verbal and has questionable receptive language skills and no expressive language. There are typical autistic behaviors, including self-injury. She is not toilet trained, and the parents stress that this is a very significant issue. They claim that it is a behavioral consequence of the student's disability that can and must be corrected for the child to obtain educational benefit. See opening statement of parents, Tr. 25:1-11. The accuracy of this description is confirmed in the school system's opening statement (there is "a constellation of issues" that is commonly agreed). Tr. 31:16-25; 32:1. The school system argued that some issues appear to be "cerebral and neurological in nature." Tr. 33:10-12. See also joint exhibit 29; Tr. 68:24-25 ("Independent results show cognitive issues related to language"); Tr. 69:23-25 ("… goes to her ability to be educated for non-medical or genetic reasons"). See joint exhibit 30, an evaluation done in October of 2003, diagnosing "unspecified encephalopathy". The school argues that the student has made progress "commensurate with her ability to learn." Tr. 34:1-3. The school system points to joint exhibit 2, which is a neurological evaluation that indicates "brain involvement" in the child's condition. Tr. 40:4-8. The parents assert that any limited progress made may not have been the result of the school system's efforts. See e.g., Tr. 54:6-11; 56:7-11. The parents argued that they and not the school have made the primary effort to facilitate or fine-tune the student's education. Tr. 82:17-19. The parties seem to agree that the last two years of history, in which an "ABA methodology" was

adopted, are the most important to focus on in this case. Tr. 34:12-16. The record does show that there were improvements based on work done by school personnel in 2003, for example when the school system contracted to provide the student with ABA. There is agreement to that. Tr. 58. See also joint exhibit 26 for a description of 2003 ESY services and some progress. Joint exhibit 27 shows services offered in 2003 and 2004. Joint exhibit 43 is a 2004 IEP offered by the school system to show the school system's continuing efforts to offer services. Joint exhibit 52, Tr. 87, was offered to show that physical therapy was made available in 2005 as a result of the school's observation. Joint exhibit 54 was offered by the school system to show efforts in 2006 to address the student's toileting problems. Tr. 89:5-13. Joint exhibit 58 was offered by the school system to show responsiveness to the parents' concerns about the student's self-injurious behaviors. Tr. 92:1-4. Joint exhibit 77 was offered by the school system to show what may have been progress noted in an August 2006 physician progress note. Joint exhibit 82 was offered by the school system to show that a physician noted some progress in November of 2006, the school year just competed. Tr. 99. Joint exhibit 93 was offered by the school system to show a physician noted some progress in March of 2007, and that there were medical efforts being made to address GI and bowel movement issues, which would be relevant to toilet training. Tr. 101:8-9. Joint exhibit 100 was offered by the school system to show efforts made by school personnel for the 2006/2007 school year to work with the parents on a plan for toilet training. Tr. 103:18-25. The parents note at Tr. 104:5-9 a disagreement as to whether the bowel issue is behavior vs. physiological in nature.

, the autism consultant for Public Schools testified that the school system considers that autistic students are all different and that the school system treats them all as individuals and tries to use tools such as Applied Behavior Analysis (ABA) to motivate them to learn. Tr. 121:16-20. She described her personal observations of the behavioral issues with this student and stated that there is empirical research that shows that programs that are systematic and based in ABA show benefit to most children with autism. Tr. 125:17-21. She testified that she had been asked to write a memo to describe whether she had seen progress in this student's behavior and academics and that she had done so and that she felt strongly that she had seen such progress. Tr. 127:14-17. She testified that some classroom data sheets from 2005 and 2006 were missing or misplaced. Tr. 135. She testified that data that was in the notebook and available showed for instance that the student was able to sort silverware and match the letters of her name. Tr. 136:1-2. See also Tr. 249. She testified that she had observed that the student was able to transition from activity to activity much less problematically in 2005 and 2006. Tr. 137:8-13. See also Tr. 249. She testified that self-injurious behavior became less problematic but that the school personnel considered using a helmet for the student's protection. Tr. 130:11-13. She acknowledges that her opportunities to observe the student during 2006 and 2007 were limited and that she based much of her opinion on the statistical data collected by school personnel. Tr. 139:16-25. She testified concerning joint exhibit 99, which is the current proposed IEP that the parents now object to, and that she participated in that IEP meeting. Tr. 145. See also for example, Tr. 257. She testified credibly as to what are appropriate goals for the IEP and the thought process of the team developing those. Tr. 146. She testified that data

collection is important for determining whether the student had made progress or not. Tr. 148:14-15. And that adequate data collection is important to development of new IEPs. Tr. 149:16-20. However, she testified credibly that there is no required amount of data and that data collection does not have to be constant. Tr. 150:18-21. She noted that schools do have other ways of reporting progress, such as VGLA data reported to the state. Tr. 290:15-16. Also, she said that there are different approaches to assessment and that those are IEP team decisions. Tr. 291:8-15. She acknowledged that other IEP goals had been limited by the toileting problem or efforts in regard to that problem. Tr. 153:19-24. She testified that judging progress using ABLLS data is difficult but maybe can be done. Tr. 160:10-11. She noted what appeared to her to be progress of this student in group instruction, social interaction, visual, performance, and self-help skills. Tr. 161:9-11. She also noted that data collection is not always reliable because there may not be uniformity between people taking data. Tr. 163:17-24; Tr. 165:13-25. But, she testified that she believed that a person with consistent experience, on a daily basis, with the student could use ABLLS data to make sound judgments. Tr. 168:12-18. She noted that without considering the data notebooks she personally witnessed improvements "by leaps and bounds" in the child's ability to sit in one place in 2004 and 2005. Tr. 222:10-14. There was also quite a bit of testimony about an exchange of emails and correspondence between the school personnel and the parents showing what appeared to be a genuine interest and attempt to work with the parents regarding the toileting issues. See Tr. Starting at 263. Tr. 273. She believes that this student will be a non-verbal communicator. Tr. 274:11-24. There was in addition a great deal of other testimony by this witness as to the activities and planning of teaching methods used to serve this student, and descriptions of educational objectives that she believed had been achieved. The witness seemed knowledgeable, credible, and interested in the student's welfare. She testified that the eligibility committee determined that the student was low functioning, but from the records she was being asked about in her view the student still made progress. She testified that she had seen the student's IEP being implemented and that she had seen data being taken in the classroom. Tr. 300:22-24. And she state that she witnessed that collected data was used to make instructional changes. Tr. 302:6-7.

, a kindergarten-through-second grade autism teacher, who had been the student's teacher for the prior two years, testified. Tr. 314. Her testimony involved discussion of the toileting problems and efforts made to address them and communicate with the parents. There was some discussion of data collection and graphing, including mistakes in data collection. Tr. 331:9-19. There was discussion of goal achievement. See for example Tr. 332, 333, 336, 341, 342, 354, 355, 356, 359, 361, 362, 363. There was discussion of work on self-help goals. Tr. 364. She expressed her opinion that the proposed IEP is reasonably calculated to provide educational benefit and that it could be successfully implemented in the coming school year. Tr. 366:1-12. She agreed that work on the toileting issues was taking a lot of time and attention. Tr. 368. She acknowledged that some classroom data was missing. Tr. 372:10. The witness seemed knowledgeable, credible, and interested in the student's welfare.

, the student's father, testified. Tr. 375. He stated that he had requested a psychological evaluation from the school in regard to the application for certain public

benefits, and that different benefits seemed to be available under MR and DD waivers. He stated that the MR waiver was not accepted and that the student is now on the DD waiver. There was discussion of toileting issues and various communications on this with school personnel. He suggested that it was his impression on some occasions that school personnel would call for the student to be picked up from school because they did not wish to deal with the problem. Tr. 380:22-23. He stated that the only improvements in the student's skills that he sees are not what she works on at school but the things he works with her on at home. Tr. 381:7-10. There was discussion of one event on the playground for brief duration when the child put an object into her mouth. Tr. 379:1-4. (The Hearing Officer notes that this one event, as unpleasant as it was described, was given no consideration as evidence that the child was not properly supervised. There was no showing of a pattern of inattention. The Hearing Officer also does not feel qualified to judge the amount of data required for utility in various educational methodologies, and there was very little evidence presented that showed mistakes by the student's 1:1 aid in data collection might have been so pervasive as to constitute a significant contribution to denial of a FAPE. The school system has argued that the law "does not require that you produce data sheets from two years ago in order to show or prove educational benefit." Tr. 470: 21-25. The Hearing Officer agrees that it would seem that the burden is on the parents to show what was in the missing data sheets that would make this so significant in the denial of a FAPE. Weast v. Schaffer, ex rel. Schaffer, 377 F.3d 449 (4th Cir. 2004); Weast v. Schaffer, 126 S. Ct. 528 (2005)). Mr. indicated that an evaluation done a VCU offered hope in his view that the student could learn to speak. Tr. 384-385. There was further discussion of the toileting issues, seeking medical advice, and assessments done at both VCU and Kennedy Krieger. See for example, Tr. 388. The witness seemed concerned and highly interested in the well-being of the child, and credible given his obvious parental perspective.

, Ph.D., NCSP, a school psychologist for the school system, testified. Tr. 397. He discussed evaluations that he had done of the student and of reports from other practitioners. He defined "encephalopathy" as a medical term that describes overall reduction in brain functioning in regard to the Kennedy Krieger assessment. Tr. 402: 21-25. His professional opinion was that this student has "sever mental retardation." Tr. 410:22-23. The result, in his opinion, would be that she would not progress as rapidly in educational progress. Tr. 411:1-3. He also testified that test results indicate that this student has "sever autism". Tr. 412. This will impede instructional process. Tr. 41:1. He stated his professional opinion that the student will make educational gains consistent with her abilities if the proposed IEP is implemented. Tr. 414:1-6. He testified that a direct IQ assessment cannot be done with this child. Tr. 419:21-25. The witness seemed knowledgeable, credible, and interested in the student's welfare.

, an occupational therapist who has worked with the student on behalf of the school system, testified. Tr. 506. She stated that in her areas of concern she witnessed the student make progress. Tr. 508:22-25. She also described a behavior known as rumination where the student sometimes regurgitated and then reswallowed her food, as a sensory-seeking behavior. They targeted that and by the end of the school year, she said, the student was not doing that anymore. Tr. 509. There was discussion of other

efforts made in Ms. 's area of expertise such as drinking from a cup (Tr. 510) and "sorting, matching, and those kind of skills". Tr. 511:7. They tried a weighted vest, "which didn't seem to make a big difference, but she did make progress in her ability to sit and attend..." Tr. 512:7-10. The witness testified that significant efforts were made to address toileting, at the request of the parents, including email exchanges discussing these matters. Tr. 513-519. There was a discussion of the development of IEP goals for 2007, which she was involved in, and that the emphasis was on self-help skills. Tr. 519-523. She stated that she was looking forward to implementing the proposed IEP that she believes is appropriate. Tr. 524:5-7. The witness seemed knowledgeable, credible, and interested in the student's welfare.

The school system's closing brief asserts that there is uncontradicted evidence that the student in this case is both severely autistic and mentally retarded per a definition of metal retardation contained at 34 C.F.R. Section 300.8 (c) (6) (2007). School Brief, p. 1. The school system asserted this in its opening argument as well. Tr. 32. It is uncontradicted that this child has sever autism and the current IEP disability category is developmental delayed. There was opinion testimony that the student is mentally retarded. There was also some dispute on the parents' side as to whether that label is appropriate. The school system asserts that the evidence shows that the student has severe cognitive impairment characteristic of mental retardation. School Brief, p. 2. The Hearing Officer lacks training and qualifications to definitively decide or state what is mental retardation and whether this student has that condition or some other condition. Clearly this student has profound disabilities that impact or interfere with learning ability. Ultimately, over time, the question that will have to be answered regarding this child is whether she can learn beyond a minimal level or whether her physical condition places a limit on what she will be able to achieve. This is not a simple issue that can be determined 100% today in accordance with the legal standards discussed further below.

The parents' demonstrated efforts and commitment to the needs of their child deserves admiration. The great burden on them, physical and emotional, is obvious, and inspires compassion. The record suggests that these young parents have done quite a bit under extremely difficult and arguably unfair life circumstances. The school system acknowledged that the parents have made extensive efforts to get an appropriate education for this handicapped student. See Tr. 40:21-25. "...[T]here is no contention on the school division's part that the parents have not been involved, not been interested, not been engaged in the process." Tr. 306:13-26. See also Tr. 467:1-10.

At the same time, the school system has not been idle. The school system acknowledges that schools may not give up on a child simply because she is severely disabled. School Brief, p. 2. The record shows a commitment and level of effort to provide services to this student that cannot be doubted. The record shows that the student was provided numerous services, commensurate with the kinds of services that other students similarly situated are offered. The record shows that for what ever reason, in some respects this student has not made good progress even with the help of some of those services, but in some other respects this student has benefited. The professionalism and dedication of the teaching staff tasked by the school system with educating this

student seems clear, particularly in the ability to disregard arguably unpleasant circumstances involving bodily functions, and some disappointing results. The record of, for instance, email communications and the testimony of persons directly working with the student regarding various efforts made shows that the teaching staff and therapists are interested and concerned. Efforts are being made. It was not contested that the student shows affection towards adults who are caring for her and that the student is in turn liked by them.

The parents complain that the IEP goals have been or are not appropriate or have been misapplied. They are concerned that the IEPs do not reflect best practices and that there has been a lack of appropriate data collection. Tr. 25:12-17. The parents have complained that some data sheets are missing for periods in 2005 and 2006. See Tr. 8:13-25. They are concerned about timeliness of assessments and that services are not sufficient to address the student's disability so that she can obtain educational benefit. Tr. 26:1-10. They complain that the student's 1:1 aid has not been attentive and properly trained and that the student's teacher and aid may not be qualified. Tr. 26:16-22. There are concerns about statements in a prior written notice and a memo to file. Tr. 26:23-25. The parents believe that the law requires that educational benefit not be *de minimus* and services must meet unique needs and be individualized. Tr. 27:17-25. They complain that they are "not 100% sure that … progress [that is made] is brought about by [the school system's] educational intervention." Tr. 485:6-9. They complain that the school system should change its "mind set". Tr. 487:5-6.

From the factual context of this case, including the description of the student's disability, the nature and element of judgment in the legal questions involved, and from the interactions and demeanor of the parties, legal counsel, and witnesses during the hearing, this Hearing Officer's impression is that the parents have brought this case in good faith because of an extreme sense of urgency on their part given the condition and now increased age of their disabled minor daughter. The school system recognizes and acknowledges the parents' sincerity and many efforts to provide for the student's education. School Brief, p. 3. There appears to be an honest difference of opinion between the parties that can only be resolved to a limited extent in this case, and that will likely continue in future cases unless the parties can voluntarily work out a mutually agreeable strategy, or as matters continue to develop throughout the student's remaining school career, the factual and legal issues are so narrowed until there is no further room for legal argument as regards all possible issues.

Some quotes from the parties' joint exhibit # 1, a booklet entitled "Autism" published by the National Institute of Mental Health, are helpful to framing the issues in this case (See Tr. 238):

> "Today, more than ever before, people with autism can be helped. A combination of early intervention, special education, family support, and in some cases, medication, is helping increasing numbers of children with autism to live more normal lives. Special interventions and education programs can expand their capacity to learn, communicate, and relate to

others, while reducing the severity and frequency of disruptive behaviors… while no cure is in sight, it is possible to greatly improve the day-to-day life of children and adults with autism.

Today, a child who receives effective therapy and education has every hope of using his or her unique capacity to learn. Even some who are seriously mentally retarded can often master many self-help skills like cooking, dressing, doing laundry, and handling money. For such children, greater independence and self-care may be the primary training goals. Other youngsters may go on to learn basic academic skills, like reading, writing, and simple math. Many complete high school. Some … may even earn college degrees. Like everyone else, their personal interests provide strong incentives to learn." p. 32.

The quoted publication goes on to suggest the context for why a sense of urgency is significant in this case and will continue to be:

"Clearly, an important factor in developing a child's long-term potential for independence and success is early intervention. The sooner a child begins to receive help, the more opportunity for learning. Furthermore, because a young child's brain is still forming, scientists believe that early intervention gives children the best chance of developing their full potential. Even so, no matter when the child is diagnosed, it's never too late to begin treatment." p. 33.

On the other side of this optimistic view, the quoted publication states:

"[T]hey [the parents] must face the fact that they have a child who may not live up to their dreams and will daily challenge their patience… Some families deny the problem… It is important for the family to eventually overcome their pain and deal with the problem, while still cherishing hopes for the child's future. Most families realize that their lives can move on…". p. 32.

This dispute is framed by the legal standard that applies, and the questions to be decided flow directly from the application of that legal standard to the facts of the case. The pre-hearing scheduling Order in this case, dated July 13, 2007, identified the parameters of the controversy as the parents' claim on one side that the student is not receiving a Free Appropriate Public Education (FAPE) because the current or proposed Individualized Education Plan (IEP) is not appropriate or if it is appropriately designed it is not being properly implemented given the student's lack of achieving standard benchmarks. On the other side, the school board claims that the proposed or (and) current IEP are reasonably calculated to provide educational benefit and therefore the school system is meeting its legal obligation per the controlling applicable legal standard. The parents have asked for a private school placement. The Hearing Officer added the

question of what relief, whether that requested by the parents, or some other remedy, might conceivably be appropriate.

The prior due process hearing decision dated March 8, 2004, which is joint exhibit 36 in this current case, found that the parties do not dispute that the student has a disability, the student needs special education and related services, and that the student is entitled to a free appropriate public education pursuant to 20 U.S.C. 1400, et seq., and Va. Code Ann. Sections 22.1-213-221 1950), and those finding continue to apply in this case and are not disputed. This Hearing Officer agrees with the legal conclusions reached in the prior case, particularly the reading of the standard applied in Hendrick Hudson Dist. Bd. Of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), which is again the starting point for analysis in this current case. The prior case involved the issue of Extended School Year (ESY) services and a complaint of procedural error in the IEP process. There appears to be no or few questions of procedural errors in the current case. Clearly the prior hearing officer's decision appears correct, according to the law. It seems interesting how circumstances can appear to change significantly in the year to year dynamic of educating a child with sever educational disabilities. The record of the current case shows subsequent IEPs with ESY services, so this suggests a willingness of the school system to try a variety of approaches in the best interests of the student even when there have been prior differences of opinion. See Tr. 59:5-17 and joint exhibit 23. See also Tr. 84:2. See discussion at Tr. 60. The parents note that they believe more issues were involved in the prior case than those actually presented to the hearing officer (See Tr. 76:10-17), which of course would not be uncommon to litigation in general. Sometimes parties may bring to court only what seems to them to be the most obvious complaints while hoping to negotiate other matters as a part of a larger process.

The U.S. Supreme Court's Rowley decision establishes a general standard that requires that this school system propose an IEP for this student that is reasonably calculated to provide educational benefit. However, the Rowley case makes a very broad statement. Its facts are distinguishable from, and offer little guidance in, cases like this current case involving very low functioning students. Indeed it states, "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." Hendrick Hudson Dist. Bd. Of Educ. v. Rowley, 458 U.S. 176, 204, 102 S. Ct. 3034, 3049 (1982). Rowley involved a disabled student who was doing well and progressing easily from grade to grade, and in fact may have been doing better academically in some respects than some non-disabled classmates. The issue in that case was a complaint that the student could possibly do even better if additional special services were provided, to which the school system responded that that was more than necessary given limited public resources. The Rowley court expressly confined its decision to that set of facts. Few parents of severely disabled low functioning students would likely disagree with the outcome of Rowley and might gladly wish to have a child only limited in her disability, with some public support, by the degree that she can exceed her non-disabled classmates. In determining the standard that applies regarding very low functioning students as in our current case, other authority and the analysis contained in other resources must be consulted.

The parents cite Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) as persuasive authority. Brief of Parents, p. 19. The school system responds that the parents misinterpret that case and that the case in fact supports its position instead. School Brief, p. 3. The parents also note the Polk court's discussion of Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986) in their brief at p. 19 as further guidance as to the standard that should apply. The school system also cites several cases from the 4th Circuit in support of its position, Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985), Tice v. Botetourt County Sch. Bd., 908 F.2d 1200 (4th Cir. 1990), and MM v. Sch. Dist. of Greenville County, 303 F.3d 523 (4th Cir. 2002). After review of the cited text, the legal standard that seems to apply is discussed below. For background as to issues that a court might consider important in similar cases, some consideration was also given to the text of JP, a minor, et al v. County School Board of Hanover County, United States District Court for the Eastern District of Virginia, Richmond Division, Civil Action No 3:06cv28, a case submitted to the Hearing Officer by the parents but not discussed by the parties in any detail.

Hendrick Hudson Dist. Bd. Of Educ. v. Rowley, 458 U.S. 176, 188, 192, 200, 102 S. Ct. 3034, 3042, 3043,3048 (1982) does provide guidance that a FAPE "consists of educational instruction specifically 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." The Court's decision mandates that a handicapped child's access [to education] be "meaningful." Citing legislative history the Court states "… Congress expressly 'recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome.'" Access must be to "specialized instruction and related services which are individually designed to provide educational benefit…" The Court goes on to say "The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirement of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations between." As stated above, for these reasons the Rowley court did not address the more complicated factual situation of the profoundly handicapped student. It left open for other courts to further refine the standard to apply, a process that is even today continuing.

The school system's cited case of MM v. Sch. Dist. of Greenville County, 303 F.3d 523 (4th Cir. 2002) at 532 suggests that a reviewing court should examine actual progress rather than just whether the IEP was "reasonably calculated" to lead to educational benefit. However, at the same time the court cites Tice v. Botetourt County Sch. Bd., 908 F.2d 1200 (4th Cir. 1990), stating "We have always been, and we should continue to be, reluctant to second-guess professional educators… Indeed, we should not 'disturb an IEP simply because we disagree with its content,' and we are obliged to 'defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides." The school system's cited case of Hall v. Vance County Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985) states that

"Rowley recognized that no single substantive standard can describe how much educational benefit is sufficient to satisfy the Act. Instead, the Supreme Court left that matter to the courts for case-by-case determination." It stated that in approaching this question, the district court whose decision was under review adopted the Rowley court's strategy, which it stated was to consider the student's capabilities and intellectual progress and what the school had provided.

The parents cited case of Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), Tr. 459, is offered as persuasive authority, which does seem to provide some helpful analysis. Citing its decision in Battle v. Pennsylvania, 629 F.2d 269, 275 (3d Cir. 1980), the court says, "Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point. If the child masters these fundamentals, the education moves on to more difficult but still very basic language, social and arithmetic skills, such as counting, making change, and identifying simple words." The Polk court also quotes Rowley at 208 to confirm "Congress sought to protect individual children by providing for parental involvement …", and quotes Rowley further for the various concepts identified in Rowley above by this Hearing Officer. It goes on to say that since the Rowley court did not have to reach the question of how much benefit is sufficient to be "meaningful" that the Act's notion of "Benefit" should be examined to determine a standard that is faithful to Congressional intent and consistent with Rowley. The standard expressed is "more than a trivial educational benefit", quoting legislative history. Specifically, the Polk court cites a key concern and primary justification for [the Act] of fostering self-sufficiency in handicapped children. [The Act's] sponsors stressed the importance of teaching skills that would foster personal independence for both the dignity of handicapped children and the financial savings to society of early education and assistance for handicapped children. Essentially the goal of the law that is identified in Polk is to prevent handicapped children from becoming a financial burden to society by teaching at a minimum essential life skills, and that therefore the benefit must be more than *de minimis* towards achieving that goal. The progress of a student with profound disability therefore cannot be measured by advancement in grade or acquisition of academic skill. That such a student may never achieve the goals set in a traditional classroom does not undermine the fact that training in basic life skills is an essential part of [the Act's] mandate. The Polk court distinguishes any contradictory dicta in Rowley from this expressed substantive standard.

Continuing the Polk court discusses its decision in Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986) for the proposition that the standard is higher than some educational benefit. It states that the Act requires a plan of instruction under which educational progress is likely, not regression or trivial educational advancement. The Diamond standard is expressed as "the proposition that a child who is regressing (and whose regression can be reversed by reasonable means) is not receiving sufficient 'benefit' under the Act". However, the Polk court goes on to say that regression is not the key consideration but rather that the benefit must be more than *de minimis*, and that the child's parents do not have to show regression. The question for the Polk court is whether the benefit is meaningful presumably to achieving the expressed policy goals of the Act described above. In addition, "major areas of need" of the child must be targeted

by the school system. The Polk court identifies as an indication of *de minimis* benefit a student working on the same skills for years but that this "must be gauged in relation to the child's potential."

Considering the legal standard that should apply, this Hearing Officer adopts the reasoning of the Polk court because it is well considered and does not conflict with any controlling authority that has been cited herein by the parties. It seems to provide the best guidance available at this time.

The parents in this case have the burden of proof, by a preponderance of the evidence. Weast v. Schaffer, ex rel. Schaffer, 377 F.3d 449 (4th Cir. 2004); Weast v. Schaffer, 126 S. Ct. 528 (2005). The school system is not required to prove anything in these proceedings. See Tr. 461:18-25, for the parents' argument that "the school hasn't proven that its agenda to meet [the student's] unique need – in order that she may receive a nontrivial educational benefit…". The parents have in general not met their burden of proof in that they have not shown that the school system is not working towards all of the objectives identified as necessary in Polk. Whether it is actually the case or not, there appears in these proceedings to be active efforts to teach at a minimum essential life skills. , the autism consultant for Public Schools, testified for example as to the importance of independence and self-help skills development in working with this student. Tr. 260:18-25. These efforts and the results obtained are not *de minimis*, although certainly from the evidence there seems to be room for and there must be improvement. In addition, "major areas of need" of the child do appear to be targeted by the school system in this case.

The school system notes in its closing argument at Tr. 471, 480 a number of areas that counsel claimed showed improvement in response to efforts of school personnel. The only testimony that contradicted that was from the child's father, who it may seem has simply a different perspective dealing with the student after school or at other times, rather than during the school day. Counsel for the school system makes a strong argument at Tr. 472, 475, 476, 479, 480 that the school system is meeting its obligation and offering beneficial self-help instruction. It is of course the parents' burden to prove that that is not the case, not the school system's burden to prove that it is. Weast v. Schaffer, ex rel. Schaffer, 377 F.3d 449 (4th Cir. 2004); Weast v. Schaffer, 126 S. Ct. 528 (2005). It seems to this Hearing Officer, from the record of this case, that the student is making some progress, and the Hearing Officer agrees with the parent's closing argument at 483 that the student is not unable to make progress. The parents' burden is to show not only that the handicapped child is capable of progress but also that she is not benefiting in a significant way from the educational opportunity made available and that the school could do something about it if that were the case. That may be the situation and time may tell, but here the burden of proof has not been met.

Without discussing the legal standard for parental private school placement, it is noted that although the parents asked for a private school placement in their *pro se* pleadings, they offered no evidence during the hearing as to how a particular private placement would offer educational benefit. See Tr. 465, 466. In their closing argument

they offered conjecture and a statement of their unsupported belief that a particular school's ABA methodology was "more scientific" and that there would be more 1:1 support. Tr. 462:16-25. Review of the applicable legal rule for parents' private school placement will show that this request could not have been granted on this record even if the parents in this case had prevailed. If the parents here meet their burden of proof in some future case, and if they then also meet a legal standard for private school placement, the outcome of a future case might be different. It is not altogether clear that a private school can provide a better education than a public school to many or most handicapped students.

This decision is unlikely to resolve the differences of opinion between these parties. IEPs are prepared every year, and the student's circumstances may change. This decision is based on the evidence presented by both parties in this hearing only. New evidence may develop in support of the position of either side in the future. Certainly if only minimal progress is made, and documented, year after year going forward, there will be a question of what is being done for this student. Pressure on the school system will increase in one forum or another to show that the student is physically limited by her disabilities in the extent of progress that can be made. With this said this Hearing Officer does not believe that this case decision requires that no order can issue that could benefit the situation, these parties, and this student. Presuming that courts have authority and responsibility to protect the interests of minor children who become the subject of litigation, and that further the legal scheme of special education implies similar authority and responsibility with respect to disabled students in the supervision of the IEP process, and further noting the Hearing Officer's express authority under 8 VAC 20-80-76 K. 7, the School Board of Virginia is ordered to provide an independent educational evaluation of this student specifically to address, and to the extent possible resolve, the question of this student's capacity for learning given her conditions of disability. The record suggests that the last independent evaluation was over two years ago and at the parents' expense. Tr. 497:9-17. Further, the evaluation (whether as a part of one single evaluation process or a separate specific evaluation) that is done must address this child's toileting ability, to determine first whether the conditions of disability prevent more than minimal progress, and if that is not the case, second, what, if anything, can be done to improve the situation. An eight year old child who cannot go to the bathroom independently is certainly at an educational disadvantage. The school system stipulated that toilet training has not to this point been successful. Tr. 433.

, an occupational therapist who has worked with the student on behalf of the school system testified that the IEP team had agreed that a functional behavioral assessment would be a good idea. Tr. 537:4-6. Given the extremely difficult facts of this case in getting at what the student's real potential may be, the fact that the parties are discussing what evaluations may be appropriate as a part of the current IEP process, and counsel for the school system's statement that it would probably have no objection (Tr. 498:24-25), an order to obtain further scientific information to help work on these problems seems a reasonable outcome of this case. The results of this evaluation process may prove helpful to either party's case as this continuing difficult situation moves forward from year to year. Since this Hearing Officer found that the parents did not prove that this student was not offered a FAPE for the time period at issue in this case

and further because there may not be any express regulatory authority for a hearing officer to order improved classroom record keeping, that is not ordered in the Decision. If this Hearing Officer were aware of authority to do so it would be ordered. Instead this Hearing Officer recommends that more attention to day to day classroom record keeping of benchmark achievements may be helpful to either parties' cases in the future. The records presented in this hearing were difficult to follow and there was no strong evidence of the methodology applied and as to why the types of records maintained should be given strong weight. The Hearing Officer attached more weight to the testimony of witnesses and to correspondence than to the voluminous tabulated statistics presented.

The Hearing Officer finds that the requirements of notice to the parents appears to have been satisfied, that the child has a disability, that the child needs special education and related services, and that it was not proven that the local education agency is not providing a free appropriate public education. 8 VAC20-80-76 J. 17.

The prevailing party in this case as to every issue presented is the local education agency. 8 VAC20-80-76 K. 11.

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 one year of the date of this decision. From VDOE guidance documentation.

The local education agency is reminded that it may have a responsibility to develop and submit an implementation plan with regard to this decision pursuant to 8 VAC 20-80-76 I. 16.

AND THE ABOVE IS SO ORDERED.

Entered: 9/5/07

Virginia State Administrative
Hearing Officer

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