

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS

CLOSE REPORT

School Division	Public Schools	Mr. & Mrs. Name of Parents
Division Superintendent	Dr.	Name of Child
Kathleen S. Mehfoud, Esquire Patrick Andriano, Esquire ReedSmith Counsel Representing LEA		William B. Reichhardt, Esquire Amanda P. Defede Esquire William B. Reichhardt & Associates Counsel Representing the Parent/Child
Robert J. Hartsoe, Esquire Hearing Officer		Mr. & Mrs. Party Initiating Hearing

HEARING OFFICER'S DETERMINATION OF ISSUES:

- Issue:** Whether the Proposed IEP Provides the Child a FAPE On the Basis: (1) that the Child's Skills Have Regressed During the Period of Implementation of the Previous IEP; and, (2) that the Child has Failed to Make Meaningful Educational Progress during the Period of Implementation of the Previous IEP?
- Determination:** The Parents Lacked Sufficient Probative Evidence to Prevail on this Issue?
- Issue:** Whether the Proposed IEP Provides FAPE By Failing to Meet the Child's Special Education Needs?
- Determination:** The Parents Lacked Sufficient Probative Evidence to Prevail on this Issue?
- Issue:** Whether the Proposed Extended School Year Services Provides a FAPE By Failing to Meet the Child's Special Educational Needs?

Determination: The Parents Lacked Sufficient Probative Evidence to Prevail on this Issue.

Issue: Whether the Child's Eligibility Designation for Special Education Must be revised to Accurately Reflect His Disabilities and Provide the Child with a FAPE?

Determination: The Parents Lacked Sufficient Probative Evidence to Prevail on this Issue.

Issue: Whether PS' Disciplinary Measures for the Child's Behaviors Were Appropriate?

Determination: The Parents Lacked Sufficient Probative Evidence to Prevail on this Issue.

Issue: Whether PS Violated IDEA in Its Relationship with the Parents By Failing: (1) to Respond to the Parents' Requests for Information; and, (2) To Notify the Parents of IEP Meetings?

Determination: The Parents Lacked Sufficient Probative Evidence to Prevail on this Issue.

HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:

ORDERED that this matter be dismissed without prejudice.

This certifies that I have completed the hearing in accordance with regulations and have advised the parties of their rights in writing. The written decision is attached and I have advised the LEA of its responsibility regarding submission of an implementation plan to the parties, the hearing officer and the SEA within forty-five days.


Hearing Officer

September 25, 2007
Date

CERTIFICATE OF SERVICE

I certify that on this 25th day of September, 2007, a true and accurate copy of this pleading was mailed, *via* first-class, postage prepaid mail, to:

Kathleen S. Mehfoud, Esquire
Reed Smith LLP
Riverfront Plaza West Tower
901 East Byrd Street, Suite 1700
Richmond, Virginia 23219

William B. Reichhardt, Esquire
William B. Reichhardt & Associates
4020 University Drive, Suite 212
Fairfax, Virginia 22030

Ron Geiersbach, Coordinator of Due Process Services
Office of Dispute Resolution and Administrative Services
Commonwealth of Virginia Department of Education
PO Box 2120
Richmond, Virginia 23218-2120

Krysia C. Nelson, Esquire
Evaluator
Nelson & Tucker, P.L.C.
600 Peter Jefferson Parkway, Suite 100
Charlottesville, Virginia 22911


Robert J. Hartsoe

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS**

DECISION

	Public Schools	Mr. & Mrs.
School Division		Name of Parents
Dr.		
Division Superintendent		Name of Child
Kathleen S. Mehfoud, Esquire Patrick Andriano, Esquire ReedSmith		William B. Reichhardt, Esquire Amanda P. Defede Esquire William B. Reichhardt & Associates
Counsel Representing LEA		Counsel Representing the Parent/Child
Robert J. Hartsoe, Esquire		Mr. &
Hearing Officer		Party Initiating Hearing

INTRODUCTION:

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), this matter came upon the Parents' and Child's (collectively "Parents") appeal from the decision contained in the Individual Education Program, dated May 10, 2007. LEA Amended Exhibit 46. ("Proposed IEP.") The Parties established several issues on whether the Proposed IEP would provide the Child a Free Appropriate Public Education ("FAPE"), as contained in the Parents letter, dated July 11, 2007, requesting a Due Process Hearing; the response, dated July 23, 2007 from Public Schools ("PS"); and, the Parents' letter, dated August 22, 2007. Counsel for the Parties presented an excellent case in a professional manner. For reasons stated herein, the appeal is denied.

ISSUES DEFINED:

- I. **Whether the Proposed IEP Provides the Child a FAPE On the Basis: (1) that the Child's Skills Have Regressed During the Period of Implementation of the Previous IEP; and, (2) that the Child has Failed to Make Meaningful Educational Progress during the Period of Implementation of the Previous IEP?**

- II. **Whether the Proposed IEP Provides a FAPE By Failing to Meet the Child's Special Education Needs?**
- III. **Whether the Proposed Extended School Year Services Provides a FAPE By Failing to Meet the Child's Special Educational Needs.**
- IV. **Whether the Child's Eligibility Designation for Special Education Must be revised to Accurately Reflect His Disabilities and Provide the Child with a FAPE?**
- V. **Whether PS' Disciplinary Measures for the Child's Behaviors Were Appropriate?**
- VI. **Whether PS Violated IDEA in Its Relationship with the Parents By Failing: (1) to Respond to the Parents' Requests for Information; and, (2) To Notify the Parents of IEP Meetings.**

PROCEDURAL BACKGROUND:

On May 10, 2007, the requisite IEP generated the Proposed IEP. LEA Exhibit 46. The Parents duly appealed *via* letter, dated July 11, 2007, requesting a Due Process Hearing. Several unremarkable Pre-Hearing Conferences were held with exception of PS request, by letter, dated August 27, 2007, that the IDEA deadlines be reset on the basis that the Parents, by their letter, dated August 22, 2007, raised new issues and therefore was, in essence, a *de facto*, request to amend their original request for a Due Process appeal; this request was denied for reasons contained in the Third PreHearing Report. (*See also* all prior Pre-Hearing Reports for details and background.) The Hearing on the merits was held on September 10, 11 and 13, 2007, at which time the Parties presented evidence and argument. The Parties and their counsel were present throughout the Hearing.¹ With the exception of the matters stated herein, all procedural matters, notices, *etc.*, were satisfied or otherwise not at issue.

FACTUAL FINDINGS:

The Parties were prepared and effectuated the Hearing in a professional manner. Given the challenges facing the Child, the commitment of the Parents and the professionals involved, this was a difficult case. The Parties respective factual and expert opinion evidence conflicted on major issues. Notwithstanding, by stipulation of the Parties and without waiving arguments as to significance and what weight, if any, the fact finder should place upon each such exhibit, all the Parties' Exhibits were admitted with the exception of the "excepts" of the Parents' Exhibit 1 and their Exhibits 13, 14 and 15. Further, by stipulation, the balance of exhibits introduced during the Hearing were received.

¹On the first day, _____, Esquire, and Ron Geirersbach, Esquire, were present. Ms. _____ served as the evaluator for the Hearing Officer, per general mandate of the Virginia Department of Education. Mr. Geirsbach, the Coordinator of Due Process Services for the Virginia Department of Education, observed. These individuals were not involved in the matter.

The Child's condition was undisputed as referenced on Pages 10 and 11 of the Proposed IEP quoting (and, by lack of disputing evidence from the PS, confirming) certain portions of the report of Dr. (" "), entitled "Report of Neuropsychological Evaluation." Parents' Exhibit 17. As stated in the Proposed IEP, the Child was diagnosed with dementia due to unspecified medical condition (high risk pre- and post-natal factors affecting brain growth and development – probable fetal alcohol spectrum disorder resulting in static encephalopathy); Pervasive Developmental Disorder; and, other DSM-IV opinions. LEA Amended Exhibit 46, Page 10 of 20. In short, the child presents with a "very complex neuropsychological profile." *Id.* Further, given the Child's age and circumstances, both documents state that "the Child is at a very critical state of decompensation due to the fact the he is under extreme environmental and educational pressures and has average intellectual abilities but very significant neurocognitive and neuropsychiatric impairments limiting his performance output."² *Id.* Further, while the Child "falls in the average range of intelligence, he meets the full criteria for a diagnosis of minimal brain dysfunction/static encephalopathy as he has severe impairments in multiple neurocognitive neuropsychiatric areas." *Id.* at Pages 10 of 20 and 11 of 20. Further, the Child "shows a prominent mixed receptive-expressive language disorder and an oral motor dysfunction impacting articulation and semantic-pragmatic-syntactical expression." *Id.* at Page 11 of 20.

The Parents introduced the testimony of six witnesses: (" "), (" "), ("Father"), Dr. ("Dr. "), and ("Mother").

As a professional, was qualified as an expert in "Behavior Analysis" and "Applied Behavior Analysis" ("ABA"). September 10th Transcript at Pages 33-34. The former was defined as "looking at a behavior, a complex one, and breaking it down into its functional components, and then analyzing it through careful data collection." *Id.* at Page 28. The latter was defined as the evaluation and remedial processes which looks at the line of skill areas for individuals with developmental delays with specific focus on language as well as other academic areas. *Id.* at Page 36. She is certified to evaluate learning needs as it relates to applied behavior analysis. *Id.* at 92. There exists no certification for these fields in Virginia. *Id.* at Page 30. She was not qualified as an expert in other areas of education including IEP classification, speech, occupational therapy, language, placement, *etc.* *Id.* at 92. However, she has made recommendations to IEP teams in the past. *Id.* at 75-76. Her opinion was that the Child's academic skills regressed during the implementation of the previous IEP. *Id.* at Pages 60-84; LEA Amended Exhibits 30, 36 and 39 ("Previous IEP"). described the Child's weaknesses including his inability to imitate and the necessity of instruction, consistent with Dr. 's report. *Id.* at 46-47; Report at Page 19. Further, based on her assessment results which included an observation, she opined that PS' response to the Child's refusal to comply with his teachers directions was inappropriate; specifically, delaying a mandate to the Child, *via* bargaining or otherwise, motivated him to act inappropriately. *Id.* at Page 60. She had

² PS introduced expert opinions inconsistent with certain opinions of Dr. via Dr. (September 11th Transcript at Pages 313-362.) However, such conflicting testimony did not extend to the Child's diagnosis. (*Id.* at Page 387.)

the opportunity to view the Child in a school setting for approximately one hour. *Id.* at 85. Overall, she did not testify as to her having an extensive, long-term, relationship with the Child. She testified as to the importance of collecting data. *Id.* at 76-77. She opined that the child would benefit from both the Parents and PS utilizing the ABA approach. *Id.* at Pages 78-84. Although implied, she did not opine, that the Proposed IEP was inappropriate. Moreover, she provided no opinion as to whether the Proposed IEP would provide the Child with some educational benefit.

As the Parents' lay advocate, Ms. testified as a factual witness as referenced in the September 10th Transcript at Page 101, *et seq.* Her testimony was covered by Parents' Exhibit 1 "CD – Complete IEP meetings: 4/17/07; 5/3/07; and 5/10/07." Her testimony was received as a factual witness.

The Father testified as to factual observations as found in the multiple references in the transcripts. He testified that he observed academic regression of the Child at home during the implementation of the Previous IEP and, by implication, the period covering the EYS. *Id.* at 276-278. On rebuttal, the Mother provided additional such testimony. September 13th Transcript at Pages 155-172. The Parents provided the IEP team with these observations in a timely manner to PS so as to allow a proper evaluation by the IEP team when generating the Proposed IEP.

The Father testified that he declined signing an *addendum* to the Previous IEP on the basis that it inaccurately reflected his appearance at the referenced IEP meeting. September 10th Transcript at Page 127-128. However, the Parents subsequently agreed to the *addendum*. *Id.* at Pages 288-289.

The Parents' allegation that PS failed to provide the necessary notices and/or communications regarding the Child and his IEP was not sufficiently articulated or otherwise evidenced as to create a factual dispute with one exception. The Father further testified that he requested the IEP review the 's Report, (Parents Exhibit 17), and reconvene for purposes of evaluating the Report's conclusions and recommendations. This request was made *via* letter, dated January 31, 2007. Parents' Exhibit 3. The letter requested PS to review all matters involved in the Child's educational environment including his educational eligibility designation, after considering 's Report. "[The Parents] are requesting a meeting of [the Child's] IEP team to review the [Report] and its recommendations, and to make appropriate changes to [the Child's] IEP" *Id.* No IEP was convened until mid April, 2007. Parents Exhibit 1, 4/17/07 recording. PS provided no evidence or explanation regarding the delay. Overall, the Parents' testimony evidenced a conclusive opinion that PS failed to understand the Child's issues (including the necessity of collecting data consistent with the ABA methodology) and, as a result, failed to possess the necessary information to effectuate the requisite services required by the Child's special educational needs.

The Mother provided general information regarding the Child's placement at the School. *Id.* at Page 277-279.

Dr. [REDACTED] was qualified as an expert in neuropsychology with emphasis as to how it pertains to children. *Id.* at 150. Further, he was qualified as an expert in related areas including occupational therapy, speech, language and physical therapy as well as the ABA methodology. *Id.* at 158. Over the course of a day in December 18, 2006, he evaluated the Child. *Id.* at Page 243. He testified consistent with his report, the [REDACTED] Report. In short, he opined that the Child had regressed during the period of the Previous IEP. *Id.* at Pages 199-212, 219-224. In addition, he found the Proposed IEP to be deficient to the extent that it was inconsistent with his recommendations. *Id.* at Pages 235-242. Further, he recommended ABA implementation as soon as practical. *Id.* at Page 227-228. Further, he opined that the Child required a great deal of occupational and physical therapy as well as other related services. [REDACTED] Report, Parents' Exhibit 17, at Pages 27-31. Finally, he opined that the Child's medication required adjustment. *Id.* at Page 31.

However, Dr. [REDACTED] was unaware of certain aspects of the Proposed IEP or its implementation. September 10th Transcript at Pages 235-237. Further, he never saw the Child in a school setting nor did he interview his educational providers. *Id.* at Page 247. He could not definitively opine that the IEP's amount of speech and occupational therapy were deficient; he was unaware as to what constituted these services. *Id.* at Pages 235-239. While he provided general opinions that the Child should receive more services than contained in the Proposed IEP, he lacked the factual knowledge to provide insightful opinions such as, *e.g.*, factual knowledge obtained from visiting the school, observing the Child in a school setting, interviewing the

PS employee who administered such educational services, *etc.* Similarly, while attempting to testify that the Proposed IEP's eligibility designation was incorrect, his use of DSM-IV opinions to challenge the Child's educational eligibility designation was misplaced. *Id.* at 217-218. While DSM-IV opinions have bearing on the issue, Dr. [REDACTED] was not qualified as an expert in education to allow his opining on the issue of why the Proposed IEP's educational eligibility designation was incorrect. To complicate matters, the difference between the Proposed IEP's educational eligibility designation ("Other Health Impairment") *versus* the unknown educational eligibility designation desired by the Parents was not sufficiently articulated to allow a comparison. Overall, Dr. [REDACTED]'s opinions regarding the inadequacies of the Proposed IEP were undermined insofar as he had not assessed the Child, his placement or progress since his evaluation in December, 2006. *Id.* at Page 272. For these reasons, he could not, and did not, provide credible opinions as to whether the Proposed IEP would provide the Child with some educational benefit.

The Parents did not introduce any expert opinions regarding their proposed placement of the Child at the [REDACTED] School.

PS introduced six witness: Dr. [REDACTED] (" [REDACTED] "), [REDACTED] (" [REDACTED] "), [REDACTED] (" [REDACTED] "), [REDACTED] (" [REDACTED] "), [REDACTED] (" [REDACTED] "), and [REDACTED] (" [REDACTED] "). They were all employed by [REDACTED] PS.

was qualified as an expert in working with children with special education needs with emphasis on emotional disturbance and learning disabilities. September 11th Transcript at Page 29-30. Further, she was qualified as an expert in autism and in ABA. *Id.* She was employed by CPS as the Administrative Coordinator of Autism. *Id.* at Page 17. She observed the child in a school setting in the Summer of 2007 for ninety minutes. *Id.* at Pages 30-31. She reviewed pertinent records and had discussions with relevant educators directly involved with the Child. *Id.* at Page 31-33. Her testimony consisted of a series of opinions as to why certain recommendations contained in the Report were incorrect. *Id.* at Pages 32-36, 57-58. For example, she opined that the Child's behaviors were not reflective of the autism spectrum of behaviors. *Id.* at Page 38. In addition, she opined that the Child required group instruction and that one-on-one instruction would be "a step back." *Id.* at Page 34. Further, she opined that the Child would succeed in a group setting. *Id.* at Page 36-37. In addition, she would not recommend ABA exclusively because it would not allow him to generalize; *i.e.*, his applying learned skills in a variety of settings. *Id.* at Page 38. In addition, she assessed that the Child's ability to transition had improved during the Previous IEP. *Id.* at Page 61. She provided no specific opinion on whether her review of the Proposed IEP would provide the Child with some educational benefit; she had not read the document to avoid its influence on her observations and resulting opinions. *Id.* at Page 45-46.

was qualified as an expert in special education, working with the education of children with disabilities. September 13th Transcript at Page 45-47. Further, she was qualified as an expert in elementary education. *Id.* at Page 47. She was the Child's teacher. *Id.* at Page 49. She saw the Child four to five hours per day. *Id.* She implemented the Previous IEP. *Id.* at Page 85. She coordinated her efforts with those of the physical therapist, occupational therapist and speech/language therapist creating a team approach. *Id.* at Pages 83; September 10th Transcript at Page 96; and September 11th Transcript at Page 143, 235. She participated in the IEP meetings which generated the Proposed IEP. Her testimony described a great improvement in the Child's behavior and academic achievement from October, 2006, through June, 2007. *Id.* at 55-56 and 85. In general terms from the testimony, the Child was out-of control from September through roughly December, 2006. For example, the Child, *inter alia*, would: communicate *via* outbursts and tantrums; run from the room or authority; fail to stay on task; have severe problems writing; and, fail to socialize with his peers. September 13th Transcript at Page 54. By year's end, the Child's behavior problems were, for the most part, resolved to occasional tantrum. *Id.* at Page 56. Various technics were used to promote proper behaviors. *Id.* at Pages 56-59. The result of the improved behavior allowed the Child to be taught. She opined that a group setting would be the best learning environment for the Child. *Id.* at 85. This would allow the Child to gain social skills as well as provide good role models for him. *Id.* at Page 85. By June, 2007, the Child had demonstrated sufficient skills to be promoted to the first grade. *Id.* at Page 81-82. She opined that the Child had mastered the Previous IEP goals. *Id.* at Page 87. The Proposed IEP referenced "K/1" for "Grade." She considered the Previous IEP and Proposed IEP to be appropriate. *Id.* at Page 85-86. She, either directly or by implication, opined that the Proposed IEP would provide the Child with some educational benefit. *Id.*

was qualified as an expert in occupational therapy. September 11th Transcript on Page 66. She was the Child's occupational therapist from November, 2006, through June, 2007, implementing the Previous IEP. *Id.* at Page 66. She saw the child one hundred and eighty minutes a month. Similar to 's observations and opinions, saw a great improvement in the area of occupational therapy. Specifically, she saw improvement in the Child's: engaging in fine motor skills as directed by the teacher (*Id.* at Pages 72-79); implementing the use of fine motor skills such as signing his name (*Id.* at Page 73, 77-80); and behaving properly (*Id.* at Page 83-85). She opined that the Proposed IEP offered the appropriate amount of occupational therapy for the Child. *Id.* at Page 93. She rejected the recommendation contained in the Report that the Child should receive one hour a day of occupational therapy. *Id.* at Page 96.

was qualified as an expert in speech/language pathology. *Id.* at Page 143. She worked with the Child three times a week, for three weeks and, on every fourth week, she consulted with the other educational professionals as well as observed the Child. *Id.* at 134-144. She visited the classroom several times a day. *Id.* at Page 145. She opined that the Child improved "rather well" in speech and language, socialization and related matters. *Id.* at Page 151-152, 149-153. She opined that the Child "did well with generalization into the classroom." *Id.* at Page 152. The Child "definitely made gains in being able to effectively communicate at school" during the school year. *Id.* at Page 153. She opined that the amount of speech and language therapy referenced in the Previous IEP was appropriate. *Id.* at Page 154. She opined that the Proposed IEP offered the appropriate amount of speech/language therapy for the Child. *Id.* at Page 159.

was qualified as an expert in physical therapy. September 13th Transcript at Page 5. She saw the Child once a week and implemented the physical therapy portion of the Previous IEP. She participated in the IEP process. *Id.* at Page 13. In the area of physical therapy, the Child made significant progress to where physical therapy services were no longer needed. *Id.* at Page 8 and 12. She opined that the amount of physical therapy referenced in the Previous IEP was appropriate. *Id.* at Page 12. She opined that the Proposed IEP offered an amount of physical therapy that was more than necessary. *Id.* at Pages 17-18.

was qualified as an expert in the area of school psychology as well as a behavior specialist planning behavioral programs for children with special needs. September 11th Transcript at Page 227. She works as a behavior specialist with PS. *Id.* at Page 222. She works with forty schools on issues related to behavior assessment and behavior management. *Id.* She was requested to observe the Child for purposes of addressing certain behavior problems. *Id.* at 228. Based on such observation and discussions with the other professionals involved in the Child's education, she assessed the needs of the child and used certain interventions to improve the Child's behavior. *Id.* at Page 234-247. Over the course of the implementation of the Previous IEP, the Child's behavior improved. *Id.* at Pages 231-241, 252. She opined that Child's behavior greatly improved from December, 2006, when the data for the Report was collected. *Id.* at Page 252. By year's end, the Child's behavior had vastly improved. *Id.* at Page 257-259. She opined that the Proposed IEP provided the Child with a FAPE. *Id.* at Page 263.

was qualified as an expert in the areas of school psychology including children with autism. *Id.* at Page 310. She reviewed the pertinent records of the Child. *Id.* Page 313. Overall, her testimony consisted of reviewing test results from various sources, in an to show that the Child did not regress during the implementation of the Previous IEP, but improved. *Id.* at Pages 355-362). Further, she opined that the conclusions that the Child had digressed during the school year as contained in the the Report, were erroneous insofar as: the underlying data was incomplete or misinterpreted by Dr. ; and/or the child was inconsistent in testing because of his age/condition. *Id.* at Page 358-363, Page 385. She opined that the Previous IEP was appropriate. *Id.* at Pages 358-359. She opined further that the Proposed IEP provided the Child with a FAPE. *Id.* at Page 259.

ANALYSIS:

Introduction

The Parents requested, *inter alia*, reimbursement for the cost of private placement at the School. Assuming without deciding whether notice requirements were satisfied, the Parents introduced no probative evidence, *via* expert or lay witness, as to the appropriateness of this placement. *See, generally, Burlington, MA v. Department of Education et al.*, 471 U.S. 359, 105 S.Ct. 1996 (U.S. 1985) and its progeny, wherein the Court held that parents may be awarded reimbursement of the costs associated of a placement upon a showing that the LEA's IEP was inappropriate and that the parents' placement was appropriate as well as other equitable factors may be considered. Without such evidence, no reimbursement can be considered.

In any event, in major areas, the law is undisputed. In Board of Education v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034 (1982), the Supreme Court found that a disabled child is deprived of a FAPE under either of two sets of circumstances: (1) if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a FAPE; or (2) if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. In Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir.1985), the Court opined that no single substantive standard can describe how much educational benefit is sufficient to satisfy IDEA and that educational services must be reasonably calculated to produce more than some minimal academic achievement. In Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), the Court stated that IDEA "calls for more than a trivial educational benefit," but requires the child to receive a meaningful benefit and an opportunity to receive significant learning. In this administrative due process proceeding initiated by the Parents, they have the burden of proof. Schaffer, ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005). The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005). Expert testimony may be required when deciding complex issues surrounding the implementation of an IEP. *See* Arlington County School Board v. Smith, 230 F.Supp.2d 704, 715 (E.D. Va. 2002) where the Court reversed the decision of the Hearing Officer on the basis that he made factual findings that were not supported by expert testimony.

As to all issues, the evidence was overwhelming that the Child made progress in the areas of behavior and academics during the implementation of the Previous IEP. , were the professional educators involved in the Child's daily school environment. Because of their intensive interaction with the Child, their interaction with each other, their individual demeanor, they presented credible, unbiased evidence and opinions.

Specific Issues

I. Whether the Proposed IEP Provides the Child a FAPE On the Basis: (1) that the Child's Skills Have Regressed During the Period of Implementation of the Previous IEP; and, (2) that the Child has Failed to Make Meaningful Educational Progress during the Period of Implementation of the Previous IEP?

The evidence was overwhelming that the Child made progress in the areas of behavior and academics during the implementation of the Previous IEP. Witnesses for PS were the professional educators involved in the Child's daily school environment. They consistently gave factual and expert evidence that the Child improved in all areas. While there was evidence to suggest that the Child's test scores were, at best, inconsistent and that the improvements did not translate to the home environment, such evidence was not sufficiently articulated (by fact or expert witness) to rebut the strength of these educators. Assuming without deciding that the Child's academic improvement did not translate to his home, such a factual determination would be insufficient to find that the Previous IEP and, by implication, the Proposed IEP, would not provide the Child with a FAPE. *See, generally, J.S.K. v. Hendry County Sch. Bd.*, 18 IDELR 143, 147 (11th Cir. 1991) wherein the Court defined "'appropriate education' as making measurable and adequate gains in the classroom. If 'meaningful gains' across settings means more than making measurable and adequate gains in the classroom, they are not required by [IDEA] or *Rowley*." *Cf. M.C. v. Central Regional School District*, 23 IDELR 1181 (3rd Cir. 1996), wherein the Court adopted a broader standard, finding that an appropriate education includes the opportunity to learn skills in a way that will allow generalization of those skills to other aspects of life including the home. On this issue, the Proposed IEP provides the Child with a FAPE.

II. Whether the Proposed IEP Provides a FAPE By Failing to Meet the Child's Special Education Needs?

The evidence is undisputed that the proposed IEP provides the Child with a FAPE. While the Parents introduced expert opinion as to the necessity of ABA, individual teaching, large amounts of different therapies, such evidence did not address the true standard under *Rowley*. Assuming, *arguendo*, that the Parents' design would serve the best interests of the Child, this is not the standard. *See Rowley*, 458 U.S. at 200. The Parents produced no credible evidence, by expert or lay witness, on the issue of whether the Child would (or would not) receive some educational benefit from the Proposed IEP. In contrast, all the experts, including the Child's teachers, opined that the Proposed IEP provided a FAPE or, at least, some educational benefit. In addition, the Parents assert that the Child was denied a FAPE on the basis that the PS employees did not maintain the necessary data to reflect the Child's progress.

However, there was no expert opinion from the Parents that the actions of such individuals were deficient or defective. By implication, the Parents assert that the collection of data by PS employees was inconsistent with the rigid collection of data as required by an exclusive ABA plan. However, the ABA was shown not certified (*i.e.*, accepted by a governmental or respected medical entity) in Virginia and, at best, to be only one of several approaches to educating the Child from several witnesses. On this issue, the Proposed IEP provided the Child with a FAPE.

III. Whether the Proposed Extended School Year Services Provides a FAPE By Failing to Meet the Child's Special Educational Needs?

The Parents' failed to provide sufficient credible evidence, *via* expert or lay witness, on this issue as to create a factual dispute. On this issue, the Proposed Extended School Year Services provides the Child with a FAPE.

IV. Whether the Child's Eligibility Designation for Special Education Must be revised to Accurately Reflect His Disabilities and Provide the Child with a FAPE?

While the Father provided sufficient notice that he wanted PS to review the designation (Parents' Exhibit 3), the Parents' failed to provide sufficient credible evidence, *via* expert or lay witness, on this issue so as to create a factual dispute. The Proposed IEP contains references to the Parents' private evaluations including the Report. The IEP team considered these reports when formulating the Proposed IEP. There is insufficient credible evidence, *via* expert or lay witness, to allow a Hearing Officer to substitute his decision for the decision of the professionals involved in the IEP process, as memorialized by the Proposed IEP. While the Parents introduced evidence of the Child's regression and that data collection by PS was imprecise, this evidence was not persuasive. See Rowley, 458 U.S. at 206 wherein the Court states that such educational decisions of these professionals are given "due weight." See also Hartman v. Loudoun County Board of Education, 118 F.3d 996, 1001 (4th Cir. 1997) quoting Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 105 (4th Cir. 1991) wherein the Court opined that such decisions were "*prima facie*" correct. However, "a fact finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate." M.S. and JacQueline Simchick v. Fairfax County School Board, et al., 2007 U.S. Dist. LEXIS 33735 (E.D. Va. 2007) quoting County Sch. Bd. Of Henrico v. Z.P., 399 F.3d 298, 307 (4th Cir. 2005). On this issue, the Proposed IEP provides FAPE.

V. Whether PS' Disciplinary Measures for the Child's Behaviors Were Appropriate?

The Parents' failed to provide sufficient credible evidence, *via* expert or lay witness, on this issue so as to create a factual dispute. In contrast, PS introduced evidence that it implemented behavior measures that were appropriate and successful. In short, behavior measures that are inconsistent with ABA does not render such measures inappropriate, based on the evidence introduced. On this issue, the implementation of the Previous IEP was consistent with providing the Child a FAPE.

VI. Whether PS Violated IDEA in Its Relationship with the Parents By Failing: (1) to Respond to the Parents' Requests for Information; and, (2) To Notify the Parents of IEP Meetings.

The Parents' failed to provide sufficient credible evidence, *via* expert or lay witness, on this issue as to create a factual dispute. With one exception, there appeared to be simple communication issues between the Parties, but such difficulties were not serious (as contemplated by Rowley) nor did they affect the Child's receiving a FAPE. With that stated, there was a delay between the Father requesting the IEP team to reconvene (to review the private evaluations including the Report) in his letter, dated January 31, 2007. For unexplained reasons, the IEP team was assembled in mid April, 2007. Evidence from the Parents, by demeanor and implication, revealed that this delay was frustrating. Assuming without deciding whether this delay was serious (as contemplated by Rowley), given the behavior issues presented in the Fall, 2006, as well as the "window" of opportunity referenced in the Report, the Parents' failed to provide sufficient credible evidence, *via* expert or lay witness, on the impact, if any, this may have had on the Child's opportunity to receive a FAPE. As a result, the actions which implemented the Previous IEP were consistent with providing the Child a FAPE. *See* 20 U.S.C. §1415(f)(3)(e)(ii). *See also*, MM by DM and EM v. School District of Greenville County, 303 F.3d 525, 533 (4th Cir. 2002) wherein the Court opined that the a procedural defect must interfere with the implementation of a FAPE. *In accord*, Gadsby v. Grasmick, 109 F.3rd 940, 956 (4th Cir. 1997).

CONCLUSION

The appeal is denied. All the adults involved in the Child's life are committed to his success. Unfortunately for the Child given his individual circumstances, the limitations created by Rowley and its progeny absolutely prohibit the relief requested by the Parents, at this time. As required, PS is deemed "the prevailing party."

APPEAL RIGHTS AND NOTICES

For your information, VAC 20-80-76 O provides that "[a] decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal court." The LEA is reminded of its obligations to develop and submit an implementation plan to the Parties, the Hearing Officer and the SEA within forty-five days of the date of this decision.


Hearing Officer


Date

CERTIFICATE OF SERVICE

I certify that on this 25th day of September, 2007, a true and accurate copy of this pleading was mailed, *via* first-class, postage prepaid mail, to:

Kathleen S. Mehfood, Esquire
Reed Smith LLP
Riverfront Plaza West Tower
901 East Byrd Street, Suite 1700
Richmond, Virginia 23219

William B. Reichhardt, Esquire
William B. Reichhardt & Associates
4020 University Drive, Suite 212
Fairfax, Virginia 22030

Ron Geiersbach, Coordinator of Due Process Services
Office of Dispute Resolution and Administrative Services
Commonwealth of Virginia Department of Education
PO Box 2120
Richmond, Virginia 23218-2120

Kryisia C. Nelson, Esquire
Evaluator
Nelson & Tucker, P.L.C.
600 Peter Jefferson Parkway, Suite 100
Charlottesville, Virginia 22911


Robert J. Hartsog

OCT 15 2007

Dispute Resolution & Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS

AMENDMENT TO DECISION

School Division	Public Schools	Mr. & Mrs.
		Name of Parents
Division Superintendent	Dr.	Name of Child
Kathleen S. Mehfoud, Esquire Patrick Andriano, Esquire ReedSmith Counsel Representing LEA		William B. Reichhardt, Esquire Amanda P. Defede Esquire William B. Reichhardt & Associates Counsel Representing the Parent/Child
Hearing Officer	Robert J. Hartsoe, Esquire	Mr. & Mrs. Party Initiating Hearing

AMENDED APPEAL RIGHTS AND NOTICES

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.

The LEA is reminded of it obligations to develop and submit an implementation plan to the Parties, the Hearing Officer and the SEA within forty-five days of the date of this decision.


Hearing Officer

October 12, 2007
Date

CERTIFICATE OF SERVICE

I certify that on this 12th day of October, 2007, a true and accurate copy of this pleading was mailed, *via* first-class, postage prepaid mail, to:

Kathleen S. Mehfoud, Esquire
Reed Smith LLP
Riverfront Plaza West Tower
901 East Byrd Street, Suite 1700
Richmond, Virginia 23219

William B. Reichhardt, Esquire
William B. Reichhardt & Associates
4020 University Drive, Suite 212
Fairfax, Virginia 22030

Ron Geiersbach, Coordinator of Due Process Services
Office of Dispute Resolution and Administrative Services
Commonwealth of Virginia Department of Education
PO Box 2120
Richmond, Virginia 23218-2120

Krycia C. Nelson, Esquire
Evaluator
Nelson & Tucker, P.L.C.
600 Peter Jefferson Parkway, Suite 100
Charlottesville, Virginia 22911

and the original sent to:

_____, Ed.S
Supervisor of Special Education
Public Schools

_____, Virginia


Robert J. Hartsoe