08-032

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

Name of Child

16 December 2007
Date of Decision or Dismissal

John F. Cafferky
Counsel Representing LEA

Bruce Ellis Fein
Counsel Representing Parent/Child

Parent
Party Initiating Hearing

PS and
Prevailing Party

Hearing Officer's Determination of Issue(s):
The primary issues in this matter involved the potential failure to comply with IEP, claimed FAPE insufficiency and failure to keep parents informed of actions impacting on child.

Hearing Officer's Orders and Outcome of Hearing:

1. Father sought an award of costs in a unilateral placement of his child in the Lindamood-Bell Learning Processes. Father was awarded a sum equal to 2/3 of the amount requested.

2. Father sought compensatory education for his child. This request was denied.

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, and if applicable, I have also advised the LEA of its responsibility to submit an implementation plan to the parents, the hearing officer, and the SEA within 45 calendar days.

W. James Dangoia
Printed Name of Hearing Officer

Signature

V I R G I N I A:

PUBLIC SCHOOLS
SPECIAL EDUCATION APPEAL

,	)	
Petitioner,	)	
v.	)	In re:
PUBLIC SCHOOLS,	)	
Respondent.		

DUE PROCESS HEARING DECISION

I. ABBREVIATIONS AND IDENTIFIERS USED IN THIS MATTER

- Father

- Mother

- Student

Comprehensive Services Act - CSA

Contract Services Specialist - CSS

Public Schools - PS

Family Assessment and Planning Team - FAPT

Free Appropriate Public Education - FAPE

Individuals with Disabilities Education Act - IDEA

Individual Education Program - IEP

Coordinator of Contract Services - COCS

Transcript of the Due Process Hearing - Trans

II. ISSUES

The four specific issues brought for resolution before this

Hearing are as follows:

A. PS denied student FAPE for the school year from September 2005 to June 2006;

B. PS failed to offer or propose an IEP for student;

C. PS ignored parents' requests for an IEP; and,

D. COCS blocked the parents' access to the FAPT process, thus effectively denying appropriate access to funding.

(See pgs 7&8, Father's 10/1/07 letter to PS; See also Trans, pg 4.)

Based on these issues, Petitioner seeks reimbursement for the costs he incurred through his unilateral placement of the student and for compensatory education for that child and appropriate transportation costs. (See Pet. Clo. Br. at 10)

III. DECISIONS

Regarding the foregoing issues, I find that:

A. PS, through the specific inaction of representatives of its COCS staff, but also in conjunction with an unjustified lack of real cooperation on the part of the father, failed to provide FAPE to the student.

B. PS did offer an IEP to the student, however, an IEP for school year 2005-2006 was never completed due to the specific inactions of PS COCS staff, and an unjustified lack of real cooperation on the part of the father.

C. PS did not ignored parents' requests for an IEP. However, through the specific inaction of its CSS representative, some requests did go unanswered, others were responded to slowly, while some answers

were non-responsive.

D. This issue was specifically withdrawn in the Petitioner's Closing Brief wherein it was stated that the father "withdraws his claim for [PS] blocking access to FAPT funding . . . ." (See Pet. Clo. Br. at page 8, fn 7.) Accordingly, no decision is required for this issue and none it given.

Regarding the claim for reimbursement and transportation costs, Petitioner sought reimbursement in the amount of $28,079.52. Petitioner is awarded reimbursement in this matter, but such reimbursem ıt is reduced due to the unreasonable actions of Petitioner. Petitioner is awarded $18,719.68.

Regarding Petitioner's claim for compensatory education, that claim is denied.

IV. FINDINGS OF FACTS AND CHRONOLOGY

1. The student was a 17 year old female at the time this Hearing was requested.

2. The student was born in the Soviet Union in .

3. The mother also was born in the Soviet Union.

4. The student was adopted by the parents in 1993.

5. The family moved to the United States and took up residence in Virginia in 1993.

6. The parents were divorced in 2001, but have maintained a close relationship and together they continue

to nurture the student.

7. The student first started her schooling in Virginia when she attended kindergarten at Elementary School in , where it was first noticed that the student was falling behind her contemporaries and an initial IEP was completed.

8. She continued her education at Elementary were her progress was not deemed to be satisfactory.

9. PS then recommended placement at School, a private day school in Washington, D.C. The student attended School for two years.

10. Following attendance at , the student was unilaterally placed in Academy for her seventh and eighth grades.

11. While did not offer a ninth grade curriculum, student's father continued her at Academy for a second year which ended in June 2005.

12. The student's last IEP, prior to this action, was dated 9 March 2004, which IEP was deemed appropriate by a Hearing Officer involved in a prior Due Process Hearing.

13. PS sent two letters to the father, dated 18 March 2005 and 21 June 2005, essentially offering to

convene an IEP for the student for school year 2005 - 2006.

14. Father maintains that he did not receive either letter.

15. On 26 August 2005, father contacted PS asking about PS plans to offer FAPE by instituting an IEP for student for the 2005 - 2006 school year.

16. PS immediately acknowledged receipt of that communication and on 29 August 2005 sent a more specific response to the father wherein, PS referred to its two prior letters, and advised that due to the imminence of school starting, it would be difficult "to arrange for an appropriate placement . . . on the first day of school." The letter went on to state that it was unlikely that an IEP determination could be completed before the start of school on 6 September 2005. It further noted that because of such delay, " PS will place [the student] consistent with the IEP of March 9, 2004."

17. PS Office of Monitoring and Compliance, the office which had been conducting these first few contacts with the father, referred the father to the PS COCS for further action.

18. On 31 August 2005, a CSS from within the COCS contacted the father and advised that she had "located an

opening at a local private day school where [the student's] goals and objectives [could] be addressed," and that would allow the student to begin schooling on the start date for the 2005 - 2006 school year.

19. On 31 August 2005, father responded to CSS and asked "which local private day school" would be recommended.

20. On 31 August 2005, CSS responded advising "[t]he school I have in mind is The School of Northern Virginia."

21. On 1 September 2005, father responded with hope for a quick re-evaluation/IEP meeting, and concern about as a placement. He also asked if there was someone with whom he could communicate regarding .

22. The re-evaluation/IEP meeting was held on 21 September 2005 with the parents, an appropriate PS psychologist, and two special education specialists, the COCS and her CSS.

23. At the 21 September 2005 meeting PS CSS brought a "draft" IEP, developed from the 9 March 2004 IEP. (See Trans at 1253 & 54, and Pet. Exh. C at 4 & 5.) At the meeting, the student was found to be learning disabled and

so continued to be eligible for special education services.

24. At the meeting a request was made by the PS psychologist for updated psychological and educational tests. The father seemed to be concerned that such additional testing might change the student's eligibility. (See Pet. Exh. C at pg 12.) The father, not refusing such tests, was given a Notice and Consent form on which he could consent to those tests. However, during the 2005 - 2006 school year that form was neither signed nor returned. (See trans at pgs 558 & 559, & 975.)

25. At the meeting, the father also asked that the student be accommodated for other conditions, i.e., dyslexia. The PS psychologist agreed to such accommodation. (See Pet. Exh. C at pg 26.)

26. Further, the father asked that the student be found to be disabled in other areas, i.e., speech and language. (See Pet. Exh. C at pgs 32 & 33.) The PS psychologist explained that due to the student's eligibility for her specific learning disability, "it's the IEP team that then determines speech and language, because speech and language is now considered a related service." (*Id.* at 33) The PS psychologist further stated that such disabilities would be a:

> separate category in the case of the student who has never had another disability classification . . . . It's a separate category for that student . . . so that they can have an IEP. A student with a current IEP for a...a different disability, like, [your child], does not need a separate disability classification for speech and language impairment. The committee recognizes that she has speech and language processing issues, very clearly. That will be reviewed at the IEP.

(*Id.*)

27. The father remained insistent that such categories be included as specific disabilities and the PS psychologist advised that additional testing and assessment data would be needed for such determinations.

28. The father verbally provided notice to PS that he intended a unilateral placement for the student and understood that he could be financially responsible for such placement. (See trans at pgs 1173 & 1174, and Pet. Exh. C at pg 54.)

29. Though the development of an IEP was spoken of prior to and during this meeting, and the parents stated that they wanted to continue to try to develop an IEP for

their daughter, no further IEP meetings were held and no IEP was finalized during the remainder of the 2005 - 2006 school year.

30. Following the meeting of 21 September 2005, CSS, through contact with the father, tentatively scheduled another IEP meeting for 28 September 2005, pending the mother's schedule for that day and available times for the meeting. However, neither the parents nor the CSS followed up on either the schedule or available meeting times.

31. On 29 September 2005, the father met with representatives of the Lindamood-Bell Learning Processes (LMB) in Washington, D.C., had the student tested at that facility, and considered enrolling her there for a 12 week period from approximately November 2005 to March 2006.

32. For the remainder of the 2005 - 2006 school year, LMB appears to have been the only program that even approximated a school instruction presentation in which the student participated. Beyond that, the student worked essentially with education games, and audio books.

33. Also, from 26 September 2005 to April 2006, communications between PS and the father became highly problematic, i.e., some communications went unanswered for

inordinately long periods of time, requests for information were not fully responded to, and information that could have been helpful was not provided.

V. IDENTIFICATION AND APPLICATION OF LAW

The father brought this action against PS on a claimed violation of the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§ 1400 *et seq.*

Essentially the father brings his action alleging that PS failed to provide FAPE, "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive . . . ." 20 C.F.R. § 1412(a)(1)(A).

The father further alleges that PS failed to provide FAPE in that it failed to develop and individualized educational plan (IEP) for his daughter, and that the IEP team was improperly constituted in that it lacked "at least one each of [the student's] regular and special education teachers." (Pet. Cls. Brief at pg 3.)

An IEP is

> a written statement for each child with a disability that is developed, reviewed, and revised . . . . [by] a group of individuals composed of . . . (i) the parents of a child . . . ; (ii) not less than 1 regular education teacher of such child (*if the child is, or may be, participating in the regular education*

> *environment*); (iii) not less than 1 special education teacher, *or where appropriate*, not less than 1 special education provider of such child; (iv) a representative of the local education agency, who . . . (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local education agency; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate the child with a disability. (Emphasis added.)

Id. at 1414(d)(1)(A) and (B).

Since there was no indication or allegation that the student had participated in a regular education curriculum at Academy, the last private day school she attended, and since there was no indication or allegation that the student would be participating in a regular education environment in her future PS placement, there would be no need for a regular education teacher to attend the IEP meeting.

Regarding a special education teacher, the meeting was attended by such individuals who qualified under the IDEA special education provider provision noted above.

Consequently, the IEP Team was properly constituted.

But again, turning to the key question of whether PS offered or provided FAPE; initially, it is shown that PS moved to offer FAPE for the student. I find that the evidence supports the fact that PS did send letters to the father on 18 March 2005 and again on 21 June 2005. (PS Exhs. 3 & 4.) Copies of those letters were contained in PS files, they were properly addressed to the father, (Trans at pgs 951 & 952) and, more importantly, they were referenced in the 29 August 2005 PS response to the father's letter of 26 August 2005. A date on which such references would have had little or no meaning. (See Pet. Exhs. A8 & A6 respectively.)

In reality, PS was meeting its IDEA obligations until a representative of COCS received the case for processing. That CSS, who testified as an expert in special education (Trans. at 1193,) started to fulfill her obligations under the IDEA when she organized the reevaluation/IEP meeting of 21 September 2005. (See Pet. Exhs. A10, A25 & A26.) The CSS took immediate action to secure a place at the School of Northern Virginia, a school she believed, "based on [my] history

with [the school,] and what I knew about [the student] . . . that they could meet [the student's] needs. . . . I knew that the School had this reading program that seemed to match much of what we had discussed in previous IEPs, and I thought that would be a big draw." (Trans. at 1198 and 1199.) She even took an action on the day prior to the 21 September 2005 meeting to secure funding for placement of the student. (Pet. Exh. B3.)

However, after the 21 September 2005 meeting, she seems to have allowed herself to become more removed from the student's placement, to become more concerned with whether the father was "making a record of the fact that he has not talked to me" than of pressing on with her efforts on behalf of the involved student. (Trans at pg.1278.)

Though she did continue to attempt some sort of placement for the student, even offering consideration of "Homebound services," until placement could be achieved (Pet. Exh. A67. and Trans at 1220,) her attempts were not pressed, but seemed rather rote, with long delays between contacts, and the provision of a minimum of information.

This culminated in a final cessation of communications between the CSS and the father on 31 October 2005. (Pet.

Exh. A85.)

After that date, and until her retirement two months later, on 1 January 2006, the CSS essentially turned the matter over to her supervisor, the COCS, and then worked to develop a letter sent to the father on 9 November 2005 (See Trans. at pg 1301, and Pet. Exh. A90,) which letter informed the father that pending completion of an IEP, and consistent with the Hearing Officer approved IEP of 9 March 2004, the student would be placed "at her base school . . . while evaluations are being completed." (Pet. Exh A90.)

This letter was sent, via Express Mail on 9 November 2005. According to the evidence of record, the Postal Service attempted delivery, as required by Postal Regulations, on three separate occasions before returning the correspondence to COCS on 12 December 2005. (Pet. Exh. A91.)

Once received back at COCS, the record indicates that no further action was pursued between COCS personnel and the father. In fact the evidence and record show that nothing further was done by COCS until 31 January 2006.

This failure essentially capped a three month period in which there had been no appropriate actions taken by

PS with regard to placing the student, even though the 9 November 2005 letter stipulates that PS' "biggest concern . . . is the fact that {the student} is *not currently attending* any school." (Pet. Exh A90, emphasis added.)

Finally, regarding the 9 November 2005 letter, during testimony COCS stated that the letter was sent to support the concerns voiced by CSS. However, COCS went on to admit that she never verified those concerns:

> I didn't look at any of the email that [CSS] had. She would just tell me about the communications that were going back and forth between [CSS and the father]. And on this particular day when she came to talk with me about the case, you know, I just felt from her that she had such concerns *that so much time was lagging*, was going on without [the student] being in school. And so I felt I needed to write a letter to see if [the father] would respond to my letter as her supervisor.

(Trans. at 1177. Emphasis added.)

Regardless of the problems visited on this situation

by the CSS and COCS representatives of PS, another person also contributed to the student's placement problems: her father.

The father in this case is the father every educator says they want for children. He is obviously devoted to the student, and presents as a person who would do whatever is necessary to achieve what he believes to be best for her. He is well educated and bright. He is also experienced in dealing with PS on behalf of the student, and is apparently very familiar with the Due Process Hearing system in the Commonwealth.

The father understands that for a person to able to maximize their own potential, they need to read as well as possible. He recognizes his daughter's learning disability and its impact on her ability to read and properly process what she has read. He wants to provide her the maximum assistance in improving her reading ability so she can have more success in other learning endeavors in her life. Unfortunately, it appears that he has become so focused on her reading deficit, that he has set aside her education in virtually every other scholastic area of endeavor.

Through his efforts during the 2005 - 2006 school year, the student received essentially 12 weeks of reading

assistance. However, the record indicates that she received virtually no educational assistance in any other academic area. I find that the father became so singularly focused on trying to help his daughter work with her reading deficit that he had lost sight of her need in other areas, or the practicality that working in other subject areas could also assist in improving her reading abilities.

The record is replete with references to requests for consent to test the student; the need for testing; the types of tests, and statements that the tests would be beneficial in placing the student. (See Pet. Exhs. A60, A70, A71, A89, A166, A174, & A186, and Trans. at pgs. 65, 164-166, 251, 284, 554, 558-559, 732, 1087-1088, 1115-1116, 1130 and 1245.)

Against this background, the father neither consented to such testing during the 2005-2006 school year process, nor did he advise PS of any specific tests to which he otherwise had access and could provide to PS.

Further, the father noted that he paid $425.00 to have testing done at LMB (See Pet. Exhs. H6, H13, & H18,) but again throughout the process for school year 2005-2006, he was quiet about the tests and the results.

Regarding his contacts with PS, outside of the

testing arena, he did not follow through with his promised contact of 27 September 2005, to provide the mother's schedule for a proposed IEP on the 28th of September 2005 (See Pet. Exh. A57,) and in fact refrained from contacting the CSS for another two weeks. He did not retrieve the 9 November 2005 previously discussed herein. Essentially, during the last two months of 2005, and the first month of 2006, he limited his contact with PS to few communiqués.

Finally, throughout the months of October to April, and all during the time the student was attending LMB, the father had been maintaining a series of contacts with FAPT representatives outside of the placement process. (FAPT provides funding for private day school placements, and is an entity with whom COCS worked on issues concerning special education students.) However, the father, repeatedly asked that FAPT representatives not notify PS of his contacts with FAPT. These requests were made even though FAPT wanted to provide such contact. (See Pet. Exhs. E7, E13, E18, E24, & E26.)

From a review of the four volumes of evidence in this case, and from hearing the testimony offered over the four days of Hearing, I find that a preponderance of the

evidence demonstrates a failure on the part of the CSS to even attempt to maintain meaningful contact with the father after the 21 September 2005 meeting.

Further, I find that COCS, through the CSS's actions or lack thereof, and its failure to follow up on its own attempt to contact the father regarding timely and appropriate placement of the student also shares in the responsibility for the student not being provided an updated IEP in a timely manner.

Finally, I find that the father, though well intentioned, also shares in the failure to obtain an updated IEP and a timely and proper placement for the student. He added to such failure by his unreasonable intransigence in refusing his consent to test, even though he separately paid for testing himself; for his unreasonable and purposeful refusal to specify what current tests he could make available to the PS for their use in assessing the student, and for his unreasonable and dilatory communication activities.

VI. DECISIONS AND LEGAL RATIONALE

To resolve the issue of whether PS provided FAPE in this case, we first look to the standard set forth in Board

of Educ., Etc. v. Rowley, 458 U.S. 176 (1982). There we find that the Court has posed two questions to determine whether FAPE has been provided. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Id.* at 206 & 207.) Regarding the first question, the Court notes that "[t]his inquiry will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question . . ." (*Id.* at 206 fn.27.)

Here, while PS claims reliance on a 9 March 2004 IEP that had been approved by a Hearing Officer in a prior Due Process Hearing, it also purported to be trying to create a new IEP for the student involved. But here it failed. It failed when its primary representative, vested with authority to establish the framework for creating the IEP, failed in her communications with the parent of the student, and in less than two months abdicated her responsibilities to her supervisor.

The supervisor then wrote one letter to the parent, which letter was returned as undelivered a month later, and sat with no further action for almost another two months until the supervisor appointed a new representative to handle the matter.

As a result of the foregoing delays on the part of PS, I find that it is, at least in part, responsible for not producing a compliant IEP for the student for the 2005-2006 school year.

While I find that PS is at fault in this matter, I do not find that it is at complete fault.

I also find that the father refused to consent to testing at a time when many of the student's available tests were old, and the new tests would have assisted PS officials in properly placing the student in an appropriate learning disabled setting. The father also failed to consent to testing, though he was having similar tests performed. He further withheld the results of those tests throughout almost the entire 2005 - 2006 school year.

Finally, the father too limited his communications with PS for an inordinate period of time, and neglected to retrieve at least one article of mail for over a month until it was returned as undeliverable to PS.

The next matter concerns whether, PS, having been found to have failed, in part, to have provided FAPE in this case, can now be held financially responsible for expenses incurred by the father when he enrolled the student in the LMB.

It is clear that LMB is not a school in any sense of the definition. In actuality, the father's own witness, the Regional Director of Centers admitted that LMB was not a school and didn't hold itself out as being a school.

Nevertheless, LMB did provide instruction in areas in which the student has been found to be disabled. The instruction she received appears to have provided her benefits in her areas of learning disabilities, primarily reading and language. (See Pet. Exhs. H6, H13, & H18.)

The father, though an intelligent person, is not an educator, and would not readily see a difference between a "school" and a reading program that provided intensive, and if the tests are to be believed, at least somewhat successful reading instruction to his daughter.

Further, while an application of the finding in Hartmann v. Loudoun County Bd. Of Educ., 118 F.3d 996, (4th Cir. 1997), is not completely apropos, it does lend itself

to the proposition that:

> [t]o dismiss Johnson's and McCullough's qualifications is to adopt exactly the sort of potential-maximizing standard rejected by the Supreme Court in *Rowley*. We think the Court's admonition that the IDEA does not require "the furnishing of every special service necessary to maximize each handicapped child's potential,"*Rowley*, 458 U.S. at 199, encompasses the notion that the IDEA likewise does not require special education service providers to have every conceivable credential relevant to every child's disability.

(*Id.*) at 1004)

Further, the County has LMB on its list of Virginia Supplemental Education Services (SES) Providers. (See Pet. Exh. D19 at pg. 12, # 42.) According to PS own witness, it is from that listing that "any of the agencies in the county can contract out to any of the vendors that are listed, and do contract out. The schools, my office contracts out to schools and/or to home-based services." (See Trans. at 1175.)

If the County has approved LMB for those contract services it wants, I see little difference in PS paying for the same services as those being provided to others, especially where such services are rendered in place of those services PS should itself provide.

Lastly, individuals within PS discussed, via email, the likelihood of receiving the student into the PS

system. "[I]f we get [the student] she will need to be in a program." This would indicate that consideration for contracting out to LMB for this student was already underway. (See Pet. Exh. A-1,)

Accordingly, I find, in this instance, that PS is responsible, at least in part, for reimbursement of expenses paid by the father for enrollment of the student at LMB.

The next issue is whether the father is subject to any limitation in the expenses he might be awarded.

Under 20 U.S.C. § 1412 (a)(10)(C)(iii)(III), "[t]he cost of reimbursement . . . may be reduced or denied - (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents."

Here, I find that it was unreasonable for the father to refuse to consent to testing at a time when the bulk of the student's existing tests were several years old, and the new tests would have positively contributed to the placement of the student in a PS program that would likely be of benefit to her.

It was also unreasonable for the father to refuse to consent to testing when he was in the process of having similar tests performed, the results of which he withheld

throughout the bulk of the 2005-2006 school year.

Further, is was unreasonable for the father to have limited his communications with PS for a number of months, and to have neglected to retrieve at least one article of mail for over a month until it was returned as undeliverable to PS. See Loren F. ex rel. Fisher v. Atlanta Independent School System, 349 F.3d 1309 (2003), "the district court focused on whether his parents acted unreasonably within the meaning of 20 U.S.C. § 1412(a)(10)(C)(iii)(III) ('The cost of reimbursement... may be reduced or denied ... upon a judicial finding of unreasonableness with respect to actions taken by the parents'). . . the district court also 'assum[ed] good faith on the part of the parents' before finding 'unreasonable their apparent unwillingness to communicate with APS . . . ."

Accordingly, I find that the current balance due: $15,746.89, plus the amount already paid by the father: $11,407.13, which includes interest already paid, plus the transportation costs: $925.50, equal a current total of $28,079.52. In light of my finding that the father was unreasonable in several of the actions he undertook, but also due to the fact that the actions of two representatives of PS have contributed to this situation,

I am reducing the award to the father by 1/3. Therefore, I order that PS pay to the father, within 30 days of the receipt of this decision, unless this Order is otherwise stayed, the amount of $18,719.68.

I now turn to the claim for compensatory education. Here, I adopt the definition of "compensatory education," as set forth in Lancaster School District, 40 IDELR 277 (SEA Pa. 2003):

> [Compensatory education is] a remedy designed to provide eligible students with the services they should have received pursuant to a free appropriate public education (FAPE). *(Lester H. v. Gilhool,* 916 F. 2d 865 (3rd Cir. 1990), *cert. denied* 499 U.S. 923, 111 S.Ct. 317 (1991)). Thus compensatory education is an in-kind remedy. A child is entitled to compensatory educational services if the child is exceptional and in need of special education and related services (i.e., eligible for FAPE) and if through some action or inaction of the district, the child was denied FAPE.

FAPE requires the development of an IEP. An IEP is developed to provide educational assistance to an individual in their areas of disability, emotional, learning, etc.

In M.C. ex rel. J.C. v. Central Regional Sch. Dist. 81 F.3d 389 (1996), the court formulated a standard for compensatory education stating:

> If the compensatory education standard is to spring from the Act, it must focus from the outset upon the IEP---the road map for a disabled child's education. See 20 U.S.C. Section(s) 1414(a)(5). When an IEP fails to confer some (i.e., more than de minimis) educational benefit to a student, that student has been deprived of the appropriate education guaranteed by IDEA. It seems clear, therefore, that the right to compensatory education should accrue from the point that the school district knows or should know of the IEP's failure.
>
> The school district, however, may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem. Thus, our holding can be summarized as follows: a school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem. We believe that this formula harmonizes the interests of the child, who is entitled to a free appropriate education under IDEA, with those of the school district, to whom special education and compensatory education is quite costly.

(*Id.* at 396 - 397)

From a review of the aforementioned cases and others dealing with the concept of "compensatory education," it appears that compensatory education is to be provided where a child, who was found eligible for services under the IDEA, didn't receive those services due either to an inappropriate IEP, or a failure on the part of a school

district to properly implement such child's IEP.

To compute the amount of compensatory education owed to the child, the starting point is the time when the school district first knows, or should have known, that the IEP was inappropriate, or was being improperly implemented, and would continue on until the school system begins to rectify the problem, not completely correct the problem.

While this seems simple enough, as the old saying goes, "the devil is in the details."

In the instant case, there was an IEP in place, the IEP of 9 March 2004. It is under that IEP that the student attended ESY at Academy during the summer of 2006, and under which she began the 2006-2007 school year at Academy.

Where PS failed, was in its overall efforts to provide FAPE for the 2005 - 2006 school year, because it wasn't able to develop a more current IEP than that of 9 March 2004. That failure, as noted above, was assisted, in part, by the unreasonable actions of the father. And the fact that the father removed the student from virtually all academic pursuits, with the exceptions of reading and language, for the full 2005-2006 school year has not been

shown to have contributed to the student's academic gains.

In the limited time allotted for researching and writing this opinion, I have not found any authority that speaks to this type of situation. However, if I were to simply ignore all of the facts surrounding this matter, and set aside the prior IEP at the start of the 2005 - 2006 school year, and ignore the father's unreasonable actions, and ignore the fact that the father removed the student from virtually all academic pursuits with the exception of reading and language for the full 2005-2006 school year, I would find thusly:

1. The point at which that the school district knows or should know of the IEP's failure would arguably have been 9 November 2005, the date PS recognized that the student was not attending any school.

2. Having recognized the problem, should the school district fail to correct it, then the disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem. Here, that correction date would arguable be 31 January 2006, the date on which a new CSS was assigned

and the date on which PS began taking the steps necessary to provide appropriate educational services to the child, and to develop a new IEP for the student.

Using the foregoing dates, the student would be authorized approximately 2.5 months of compensatory education in the areas of her disabilities, i.e., reading and language.

However, I can't set aside the 9 March 2004 IEP, or the unreasonable actions of the father in this matter and just consider the failures of PS in this instance. To do so would be to open a door to too many unforeseen consequences. Accordingly, I must deny the request for compensatory education in this matter.

VII. FINAL DECISIONS

1. Petitioner is awarded the sum of $18,719.68.

2. Petitioner's request for compensatory education is denied.

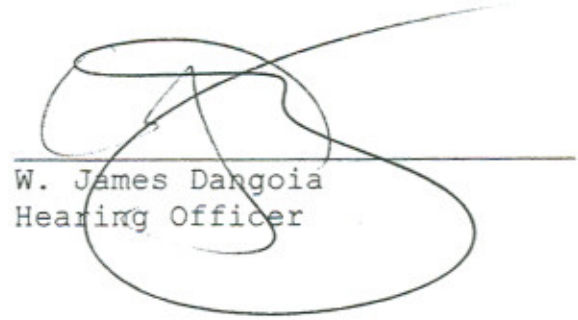
3. No other issues were raised or remain for decision and this matter is closed.

VII. APPEAL INFORMATION

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

one year of the date of this decision.

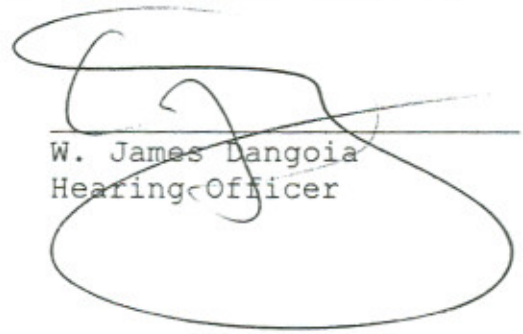
DATE: 16 December 2007



W. James Dangoia
Hearing Officer

Certificate of Service

I hereby certify that a true copy of the foregoing Due Process Hearing Decision was mailed, first class postage prepaid, this 4th day of January 2008, to Mr. , , , Virginia , Bruce Ellis Fein, Counsel for Child, 1200 N. Nash Street, Suite 1127, Arlington, Virginia 22209, , Coordinator, Monitoring and Compliance, Public Schools, , , , Virginia , John F. Cafferky, Counsel for PS, Blankingship and Keith, 4020 University Drive, Suite # 300, Fairfax, Virginia 22030, Brian Miller, Hearing Officer Observer, 2119 W. Main Street, Richmond, Virginia 23220, and Dr. Judith Douglas, Coordinator, Due Process and Complaints, VDOE, Division of Accountability Services, P.O. Box 2120, Richmond, Virginia 23216-2120, and that this certifies that replacement pages 30 and 31 to the foregoing Decision were mailed this 5th day of January 2008 to all involved.



W. James Dangoia
Hearing Officer