

08-041

Received

DEC 14 2007

Dispute Resolution &
Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

DECISION

SCHOOL DIVISION: SCHOOL DIVISION
LEA COUNSEL: G. RODNEY YOUNG, II, ESQUIRE
LEA REPRESENTATIVE: DR.
NAME OF PARENTS:
NAME OF CHILD:
NAME OF CHILDS'/PARENTS' COUNSEL: NONE
PARTY INITIATING HEARING: SCHOOL DIVISION
VDOE REVIEWER/OBSERVER: KRYSIA CARMEL NELSON, ESQUIRE
HEARING OFFICER: SARAH SMITH FREEMAN, ESQUIRE

IN RE: , "STUDENT" or "CHILD"

SCHOOL DIVISION

v.

& , Parents on behalf of

INTRODUCTION

This matter came for hearing on November 30, 2007 at the administrative offices
 of the School Division, , Virginia before a duly
 appointed hearing officer. Present in person, in addition to the court reporter and the
 hearing officer, were the mother and father, ("Parent" or "Parents"), counsel for the local

educational authority, (“the LEA”), the LEA Representative and the VDOE Reviewer.

The LEA has requested this due process hearing in order to resolve this dispute and to request a written decision in conformity with federal special education law, the Individuals With Disabilities Education Act, (“the IDEA”), 20 U.S.C. 1400 et seq., the Regulations at 34 C.F.R., Part B, Section 300 et seq., and the Virginia Special Education Regulations (“the Virginia Regulations”) at 8 VAC 20-80 et seq.

ISSUES PRESENTED

(1) Given the severity of this Student’s Mental Retardation (“MR”) category and his pervasive behavioral issues, is the inclusion model an appropriate placement for the provision of FAPE to this Student?

(2) If the inclusion model is not the appropriate placement for Student, as the LEA contends, what is the least restrictive environment in which student will receive a FAPE?

FINDINGS OF FACT

1. Student is a year old child who was born on February 4, . Student attends Elementary school in this LEA. Student has been diagnosed with Down Syndrome and he receives special education services under the category of Mental Retardation (“MR”). (S-10, S-11)

2. Student first qualified to receive special education services on October 28, 2004. Student’s most recent agreed IEP places him in the modified inclusion model (“split inclusion model”). A split inclusion model means that student’s day is “split” between classes with general education students and special education classes in a self-contained model. A proposed IEP addendum would place student in a self-contained model, with a behavioral focus, for the 9/4/07-10/20/07 school year. (S-1, S-8, Tr. 242, 14-20)

3. Proposed IEP revision for Student provides for more restrictive environment with behavior support and an emphasis on socialization, sensory integration, and

communication. Student's academic classes and related services, reading, math, fine motor, life skills and adaptive PE. Speech, language and occupational services would also be delivered to student at the self-contained, behavior-support setting at

Elementary School. Parents were notified of the proposed change. Parents participated in the discussions concerning changes to Student's placement, however, Parents have refused consent to the change of placement on June 11, 2007 and on October 19, 2007. (S-1, S-33, S-34)

4. Student received ESY services in 2007 in order to address LEA behavior concerns over the summer. Overall, the ESY teacher reported good progress. Student didn't crawl over furniture much, worked in a small group and used "good" words. (S-2)

5. Behavioral aides were added as an accommodation to student's IEP on April 11, 2007. Parent consented. (S-3)

6. Functional Behavior Assessment ("FBA") and Behavior Intervention Plan ("BIP") were developed in response to Student's behavioral issues and safety concerns. BIP addressed LEA strategies to correct Student's behavior. Parent consented. (S-4, S-5, S-6)

7. The LEA developed a revision to Student's IEP on October 20, 2006. The revision states "Classroom behavior is [Student's] greatest limitation." Split inclusion model designed for student. Accommodations (12) are specified for Student throughout the school day. IEP states that "Student will receive, "Support in all daily routines to insure safety." Parent consented to IEP accommodations. (S-7)

8. An IEP was created by this LEA on August 30, 2006. Student attended school in another Virginia locale in which his prior placement was entirely self-contained. When Student moved from that city, Student's prior IEP ("transfer IEP) did not contain any accommodations. The IEP developed provides inclusion placement. Parent gave consent. (S-8)

9. Student's transfer IEP provided for Student's placement in a class for the Developmentally Delayed ("DD"). (S-13)

10. A psychological evaluation of Student completed on September 24, 2004 contains statements from Student's mother ("Parent") indicating that she intended to seek medical assistance from a neurologist to address Student's "defiant" and "oppositional" behavior. The evaluator stated in her 2004 report, "Student displays behavioral problems at home and at school." (S-13)

11. A classroom observation of Student dated September 23, 2004 reveals that Student "was observed to have significant difficulty staying focused and completing the task." Instead of doing his assignment, Student threw crayons and shouted out to the teacher or the assistant. To complete the task, a teacher sat with Student and placed her hands on top of Student's to guide the movement of his hands and the crayons. When

Student's teacher diverted her attention momentarily, Student stopped coloring. At this point, Student was placed in "time-out." Objecting to the discipline imposed upon him, Student banged his head on the desk and yelled out. (S-13)

12. On September 23, 2004, when asked by the evaluator to respond or to comply with an instruction, Student replied emphatically, "No!" (S-13)

13. Testing completed in September, 2004 reflected that sometimes Student answers questions correctly. He could name, "a cat, spoon and a book." When asked how to use the spoon, Student banged the spoon on the table. (S-13)

14. When evaluation was completed on September 23, 2004, Student could count to "3." (S-13)

15. To complete Student's triennial review, Dr. _____, School Psychologist for this LEA "evaluated" Student on September 24, 2007 and October 4, 2007. Two evaluation attempts were necessary because Dr. _____ could not elicit reliable responses from Student on either occasion. Dr. _____'s behavioral observation on September 24, 2007 is exemplary of Student's level of defiance on many school days.

[A counting exercise preceded this incident. Though Student was at times non-compliant with the teacher assistant during the counting activity, overall, Student did the requested task. At the end of the counting exercise, Student was rewarded with cream cheese and edible "fish" crackers. During the counting task, it was apparent that Student wanted to eat the treat but chose not to do so until he and the other children were allowed to eat. Dr. _____ observed the following incident after the above counting exercise ended:]

"Then he began acting silly and was asked to pay attention as he was disturbing the group. He quickly folded his arms and scowled. Once the teacher worked directly with him, he answered a couple of questions correctly, circling the right answers and identifying the cutting board. When she asked where the strainer was, he had difficulty focusing on completing the lesson. The students were asked to circle their answers on paper and [Student] refused. _____, the teacher assistant] asked [Student] several times and he shook his head. She then asked if he was going to time out. He nodded, got up and walked over to the far corner of the room. _____ instructed him to get into his chair, When he did not comply she counted 1, 2, 3. [Student] was still not sitting in the chair and when she asked him again he yelled, "NO!" "I'm mad!" Abruptly, he softened and went to hug _____, but she backed off telling him not to touch her. She indicated he needed to tell her when he was ready to begin time-out at which point he began banging on the metal file cabinets, making quite a bit of noise. He was yelling profanity, s---, and then f--- off. _____ tried calmly talking to him, but he continued screaming, "Shut up, b----!" Then he started laughing, banging on the cabinet. _____ told him when he was ready to finish his paper, they would do it. She showed him the PECS book again and asked him to tell her what the picture she was pointing to meant. Growling, he sat down. In the meantime, as soon as [Student] began using profanity, the teacher escorted the rest of the

children out of the room. [Student] did not appear to care as he continued banging on the cabinet and screaming, "B----, f--- off." Interspersed with some of his profanity were unintelligible words. (S-35)

16. Testimony at the hearing was clear: The above vignettes occur often during Student's present school day. These events date back to the evaluation completed in September, 2004 and have continued to occur during the past school years, 2006-2007 and 2007-2008. Evidence reflected that Student's behaviors during this past school year have slightly improved. Teachers report that Student's slight behavioral improvement does not reflect any real academic or behavioral progress. Student's numerous removals and self-imposed "time-outs" have caused Student to be isolated in his school environment. (Tr. 102, 1-6)

17. When Student first started school, he functioned at the 2 1/2 to 3 year old level in all areas. When compared to same age peers, Student tested in the "very poor" range of educational skills in all areas. On Student's current PLOP, Student functions much like a child of 37 months. Thus, Student has not shown much overall improvement in the past two years at this LEA. Although Dr. _____ was unable to verify correct responses, the school psychologist identified several "at-risk" behaviors reflecting "a high level of maladjustment and indicat[ing] the need for immediate attention." Dr. _____ arrived at her expert conclusion by making a classroom observation of Student, making two attempts to evaluate Student in her office and by gathering information from [Student's] regular classroom teacher and from Student's two teacher assistants. (S-13, S-35)

18. Student's prior present level of performance ("PLOP") completed at the age of 6 years indicated speech and language deficiencies. Student tested at the 3-4 year old level of performance. Student had not learned communication skills at school. Behavioral difficulties impeded Student's ability to learn oral and sign expressive language. Student's present PLOP indicates some progress in Student's functional language skills: Student scored 100 % in a sample of the words Student understands, however, overall Student's conversational language is rated in the "very poor" range of functional skills. (S-13, S-35)

19. _____, Occupational Therapist, ("OT"), recently evaluated Student on September, 27, 2007, October 4, 2007 & October 11, 2007. Her evaluations provided detailed insight regarding Student's "unique sensory needs." Student "craves high doses" of "joint input and tactile exploration" to calm him. Student is easily stimulated and requires that "sensory experiences" be presented in "controlled amounts" in his school day in order to "improve his ability to tolerate and make sense of his learning environment." Ms. _____ noted that some progress has been made since Student's last evaluation in 2004 because accommodations have been made for Student's sensory needs. Fine motor skills are now in the 36-42 month range. Student's grasp, limited by the physical structure of his hands, is lower in range at 28 months but

also shows improvement. Student's difficulty is in "multisensory processing" and he has difficulty "modulating responses" when he becomes overstimulated by visual and auditory information. In conclusion, the OT evaluator's report stated: "[B]ehavior difficulties still present a significant challenge to his progress and participation [in the school environment.]

(S-13, S-35)

20. Student's mother confirmed that joint stimulation is a reward to Student. He will ask for "pressure" at home which Parent applies regularly to Student to soothe him. Student's mother testified, "He'll say, Mommy pressure. And he tells me when he needs stimulant – when he needs that pressure time." (Tr. 279, 13-18)

21. IEP revision dated April 11, 2007 indicates strategy of applying "deep pressure" was added as an accommodation in response to Student's escalating behaviors at school. (S-3)

22. Parent's assertion at this hearing was correct: Ignoring Student's bad behavior at school does not provide adequate disciplinary response to Student's "craving for stimulation" in the school environment. If Student does not quickly receive stimulation from teachers, students, or from his physical environment, Student responds by using expletives, hitting, spitting, kicking or by loudly refusing to comply with a demand. Student utilizes "attention seeking" behavior. He demands immediate response to his needs. Student's mother testified that "[Student] is not the child that they [the LEA] speak of here today [at the hearing.] He does not do these behaviors." If all of Student's sensory needs are met at home, Student might not act out as he does in a school setting. (Tr. 279, 11-13)

23. Though Student walked calmly with the psychologist to her office, Dr. was unable to obtain enough information about Student to project an IQ for him. Generally, BASC2 Behavior Rating Scales indicate age equivalency. On the test date, Student was a . year, month old child in grade. The developmental scale indicated that Student is like a child of 37 months in social development. Student shows a severe deficit, less than first grade level, in domain scores of communication, daily living skills and socialization. (S-35)

24. Dr. 's assessment that, "[Student] could be a polite and charming little boy, but was also seen to be out of control, screaming obscenities, and hitting whatever was in his way" is often an accurate depiction of Student's school profile. Dr. recommends "a small, highly structured environment with clear, consistent expectations and immediate consequences for both appropriate and inappropriate behaviors." Further, because Student requires constant adult supervision, peer relationships are non-existent for Student. Dr. also recommends that an appropriate program for Student must include interaction with peers and life skill instruction. (S-35)

25. , special education teacher and service coordinator for Student,

testified at the hearing. Ms. [redacted] has attained the licensure classification, “highly qualified.” Ms. [redacted] has a BA specializing in special education, from pre-school through adulthood and a Masters Degree in Educational Administration. Ms. [redacted] has obtained Virginia special education endorsements in Mental Retardation (“MR”), Emotional Disturbance (“ED”), and Learning Disability (“LD”), K -12th grade. Ms. [redacted] has worked for this LEA in the same capacity for 18 years in the inclusion setting. (S-27, Tr. 50, 14-16, 20-25, Tr. 51, Tr. 52, 1-2, 17-20)

26. Ms. [redacted] described a great deal of success working with other children in this LEA in the inclusion model by modifying the goals of individual MR students to meet the unique set of academic skills possessed by each special education student. Ms. [redacted] collaborates with the general education teacher to match a given student’s curriculum to his academic goals and level of functioning. The special education curriculum “mirrors” the general education curriculum but the disabled student’s IEP is modified individually to reflect the special education student’s performance level. In this manner, special education students are “included” in the general education environment. (Tr. 54, 12-25, Tr. 54, 12-25, Tr. 55, 1-12)

27. Ms. [redacted] described implementing a “buddy system” between the general education students and the special education students: General education students, “peers,” assist special education students with reading or “hands-on” academic activities to include special education students in the general education curriculum. Disabled students are assigned leadership roles in the regular education class. A special education student may sometimes help put things in mailboxes, choose seating or pass out papers. (Tr. 55, 13-25)

28. Student became Ms. [redacted]’s special education student when he first began school at this LEA in the 2006-2007 school year. Ms. [redacted] is responsible for Student’s IEP and coordination of all educational services for him at this LEA. (Tr. 59, 20-25, Tr. 60, 1-22)

29. Ms. [redacted] testified regarding Student’s integration with the regular education students: Student has improved somewhat in the area of socialization with his regular education peers, however, Student does not “connect academically” during instructional time in an inclusion setting. Student’s behavioral “interferences” have “limited [Student’s] access “ to educational endeavors. Student is “incredibly defiant” with a new adult and he often refuses to “try new things” or “maintain composure when sitting in a classroom.” (Tr. 58, 7-13, Tr. 57, 8-25)

30. Classroom activities are “very distracting” for Student who takes in “all sensory input.” Student does not know how to function in a regular classroom: Student does not know how to focus on an academic activity, and he cannot predict what will happen next. Student’s participation in the inclusion environment has “provoked” Student’s behavioral difficulties. (Tr. 58, 14-25)

31. About two weeks into the 2006 -2007 academic school year, it became evident to Ms. [redacted] that Student would not be successful in the regular education setting. Cognitive deficits and behavior difficulties rendered Student's IEP goals unattainable. Student would not sit in a room. Student's behavior was so disruptive that teachers could not focus on anything but Student's behaviors. Student "did not possess any of the skills necessary to maintain appropriate behavior in the regular classroom setting." Student could not communicate his thoughts: Student rarely spoke in two word utterances, only one word. Student lacked fine motor skills: He could not hold a book or pencil. Student was able to identify his name, colors and body parts, but he could not always count to ten. Student knows some sign language. (Tr. 69, 8-15, Tr. 66, 9-12, 16-22, Tr. 69, 19-25, Tr. 70, 1-3)

32. Student regularly uses inappropriate language in a "very vulgar" and "very loud" manner. In front of other students, Student frequently uses profanity to express himself. Student's "school" vocabulary includes these words, "f---, s--- and b----. Student often addresses his teachers by referring to them as, "B----." There were days when the "bad" language did not happen, Ms. [redacted] testified, but "more days than not" "we experience[d] the bad language."(Tr. 71, 16-21Tr. 70, 23-25, Tr. 73, 4-11, 15-24)

33. Ms. [redacted] provided incidences of Student's aggressive behavior in class: "Slap you in the face, b-----" was a frequent expression. Student also regularly says, "pop you in the butt" and "I'm going to hurt you." (Tr. 75, 7-15)

34. Student's refusals are frequent. Usually, Student pushes himself away from the activity suggested, Ms [redacted] testified. Student accompanies his refusals by blurting, "No!" Student climbs under desks and tables then he removes his shoes and socks while shouting, "No!" When an incident escalates beyond control, Student is removed from the room. Incidents become physical at this point. "At times we can manipulate a situation and come about it," Ms. [redacted] testified, "But nine times out of ten, the initial response is defiance." (Tr. 76, 3-12, Tr. 77, 5-12)

35. Often, Student's behavior escalates verbally, then physically in the class. When the situation escalates, Student puts his hands on the student next to him, Ms. [redacted] testified. (Tr. 76, 22-25)

36. Ms. [redacted] testified that Student's bad behavior in class is attention seeking It's as if Student is playing a game in class. (Tr. 76, 25, Tr. 77, 1-7)

37. Student's bad behaviors are triggered "any time an academic demand was placed upon him," Ms. [redacted] stated, "it resulted in a confrontational situation." (Tr. 77, 20-22)

38. Student did have good days, Ms. [redacted] testified, but Student's removals occurred "on more days than not," and often "multiple times throughout a day." (Tr. 77, 16-20)

39. On the playground, Student does not know how to act in a less restricted environment. Student hits, pushes or kicks other students. At lunch, in the hall or at play, Student does not know what to do with his body or how to express his needs. Often, Student steps on students' feet, pushes them, spits at them, kicks them or pulls their hair. (Tr. 78, 2-18)

40. Student frequently expresses aggression toward school staff. He steps on their toes or slaps them. If he is physically restrained, Student will bite, scratch or use a "headbutt" to avoid the restraint. Student's headbutts and spitting still occur, not as regularly this year, though Student has been in "full restraints" this year. (Tr. 78, 22-25, Tr. 93, 11- 17)

41. Student places himself in "unsafe positions," Ms. testified. If you ask him to come to you, "[Student] will run." Student climbs over and under file cabinets and other objects and he stands on top of tables in the classroom. (Tr. 81, 4-9)

42. Ms. has documented Student's behavior in teacher drafted notes or "logs." The teacher's notes include entries from the center ("C") personnel. Ms. utilized the logs to identify "triggers" and "antecedents" to Student's behavior. The logs were not productive, Ms. testified. Student's behavior does not occur consistently during one part of the day, in one environment, or with one particular individual. Ms. collected the data to prepare Student's BIP. (Tr. 81, 15-19, Tr. 82, 20-25, Tr. 83, Tr. 84, Tr. 85, S-14, S-15, S-16, S-17, S-18, S-19, S-36, S-38)

43. The additional C support "helps" teachers to manage Student because his behavior has decreased this year. Student is now removed by the C's before his behavior can progress in class. Ms. testified, however, that "The level of intervention needed to maintain [Student's] behavior limits academic access in the inclusion environment." (Tr. 93, 19-25, Tr. 109, 5-7)

44. Student is missing socialization with his peers, Ms. testified. Student has been able to socialize with peers in the hall and at recess, but not at all during instructional time. Student is "so overstimulated within the regular classroom" that he cannot interact with his peers. (Tr. 57, 8-25, Tr. 101, 6-12)

45. In response to Parent's questioning regarding strategies utilized by the LEA to prevent student from "cursing," Ms. stated that she "ignores" Student. Ms. admitted that this strategy has not modified Student's behavior. (Tr. 135, 18-25, Tr. 136, 1-6)

46. Ms. denies that she or this LEA have discriminated against Student because of his handicapping condition. (Tr. 152, 18-25, Tr. 153, 1)

47. Student's removals last from about 10 minutes to sometimes over one hour,

Ms. testified. Many of the “extinguished” behaviors return. This year, Student has “spat” at individuals about 3 times and he uses profane language “throughout his entire day.” Some behaviors noted on the FBA have been extinguished, “blowing snot” intentionally, “biting”, “hair smelling and touching.” Still, Student has run away from his teachers once this year, steps on toes when students are “lined up” for lunch or class, and he “will dart away” at recess. (Tr. 165, 7-15, 19-24, Tr. 167, 12-25, Tr. 168, 1-21 Tr. 169, 1-11, 15-25, Tr. 171, 172)

48. , Student’s regular education teacher testified at the hearing. Ms. has been employed by the LEA for 27 years. Ms. has obtained a B.A. and a Masters Degree in early childhood education, K-3rd grade. Although Ms. has taught children with many different learning disabilities, Student is the first child she has taught with Down Syndrome. (Tr. 175, 176, Tr. 177, 1-7)

49. Ms. confirmed that Student’s behavior has improved slightly since last year. Student does not cause disruption “every day.” Student causes disruptions or is removed from class about 3 to 4 times weekly. (Tr. 191, 9, 10-20)

50. Ms. confirmed that when Student is disruptive, he speaks “louder than [Ms.] and he shouts ‘No!’” Student then pushes things off his desk. “[I]t goes flying.” When an adult picks up the articles, Student pushes them off again. Again Student yells, “No!” “The pushing of things, the yelling out, when he goes to hit an adult that’s near him, the kids become concerned about that.” (Tr. 191, 21-25, Tr. 192, 1-10)

51. Ms. stated that Student uses “foul language” and he says the words, “f---,” and “b----“ in her class. Student also says, “I’m going to hit you,” and “I’m going to kick you.” Student is removed on these occasions. After Student’s outbursts of profanity and abusive language, Ms. diverts from the lesson and explains to her third graders the difference between appropriate and inappropriate language. This year, incidents occur about once or twice a week. (Tr. 192, 11-12, 22-25, Tr. 193, 1-15)

52. Ms. noted that Student expresses physical aggression in her class: “[Student] likes to hit. [Student] likes to throw himself on the ground. [Student] has hit the teachers.” Ms. testified that she has “safety concerns” regarding Student’s conduct in class. Ms. fears that Student will injure himself or another student. (Tr. 194, 9-22]

53. Dr. (“the LEA Representative”) has been the Director of Student Services for The School Division for almost a year. The LEA Representative has work experience in special education and in placing individuals with severe behavioral disorders into employment. In addition to a BA in psychology, the LEA Representative has obtained a Master’s Degree in Special Education and a Doctorate in Educational Administration. The LEA Representative is a state certified special education teacher in Georgia and Virginia. She has obtained special education

endorsements in ED with specialization in behavior and she is licensed as a school superintendent. (Tr. 224, Tr. 2251-15)

54. The LEA Representative confirmed that LEA personnel had tried many supports and resources for Student when it became apparent that Student was not accessing his education before the IEP team considered a change of placement. (Tr. 228, 1-8)

55. Student requires constant one-on-one attention. Initially, there was no direct instruction if the teacher and assistant had to contain Student or prevent him from injuring himself or the other students. The LEA hired additional service personnel, the C assistants, so the teacher could deliver instruction. Eventually, there were two-on-one individuals, an instructor and a behavioral aide, assigned to Student whenever he received instruction in the inclusion environment. (Tr. 231, Tr. 232, 1-22)

56. The LEA Representative testified that it eventually became easier to deliver instruction to Student but he was not actively engaged in the academic content. If the LEA attempted to engage Student in instruction, his behavior escalated. Student does not now receive educational benefit because of the extent of disciplinary supports he requires in his educational setting. The presence of the behavioral aides represents a trade-off: Student's behaviors are controlled but Student does not receive a FAPE. This past academic year reflects slight improvement in Student's behavior because of the skills of the behavioral aides. (Tr. 233, 8-10, Tr. 239, 18-21)

57. The LEA Representative explained why the inclusion environment, in itself, is harmful to Student: Transition from one class to another requires many adjustments for Student to self-regulate. Academic demands are made upon Student and he cannot respond appropriately. Negative behaviors are "triggered" by the academic demands placed upon Student. Student's greatest need is external behavioral control and the necessity to know how to self-regulate. (Tr. 235, 16-25, Tr. 236, 1-6, Tr. 249, 6-9)

58. The LEA Representative explained that Student does not benefit from inclusion because behaviorally, there is no real opportunity for Student to interact with his peers. Cognitively, Student's delays are so significant that Student's work has "minimal relation" to the work of his peers. (Tr. 239, 2-7)

59. is the academic placement recommended for Student. The LEA Representative testified that the self-contained program is based upon a cognitive behavior modification model. The program utilizes a level reward system. External behavioral control is the central theme. Structure of the program is "very stringent, very laid out ... moment by moment." The LEA's lead psychologist, Dr. , oversees this program. She confers with staff weekly to provide psychological consult regarding each Student's progress in the class. Students range from K-5th grade level and a buddy system is employed between the students. There are ten students currently in this program out of 12,789 LEA students in this district. (Tr. 242, 14-20, Tr. 246, 4-9, 16-25)

60. More than one placement was considered by the IEP team for Student. Ms. [redacted] stated that the parents and the IEP team discussed Student's placement at a school where Student's communication difficulties would be the focus. This placement was deemed not appropriate because of Student's behavior. (Tr. 114, 115)

61. At [redacted], Ms. [redacted] testified, Students modify behavior in a small, controlled environment. Student would not experience the "changes in routine" that frustrate him, the student-teacher ratio is small, and the curriculum is presented to Student in a setting which is "predictable, consistent, structured." (Tr. 118, 14-22)

62. Students at [redacted] learn how to self-regulate so that each of them may return to the inclusion environment at this LEA. As students acquire skills, they are re-integrated into the inclusion environment. As [redacted] students move through the skill levels, a self-contained staff member practices the learned skill with the student in the inclusion environment. (Tr. 244, 1-8)

63. The LEA Representative testified that the LEA's goal, in Student's change of placement to a self-contained, behavior support model, is that Student will acquire the skills necessary to progress through the behavior program. Student's successful completion of the final behavior level means that "[Student] is back into a full inclusion environment in [his] home school." (Tr. 244, 1-12)

ARGUMENT

Parents' deny the LEA's allegations that Student's behavior at school is uncontrollable. Parents allege that the LEA discriminates against Student because he is disabled. Parents allege that LEA personnel have caused Student's behavioral problems to worsen because "they do not want to deal with Student and they want to remove him."

Parents assert that Student's behavior was not corrected immediately at school by special education personnel. Parent asserts that Ms. [redacted]'s technique, ignoring "bad words," was ineffective. That is why, Parent asserts, Student's behavior is now unmanageable for the LEA.

In any event, Parent testified, Student does not act this way at home. Student

behaves properly at home. Parent applies “pressure” when Student requests it and, therefore, Student does not misbehave.

BURDEN OF PROOF

In *Schaffer v. Weast*, 126 S. Ct. 528, the United States Supreme Court has ruled that under the IDEA in an administrative hearing, the burden of proof properly rests upon party who seeks relief. In resolution of the issue of which party bears the burden of proof at a due process hearing, the Court stated therein: “[The] burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district.”

In the instant case, the LEA bears the burden of sufficiency of the evidence in this case.

APPLICABLE LAW

The IDEA provides for every disabled child to receive “free appropriate public education” (“FAPE”) designed to meet the specialized needs of the child. Id. Sec. 1400 (d)(1)(A). Pursuant to the IDEA, FAPE is defined as:

Special education services that ... (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate education in the state involved and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title. Id. Sec. 1401(9).

A school division provides a FAPE to each disabled child by creating an “individualized education program” (“IEP”) Id. Sec. 1414(d)(1)(A).

Virginia regulation at 8 VAC 20-80-60 A.1. 34 C.F.R. 300.300; 300.304 provides

as follows:

A. Age of Eligibility:

1. A free appropriate public education shall be available to all children with disabilities who need special education and related services, aged 2 to 21 inclusive, residing within the jurisdiction of each local educational agency.

Pursuant to 8 VAC 20-80-76 B. 1. (a-d) & 2. , 34 C.F.R. 300.507 (a) & (b); 300.525;300.526 regarding the LEA's right to request a due process hearing and a decision from a hearing officer if a dispute develops with a parent or parents regarding educational placement and services or the provision of FAPE to a child entitled to special education services in this state, Virginia law is as follows:

B. Basis for due process hearing request.

1. Either a parent or parents or a local education agency may request a due process hearing when a disagreement arises regarding any of the following:
 - a. Identification of a child with a disability;
 - b. Evaluation of a child with a disability (including disagreements regarding payment for an independent educational evaluation);
 - c. Educational placement and services for the child; and
 - d. Provision of a free and appropriate education to the child.
2. A local educational agency may initiate a due process hearing to resolve a disagreement when the parent or parents withhold consent for an action that requires parental consent to provide services to a student who has been identified as a student with a disability or who is suspected of having a disability.

Further, children must receive instruction in the least restrictive environment for their proper placement. Pursuant to 8 VAC 20-80-64, 34 C.F.R. 300.550 (b) the general

requirements for restrictive environments and placements are as follows:

A. General least restrictive environment requirements state that:

1. Each local educational agency shall ensure:
 - a. That to the maximum extent appropriate, children with disabilities, including those in public or private institutions or other care facilities, are educated with children without disabilities; and
 - b. That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

DISCUSSION AND CONCLUSIONS OF LAW

Evidence presented at the hearing reflects that the LEA has proven that Student's proper placement is at _____ Elementary School, in the cognitive behavior modification program. Student's MR is severe and his behavioral problems prevent him from making much academic progress. The split inclusion model, with all available supplementary aids and services provided by the LEA, does not provide a FAPE to this Student. No evidence presented at the hearing suggests that LEA personnel have discriminated against Student because of his disability or that the LEA has ignored Student's behavioral problems.

The facts of this case are similar to the facts presented in the case of Daniel R.R. v. State Board of Education, 441 IDELR 433 (EHLR 441:443) (5th Cir. 1989). The 5th Circuit affirmed the school district's decision to place the child in a special education program with mainstreaming only during lunch and recess. The court determined that Daniel R.R.'s integration with regular education students, only during lunch and recess, was a placement for Daniel R.R. with mainstreaming opportunities "to the maximum extent possible."

Daniell R.R. was a 6 year old who had Down syndrome and speech impairments. Daniel's mental age and communication skills were between 2 and 3 years of age and he also attended a "split program" of one-half day in the general education class and one-half day in special education classes.

When the school district proposed a change of placement to a full day of special education classes, lunch and recess only with peers, the school district asserted that the

change was necessary because Daniel R.R. received little benefit from the general education classroom. The school district proved that Daniel R.R. required too much of the teacher's attention and the rest of the class was diverted by his behavior.

First, the court in Daniel R.R. responded to the issue of whether the district could educate Daniel R.R. in a general education classroom. The court held that Daniel R.R. could not be educated in the general education classroom. The court addressed several points to make that determination: The school district had made a sufficient effort to accommodate Daniel R.R. by taking steps to modify Daniel's general education program and by providing adequate supplementary aids and services. Notwithstanding the modifications, Daniel R.R. received little benefit from the inclusive program, the court opined, because Daniel R.R. was not yet ready to learn the developmental skills offered, did not participate in class activities and could not master most or all of the lessons taught in the class.

In response to the demands of the general education class and Daniel R. R.'s inability to function at all in the class, Daniel R.R. began to stutter. Educators attributed Daniel R. R.'s stutter to the stress the general education class caused him. The 5th Circuit stated therein, "Regular education not only offers [the student] little in the way of academic or other benefits, it also may be harming him."

Affirming the LEA's revised placement out of the general education classroom, the appellate court considered the fact that the teacher had to devote most of her class time primarily to Daniel R.R., not to the other students. The 5th Circuit held that Daniel R.R.'s presence in the class was unfair to the other students.

The 5th Circuit opined in Daniel R.R. that the LEA's evidence proved that Daniel R.R. had been "mainstreamed" by the LEA "to the maximum extent possible." All of the forgoing factors, the 5th Circuit opined in Daniel R.R., meant that the LEA's split placement was unsuitable. Ultimately, Daniel R.R. was mainstreamed for lunch and recess with his non-disabled peers to prepare him for re-entry into the general education classroom in the future. His primary instruction, however, was delivered in a special education program.

In *Oberti v. Board of Education of Borough of Clementon School District*, 19 IDELR 908 (3rd Cir. 1993) the LEA's self-contained placement decision was not upheld in the case of an 8 year old child with Down Syndrome. The 3rd Circuit held that the lower district court had not properly reached its decision: The lower court had not adequately considered all of the supplemental aids and services that could have made possible the child's special education placement in an inclusion model.

Significantly, the *Oberti* court provides three factors to determine if a disabled child can receive FAPE in the general education classroom. This test has frequently been borrowed by other circuits to make the same determination between a general education program versus a separate special education program. The analysis poses the following questions on a case-by-case basis: (1) Has the LEA made a reasonable effort to

accommodate the child in a regular education classroom? (2) What educational benefits are available to the child in the general education classroom, with appropriate supplemental aids and services, when compared to the benefits provided to the student in the special class? (3) What are the possible negative effects of the child's inclusion on the education of the other students?

Recently, in the case of *M.S. & Jacqueline Simchick v. Fairfax County School Board, et al.*, U.S. District Court for the Eastern District of Virginia, 1:05 cv 1476 (JCC), May 8, 2007, the Federal District Court held that the LEA had not provided a FAPE to M.S. for 3 years nor had the parents provided M.S. a FAPE in their unilateral private placement. M.S., who was diagnosed with mental retardation, had a significant communication disorder, auditory processing problems and moderate autism. Evidence reflected that M.S. experienced difficulties in communication skills, social interaction and motor control. Evaluations revealed delays in receptive and expressive language skills, limited oral motor skills and gross motor and fine motor skills.

The LEA recommended placement for M.S. in a program that would include individualized attention along with social and peer interaction in a less restrictive group setting. Parents had privately placed M.S. in a program that was intensive one-on-one education in a distraction free environment. The district court agreed with the hearing officer that M.S. would benefit from interaction with peers and exposure to working skills. M.S. required one-on-one academic instruction in all of his subject areas to progress academically.

Further, evidence showed that M.S. had not made many academic gains in the parents' private placement in the one-on-one distraction free educational setting. The hearing officer and the district court concurred, one on-one distraction free placement was not appropriate "because it was too restrictive and it didn't show significant [academic] progress."

The M.S. case recites the standard which defines FAPE in all placement decisions: A FAPE 'consists of educational instruction specially designed to meet the unique needs of the handicapped child... supported by such services as are necessary to permit the child to benefit from the instruction.' M.S., at 23, citing *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, at 188, 189 (1982). A FAPE must be implemented through the IEP. As recited in M.S., the Supreme Court has stated that an IEP is sufficient if it is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, at 207.

Educators' decisions regarding the IEP and placement are supported by reviewing courts only if the child receives "the basic floor of opportunity that access to special education and related services provides." M.S., at 25, from *Tice by and Through Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) quoting *Rowley*, at 201)

The IDEA provides for disabled students to be instructed in the least restrictive environment. Pursuant to the IDEA, a 'least restrictive environment' is defined as the educational environment suitable for the disabled student that is most similar to the public school environment in which non-disabled children are educated. M.S., at 37, citing 20 U.S.C. 1412; School Board of Prince William County v. M.A., 762 F.2d 1210, 1213 (4th Cir. 1985)

As recited in M.S., however, "mainstreaming [or providing education in the least restrictive environment] is a policy to be pursued so long as it is consistent with the IDEA's primary goal of providing disabled students with an appropriate education, and when necessary for educational reasons, assumes a subordinate role in formulating an educational program." M.S., at 37, citing Hartmann v. Loudon County Board of Education, 118 F.3d 996, 1002 (4th Cir. 1997)

Application of the Oberti standard to this case clearly shows that this LEA has not moved prematurely for Student's removal from inclusion model placement at Elementary School to the more restrictive placement at in the cognitive behavior modification program.

The LEA has made a reasonable effort to accommodate Student in the regular education classroom. Ms. , Student's special education coordinator, Ms. , Student's regular education teacher, and Dr. , the LEA's Director of Student Services, testified regarding the extent to which the LEA has made accommodations for Student's regular education format: Behavioral aides have been hired to assist Student during his entire school day. Student cannot be contained. Student's class removals are frequent, sometimes more than once per day. The LEA has utilized "time outs," sensory "calming" techniques, reward strategies, extensive accommodations, psychological consultation and the IEP team has timely convened to formulate an FBA and a BIP, all to no avail.

There are few benefits available to student in his current placement. Ideally, inclusion addresses the needs of disabled children while educating these students with non-disabled peers. The inclusion concept is grounded upon the special education principle that disabled children are best educated in the educational environment that is least restrictive for them. In Student's case, like Daniel R.R.'s, the inclusion model provides little educational benefit.

Dr. , the LEA's lead psychologist was unable to measure Student to test him. It is therefore impossible to measure with much accuracy Student's present level of academic progress. Student requires constant adult supervision, one adult staff member on each side of him, to sit in class. In its present form, the inclusion placement represents a punitive, restrictive setting for Student, not an educational environment.

Dr. testified that this past year has reflected some improvement in Student's behavior over last year's record. The "trade-off" for Student's behavioral

improvement, Dr. [redacted] testified, is that Student's access to general education is now limited. Student now receives "no educational benefit" in his present placement.

Dr. [redacted] attributed Student's failure to be successful in the inclusion placement to the fact that school "triggers" a myriad of responses in Student that he has no ability to control. Dr. [redacted], the OT evaluator, and the mother all corroborated this fact in their assessment that Student requires sensory integration and physical "pressure" to calm him. In a regular education classroom, Student experiences sensory overload to various stimuli.

To Student, questions posed to him, other children in the room, directions from the teacher, all stimulate Student to respond. Because of Student's severe cognitive deficits, Student cannot "self-regulate" by making behavioral "adjustments" necessary to sit quietly in a class. When Student's limited social skills fail him, he often reacts poorly. He uses profanity, hits, spits, throws himself down or screams, "No!" It does not appear that Student knows the wrongfulness of his acts. It is this aspect of Student's behavior that does not now mesh with his current placement in the inclusion model.

If Student does not possess the life skills necessary to distinguish between "bad" and "good" behavior he will likely encounter serious consequences for his actions later. Student will not be able to live in a civilized world. There will be no behavioral aides standing on either side of Student to rescue him from injurious behavior to himself or to others.

Parent is likely correct in her assertion that "ignoring" Student's negative behaviors will not help Student to extinguish them. Even if Ms. [redacted]'s strategy of "ignoring" Student's behavior was not the most direct response to some of Student's behaviors, she and the LEA teachers and staff have proven that they have utilized every reasonable effort to include Student in his placement and to correct Student's behavior.

Placement at [redacted] Elementary School, in the cognitive behavior modification program, is the least restrictive environment in which Student will receive primary academic instruction and related services. Student's IEP revision states that Student needs "socialization." The hearing officer is satisfied that the behavior modification program incorporates adequate opportunities for positive peer interaction. The program does not appear to cause any lapse in academics or in related educational services to be provided.

The [redacted] program offers Student access to his environment in a small, controlled setting which was recommended by Student's psychological evaluation.

Also, the program appears to address Parent's concern that her consent for Student to enter this program means that Student's educational options will be provided in the future only in self-contained placement. Educators testified credibly, the goal of the behavior modification program is inclusion, not self-contained placement. Dr.

testified that students practice the behavior skills they learn almost immediately in an inclusion setting. Dr. testified that behavior skills are not taught or achieved in a one-on-one instruction or isolated environment model. Further, Dr. , the LEA School Psychologist, will provide individual consultation for the ten students admitted to the program.

This hearing officer is convinced that the behavior modification program will target Student's unique needs and prepare him for re-entry into an inclusion environment. Perhaps the LEA could allay Parent's apprehensions about the setting by allowing Parent to observe the program.

Finally, it is clear that Student's behavior has caused upheaval in class. Second and third grade students do understand the significance of profanity and out of control behavior. Student's removals, defiant behavior and outbursts require an inordinate amount of attention from the teaching staff. When a tantrum begins, evidence was that the entire class must be removed. For the LEA to devote this level of attention, exclusively to one student, is unfair. If Student's climbing, banging, striking and hair-pulling activities are not soon curtailed, Student will injure another student or himself.

Based upon all of the evidence presented, applicable statutes, regulations, case law, and the arguments presented by the parties, the hearing officer makes the following conclusions of law:

1. ("Student") is handicapped, having "Mental Retardation," and comes within the purview of IDEA.
2. This Student requires specific conditions and related services in order to derive educational benefit from his education.
3. At all times relevant hereto, Student's Parents have resided in Virginia, thus the local educational agency, ("the LEA"), is responsible for educating and providing him with a free, appropriate public education ("FAPE").

PROVISION OF FAPE

In consideration of the LEA's evidence presented at the hearing, testimony of the witnesses and presentation of exhibits, it does appear to this hearing officer that

does not now receive a FAPE.

4. I find that parental notice requirements were satisfied by the LEA.

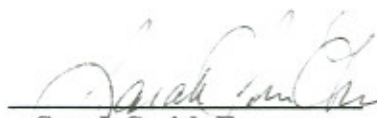
Accordingly, I find that:

5. The LEA has properly requested a due process hearing because Parents withhold consent to their son's change of placement from an inclusion placement to a self-contained placement with behavior support, supplementary aids and services. The LEA requests a decision pursuant to 8 VAC 20-80-76. Elementary School, in the cognitive behavior modification program, provides the least restrictive environment for this child's delivery of his direct instruction, supplementary aids and services, pursuant to 8 VAC 20-80-64, 34 C.F.R. 300.550 (b).

6. The LEA proved that the LEA has been unable to provide a FAPE to in the inclusion placement.

DATE OF DECISION:

December 10, 2007



Sarah Smith Freeman
Hearing Officer

IDENTIFICATION OF THE PREVAILING PARTY

Pursuant to 8 VAC 20-89-76 K.11. this hearing officer has the authority to determine the prevailing party on each issue as follows:

(1) Given the severity of Student's MR category and pervasive behavioral issues, is the inclusion model an appropriate placement for the provision of FAPE to Student?

The LEA prevails on this issue. Student's MR category is severe. Student demonstrates pervasive behavioral issues. The inclusion model is not an appropriate placement for the provision of FAPE to Student. Student receives no educational benefit from the inclusion placement. Student does not receive FAPE, with supplementary aids and services, in the

inclusion placement. Student is not offered the “basic floor of opportunity that special education provides” to which Student is entitled pursuant to Rowley, at 201 and to the IDEA.

(2) If the inclusion model is not the appropriate placement for Student, as the LEA contends, what is the least restrictive environment in which Student will receive a FAPE?

The LEA prevails on this issue. The inclusion model is not the most appropriate placement for Student. The least restrictive environment in which student will receive a FAPE is the cognitive behavior modification program at _____ Elementary School.

APPEAL INFORMATION

8 VAC 20-80-76 O.1. states as follows:

1. This decision shall be 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.

2. The appeal may be filed in a state circuit court or in a federal district court without regard to the amount in controversy.

3. If the hearing officer’s decision is appealed in court, implementation of the hearing officer’s order is held in abeyance except in those cases where the hearing officer has agreed with the child’s parent or parents that a change of placement is appropriate in accordance with subsection E of this section. In those cases, the hearing officer’s order must be implemented while the case is being appealed.

IMPLEMENTATION PLAN

It is the LEA’s responsibility to submit an implementation plan to the parties, the hearing officer and the Virginia Department of Education within 45 calendar days.

Dated:

December 10, 2007



Sarah Smith-Freeman
Hearing Officer