07-035

REISSUED DECISION OF THE HEARING OFFICER

I. Introduction

On January 17, 2007, the local educational agency (the "School District" or the "LEA") received the parent's Request for Due Process Hearing dated January 17, 2007 (the "Request"). HO 1[1]. The hearing officer was appointed to this administrative due process proceeding on January 22, 2007.

On January 29, 2007, the LEA filed with the hearing officer its Response to Due Process Notice and Motion to Dismiss and Memorandum in Support dated January 29, 2007 (the "Motion to Dismiss"). HO 4. The parent, by counsel, filed with the hearing officer on February 7, 2007 her objection to the Motion to Dismiss. HO 7. The parent also submitted to the hearing officer on February 7, 2007 a Motion for Summary Judgment concerning the issues raised in the LEA's Motion to Dismiss. HO 8. By letter dated February 13, 2007, the hearing officer informed the parties that he had decided to delay any decision concerning the LEA's motion to dismiss and any other motions still before him, including the parent's motion for summary judgment, until he had had an opportunity to receive and consider evidence at the hearing. HO 14.

The parties agreed that the remaining issues for the hearing were those specified by the parties in their clarification of issues dated February 7, 2007. HO 10.

Shortly before the parties' scheduled first pre-hearing conference call on January 24, 2007, the parties, by counsel, faxed to the hearing officer their written waiver of the resolution session meeting otherwise mandated by the *Individuals with Disabilities Education Improvement Act of 2004* (the "IDEA 2004"). HO 2. Accordingly, the start date of the 45 day timeline for the due process hearing began the day after the parties agreed in writing to waive the resolution session meeting. 34 C.F.R. § 300.510(c). Thus the deadline for the hearing officer's decision is March 12, 2007.

The hearing was held over four (4) days on February 21-23, 2007 and February 26, 2007. The hearing officer did not admit into evidence exhibits numbered 10, 24, 26, 97(E), 97(I), 98 and attachments proposed at the hearing to exhibit 88. Tr. 362-365, 970. The hearing officer admitted into evidence at the hearing all of the remaining exhibits, with the exception of certain cassette tapes of IEP meetings which were admitted when they were delivered by the parent after the meeting and which are described in more detail below and in the administrative record. After the hearing, the parties timely submitted to the hearing officer their respective closing briefs (each a "Brief" and collectively, the "Briefs").

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1 References to the hearing officer's seventeen (17) exhibits will be designated HO followed by the exhibit number. References to the parties' exhibits in the Joint Exhibit Binder will be designated by the exhibit number. The transcript of the four (4) days of the hearing will be cited "TR" followed by the page number.

The IDEA 2004 was signed into law on December 3, 2004. With the exception of some elements of the definition of "highly qualified teacher" which took effect on December 3, 2004, the provisions of IDEA 2004 became effective July 1, 2005 (the "Effective Date"). Concerning this administrative due process proceeding, where the events occur before the Effective Date, the Individuals with Disabilities Education Act of 1997 20 U.S.C. § 1400 et seq ("IDEA 1997") and the implementing regulations apply. Obviously, concerning events occurring on or after the Effective Date, the IDEA 2004 and its implementing federal regulations apply. Any state special education regulation not impacted by the IDEA 2004 and its implementing federal regulations remains in effect until newly revised state special education regulations are implemented. Where the provisions of IDEA 2004 and IDEA 1997 are essentially the same, the hearing officer will refer simply to "IDEA" rather than differentiate between the two statutes.

The hearing officer renders his decision based on the sworn testimony of the various witnesses, the numerous exhibits admitted into evidence and the argument of the parties.

II. Findings of Fact

1. The hearing officer hereby incorporates herein the parties' "Joint Stipulations of Certain Facts, Limited Conclusions of Law, and Authenticity of Various Documents" numbered paragraphs 1-35. HO 5.

36. The requirements of notice to the parents were satisfied. The child suffers from a disability, presents with a complex medical history and is eligible to receive specified education and related services under the primary disability category other health impairment ("OHI"). #61, #60, #39 and #71. Tr. 75, 77.

37. An independent Neuropsychological Evaluation by Dr. Gourley of the child at age 3 stressed that "Continued exposure to normally developing peers will be essential to learning developmentally appropriate social skills." #1 at page 9.

38. On or about January 19, 2005, numerous evaluators at the Center for Development and Learning ("CDL") at , evaluated the child's skills and development at the request of the parent. #7 at page 1.

39. An assessment of the child's overall intellectual ability revealed that her cognitive skills fell within the Low range, significantly below what would be expected for a child her age. #7 at page 4.

40. The psychological evaluator found that the child's overall developmental profile and skills were significantly below the average level of intellectual functioning and self-help skills; and were consistent with a diagnosis of mild mental retardation. #7 at page 4.

41. The parent and the LEA agreed that it would not be necessary for the LEA to duplicate the testing done at the CDL and arrangements were made for a representative of the LEA to observe the child in her private day school. #9. Tr. 173-175.

42. On March 4, 2005, a representative of the LEA in due course observed the child in her private day school. #12.

43. On February 24, 2005, , a Vision Itinerant Teacher of the LEA, performed a functional vision evaluation of the child to determine the child's present level of vision performance and subsequent accommodations/modifications for the classroom/home setting. #13. The teacher made numerous specific and detailed therapeutic and educational recommendations for the child. #13 at pages 4-5.

44. On March 14, 2005, the child was evaluated by the CDL in the additional areas of occupational therapy, physical therapy and nutrition. #14.

45. In the physical therapy assessment, the CDL found that the child demonstrated functional independence in all areas of mobility and was able to move around her environment without assistance. #16 at pages 11-12.

46. Academy, the child's private day school (" "), is a small physical environment and has only 100 students in grades K-12. #19. Tr. 223.

47. During the 2005-06 school year, the child was in an ungraded class with a total of eight (8) students and two (2) teachers. #19 and #21, page 2.

48. By the time of Dr. Cobb's psychological evaluation on March 30, 2005, the child's anxiety problems that she experienced during Kindergarten were no longer present. #21, page 5.

49. A Speech/Language Evaluation of the child by Maria Zanetti found that the child's language understanding skills were well below average with respect to chronological age, and these findings were consistent with the child's evaluation at the CDL. #22.

50. On or about May 4, 2005, the parent supplied to the LEA a significant amount of test data concerning the child (#28) and detailed recommended OT Goals and Objectives for the child (#30) for the child's IEP Team meeting in the library of Elementary School, the child's neighborhood school within the LEA (" ").

51. The parent, parent representatives and numerous LEA personnel convened on May 4, 2005, for an IEP Team meeting concerning the child. #74 and #32.

52. During a lengthy IEP Team meeting, the IEP Team considered the child's educational needs in an effort to develop for the child an appropriate educational program. #32 and #33. The parent and her representatives fully participated in the meeting. #32 and #33.

53. In addition to the evaluations and information submitted to the LEA referred to above, during the May 4, 2005 meeting, the parent also submitted to the Team a letter from Dr. Kahler (#27) and a detailed student profile drafted by the parent (#29). Accordingly, at the meeting on May 4, 2005, the IEP Team was well informed concerning the child's educational and medical needs by the numerous, detailed evaluations, the parent's significant input and the observation and assessments by the LEA personnel. Tr. 438.

54. With the full knowledge of the parent and her representatives, transition services for the child were not slated for discussion. #32, page 5.

55. The Team was essentially in agreement concerning all issues other than placement. #32 and #33. Tr. 87, 100, 439, 442, 875-876.

56. The IEP Team was supposed to reconvene to make a final decision concerning placement on May 25, 2005, but at the parent's request, the meeting was rescheduled to June 1, 2005. #33.

57. On or about May 25, 2005, in preparation for the meeting, the LEA sent to the parent a draft IEP. #35. This document was clearly identified as a work in progress, subject to amendment. #35, page 2.

58. During or immediately prior to the June 1, 2005 meeting, the parent submitted to the Team and the Team considered two letters from Dr. Bodurtha dated May 12, 2005 and May 25, 2005 (#34 and #36, respectively) and a Present Level of Performance drafted by the parent.

59. Dr. Bodurtha has followed the child since 1997. #34. Dr. Bodurtha opined that while she did not have a clear-cut, specific diagnosis for the child, the child fits the umbrella of Septo-optic dysplasia and appears to have a strong component of nystagmus and hyperacusis, in addition to hyperthyroidism. #34. Dr. Bodurtha stated that "I believe that she is quite capable of learning in a supportive environment that addresses her visual and auditory challenges." #34. Dr. Bodurtha in her follow-up letter of May 25, 2005, also stated that "Individual supports with appreciation of her visual needs, some of which we do not fully understand, are critical for her continued progress in learning and development." #36.

60. Dr. Teasley agreed that the LEA's categorization of the child's disability as OHI is appropriate. #37, page 1.

61. Concerning Exhibit #41, the two cassette tapes of the June 1, 2005 IEP Team meeting provided by the LEA are, in large part, barely audible or totally inaudible. After the hearing, the parent provided one cassette tape of the first part of the meeting which is audible but was unable to locate and provide to the hearing officer the second tape of the second part of the meeting.

62. At various times throughout her interaction with the LEA, the parent has clearly made evident her ultimate goal of having the LEA fund her child's private placement at . See, e.g., #21, page 3; #50, page 1; Tapes of June 20, 2006 IEP Team meeting; #21, page 3; Tr. 326-327; Tr. 934.

63. The parent has come to realize that the LEA is not legally obligated to reimburse the parent or to pay for the parent's private placement of the child at unless the LEA fails to offer the child a free appropriate public education ("FAPE"). Tr. 151.

64. Based on the totality of the administrative record, and despite the parent's protestations that she is open to the possibility of an appropriate public day school placement, the parent has predetermined that no placement other than would be appropriate for her child concerning the educational placements at issue in this administrative proceeding. #21, page 3; #50; Tr. 24, 86, 151, 166, 326-327, 486-487, 520, 1338.

65. Numerous participants on behalf of both the parent and the LEA attended a lengthy IEP Team Meeting concerning the child on June 1, 2005. #39-41. Tr. 450.

66. The Team essentially agreed to all elements of the proposed IEP, which was drafted using the IEP online computer program (#40, page 2), with the exception of the placement decision. #39-41. Tr. 193, 212-213, 291-3, 439, 875-876.

67. The parent and her representatives fully participated in the meeting and the Team considered three placement continuum options (#39, page 24), including private day school.

68. Numerous detailed accommodations, modifications, goals, objectives and services were carefully and skillfully crafted by the Team to support the child's unique educational needs. #39-41. Tr. 562-563.

69. During the IEP Meeting held on June 1, 2005, the IEP Team reviewed, discussed and made revisions to the IEP goals and objectives for the child, based on information from the parent, persons the parent invited to the IEP Meeting, and LEA staff. The IEP Team also considered if there would be any possible harmful effects to the child if she returned to a public school setting. Specific goals and objectives were discussed and developed to address this issue. The child would receive the following special education and related services under the IEP developed during the two meetings: (a) Academics, five and one-half hours (5 ½), five days a weeks in a special education classroom; (b) Occupational Therapy, sixty (60) minutes one (1) time per week; (c) Vision Itinerant, thirty (30) minutes one (1) time monthly; and (d) Speech and Language Therapy, thirty (30) minutes two (2) times weekly. After careful consideration of all evaluative reports and other information, the IEP Team determined that the child's educational needs could be appropriately addressed in a special education classroom in the LEA in accordance with the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-80-64 Least Restrictive Environment and Placements. Specific teaching strategies and supports for the child's success in a school environment would be determined by her teachers and related services personnel based on her

individual needs, IEP goals and objectives. (See, also, Tr. 558.) The proposed IEP for the child's 2005-06 school year was reasonably calculated to provide the child with the necessary quantum of educational benefit required by law.

70. At the meeting, Dr. Woolridge, the parent's advocate, stated that the parent was not prepared to discuss a start date for the IEP. #40, page 2. Tr. 486-487.

71. The parent never raised or requested consideration of ESY services for her child during the 2005-06 school year.

72. The parent and her representatives raised the issue of "potential harm" to the child in a public school placement based on the child's earlier Kindergarten experience of anxiety while enrolled in Public Schools. #41, page 41. Tr. 144, 309.

73. Dr. Cobb stated that the child's anxiety had resolved and the symptoms were no longer there. #41, page 42. Tr. 309. Dr. Cobb continued, stressing several times, that concerning the LEA: ". . . nobody has a crystal ball, nobody knows how, um, [the child] would react going back into that kind of public school setting. . ." (#41, page 42); ". . . although no one has a crystal ball (#41, page 42); ". . . there is a potential for harm, we don't know how great that potential is, we can't predict that with any certainty. . ." (#41, page 42); "This is not a judgment at all about the program that you all have to offer, I mean it has absolutely nothing to do with your program. . ." (#41, page 42). Tr. 324.

74. LEA representatives also testified that new children at would be given individual attention by staff to ease any transition and the proposed IEP included numerous supports, accommodations and modifications to address any transition concerns for the child. Tr. 1014.

75. During the hearing, the parent testified that she agreed that the present level of performance, goals and objectives, accommodations and services were all appropriate to meet her child's educational needs. Tr. 193, 212-213.

76. On July 20, 2005, the parent, by counsel (a different attorney-at-law than represented her at the hearing), wrote to the Virginia Department of Education (the "SEA") and stated as follows:

> What should have been a simple "rubber stamp" that would have allowed [the child] to continue at Academy (" "), a private day school in , when [the child and parents] moved from to the [LEA], has unfortunately become a dispute caused by the [LEA's] refusal to recognize the inherent fact that [the child's] needs are better met at than in [the LEA]. While we feel that [the LEA's] decision to deny the [parents'] request is driven by economic rather than educational factors, we will take pleasure in showing [the LEA] why is the most

> appropriate placement for [the child] given her unique educational and medical needs.

#50, page 1. Tr. 151.

77. The LEA has offered the child an appropriate education during the current school year (2006-07) and the June 20, 2006 IEP (#71) offered by the LEA and rejected by the parent was appropriate and was reasonably calculated to meet the child's unique educational needs and to provide educational benefit.

78. Numerous participants on behalf of the parent and the LEA attended an IEP Team Meeting concerning the child on June 7, 2006 at . #67-68.

79. Again, prior to or at the meeting, the LEA Team members accepted, reviewed, considered and discussed various written and verbal reports concerning the child's educational and medical needs, including a Speech and Language Progress Update (#61); a Progress Report (#62); a Present Level of Performance drafted by (#64); an Occupational Therapy section of the Present Level of Performance drafted by (#65). In addition, Ms. , Guidance Counselor, conducted a classroom observation on May 24, 2006, in preparation for the June 7, 2006 IEP meeting (#63).

80. The IEP Team considered, discussed and reviewed this information during the June 7, 2006 IEP meeting and used this information to draft appropriate goals, objectives, modifications, accommodations and services.

81. Again, the IEP Team agreed on all elements of the proposed IEP with the exception of the placement decision. The Team agreed to reconvene on June 20, 2006 to complete the meeting. #68. Tr. 212-213, 998-1008.

82. Additional information was provided by the parent and considered by the IEP Team when it reconvened on June 20, 2006. (#69 and #70).

83. , LEA Occupational Therapist, , Vision Itinerant and , LEA Speech Therapist all convincingly, credibly and consistently testified during the hearing as to how the goals, services, and accommodations were specifically crafted to meet the child's unique educational needs.

84. During the due process hearing, the parent testified that she agreed that the present level of performance, goals, objectives, accommodations, and services were all appropriate to meet the child's educational needs. Tr. 212-213.

85. When specifically questioned about her objection to the June 20, 2006 IEP, the parent replied that she had the same objections regarding specific nature of the program she had during the 2005-06 school year. Tr. 213, 217-218.

86. This IEP confusingly described the "Provider" of special education academics as " PS staff" and the "Location" as "school environment." #71, page 32. The LEA personnel testified that they made this change to signal that academic services can continue to be provided to the child throughout the day without regard to physical location. Tr. 1009-1011, 1110-1112, 1223-1224. The LEA personnel clearly understand that placement is an array of special education and related services and not a physical location. Tr. 917, 1019, 1034, 1296-1297. Any confusion concerning the changes between the June 7, 2006 IEP (#67, page 26) which, correspondingly, listed "Exceptional Educational Teacher" under the "Provider" column and "Exceptional Education Classroom" under the "Location" is quickly dispelled by the Minutes of the June 20, 2006 meeting and the record which make is abundantly clear that academic services were to be provided in an exceptional education classroom by an endorsed exceptional education teacher, and that the parent, the parent's participants and the LEA personnel fully understood this arrangement. #72, Tr. 966-969, 1009-1011, 1250, 1361-1364.

87. Contrary to the parent's contention that the IEP Team refused ESY services during the June 20, 2006 IEP Meeting, the record establishes that the Team needed more information before any decision regarding ESY could be made. See, e.g., #79. Tr. 534, 1072-1073, 1307-1308.

88. The hearing officer found the testimony of the LEA professionals more convincing and credible than that of the parents' experts for the reasons described below.

89. Many of the parent's experts expressed their opinions in terms of an optimization standard, namely that was more appropriate or better than . For example, Dr. West at #19, page 1 ("cannot be duplicated"); Dr. Kahler at #27, page 1 ("not be best served"); Dr. Bodurtha at #34 ("allow her to benefit most"); Dr. Teasley at #37, page 2 ("maximize her academic and cognitive potential"); Dr. Cobb, as previously described. Tr. 208-210, 464-465, 498, 516, 520.

90. At other times, the parent's experts appeared to support the LEA's position concerning placement and LRE: Dr. Gourley at #1, page 9 ("exposure to normally developing peers will be essential to learning developmentally appropriate skills"); Dr. Teasley at #20; Dr. Cobb, as previously noted; and Dr. Bodurtha at #36. Tr. 420 (Ms. Culley), 533, 539, 558.

91. As previously noted, the parent herself has frequently adopted an optimization standard during the relevant period (#50) and has agreed that components of the relevant IEPs were appropriate other than the placement decision. Additionally, at the hearing, the LEA learned that the parent is now gainfully employed by . Tr. 119-120, 218.

92. While the parent's experts may have been somewhat familiar with the child's educational program at , most did not possess any specialized knowledge concerning special education programs in the LEA. e.g., Tr. 423, 478-479. Of course, the LEA has never been given the opportunity to implement the educational programs it has proposed for the child. Tr. 883.

93. The testimony of the LEA's educational professionals was both credible and consistent on the major issues before the hearing officer and is entitled to deference from the hearing officer. The demeanor of such professionals at the hearing was candid and forthright. LEA personnel acted appropriately in exercising their considered professional judgment, well within the bounds of their professional, educational discretion.

94. The LEA has made a good faith, collaborative, coordinated, reasonable effort to develop and offer appropriate educational programs to the child for her school years 2005-06 and 2006-07. Tr. 849, 857-859, 864-865, 960, 1003, 1219. The LEA has offered the child an appropriate education during the current and past school year and the IEPs provided and offered for the current and past school year were appropriate. The child did not suffer any loss of educational opportunity due to any action or inaction on the part of the LEA.

95. The LEA has offered the child a FAPE.

96. Any procedural violations were technical and did not actually interfere with the provision of a FAPE to the child. Any procedural violations did not cause the disabled child to suffer a loss of educational opportunity.

III. Conclusions of Law and Decision

In this administrative due process proceeding initiated by the parents, the burden of proof is on the parents. Schaffer, ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005).

For the reasons provided below and in the parent's Brief and Motion for Summary Judgment, the hearing officer hereby denies the LEA's motion to dismiss.

IDEA requires states to provide FAPE to all of its children with disabilities. 20 U.S.C. § 1412(1). See, also, Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997).

> **§ 1412(6) states that "the State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out." 20 U.S.C. § 1412(6). This language suggests that, ultimately, it is the SEA's responsibility to ensure that each child within its jurisdiction is provided a free appropriate public education.**

Gadsby, at 952.

The hearing officer finds that the reasoning in M.M. v. Sch. Bd., 437 F.2d 1085, 1100 (11th Cir. 2006) is convincing and highly persuasive and adopts such reasoning.

However, the parties are unaware and the hearing officer hereby calls their attention to the fact that on Monday, February 26, 2007, the U.S. Supreme Court granted certiorari in Board of Education of the City School District of New York v. Tom F. ex rel. Gilbert F., No. 06-637 (U.S. 02/26/07, *cert. granted*), a case that will decide whether a student who receives special education services from a private school is eligible for tuition reimbursement if he never obtained such services from a public school district.

The new law retains the previous definition of a "free appropriate public education." IDEA 2004 Section 612(a)(1)(A). Accordingly, any analysis of the standard of FAPE must begin with Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). The Rowley Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education. The Rowley analysis provides that the disabled child is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. Rowley, *supra*, 206-7 (1982); Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990); Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987); Gerstmyer v. Howard County Public Schools, 20 IDELR 1327 (1994).

The parents have not developed probative evidence of any serious procedural violations in this proceeding. The parent and her representatives wanted much more specificity in the two IEPs which she rejected than she is legally entitled to. Providing the level of detail in an IEP of classroom composition regarding categories of disabilities served, endorsement of teachers, etc. requested by the parent, would have put the LEA in a box and set it up for certain failure should it ever be given the opportunity to implement the IEP. See, A.K. v. Alexandria City School Board, 44 IDELR 276 (2005). Tr. 89, 135-136, 196-198, 201-205, 213, 217-218, 272, 276-283, 289-290, 307-311, 315, 325, 450-451, 456-457, 491-494, 502, 528-529, 537, 558, 567, 886, 916-918, 934-935, 952, 1017-1021, 1022-1023, 1056, 1100-1101, 1158-1159, 1226-1227. Placement is an array of educational services offered to the child, the actual educational program, not a location. Jennings v. Fairfax Co. Sch. Bd., 35 IDELR 158 (E.D. Va. 2001), *aff'd* 2002 U.S. App. LEXIS 14372 (4th Cir. July 16, 2002) (*citing* Leonard v. McKenzie, 869 F.2d 1558, 1562-63 (D.C. Cir. 1989) (acknowledging that an IEP is not location specific). See, also, 8 VAC 20-80-64(B); definition of "Initial Placement" in 8 VAC 20-80-10; and the Virginia Regulations generally.

A small violation of IDEA's procedural requirements does not, without evidence of an actual loss of educational opportunity, constitute a failure to provide the disabled child with a free appropriate public education. Rowley, *supra*; Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997); MM v. School District of Greenville County, 303 F.2d 523 (4th Cir. 2002); Dibuo v. Board of Educ., 309 F.3d 184 (4th Cir. 2002); Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985); Tice, *supra*; Doe v. Alabama Department of Education, 915 F.2d 615 (11th Cir. 1990); W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Evans v. School District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988). Technical violations of IDEA procedures that do not deny the student FAPE are considered de minimis. See, e.g., Fairfax

County Sch. Bd. v. Doe, Civil Action No. 96-1803-A (April 24, 1997); see also Roland v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990); Spielberg v. Henrico County Sch. Bd., 853 F.2d 256, 259 (4th Cir. 1988); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633-635 (4th Cir. 1985); and Board of Educ. v. Brett Y, 155 F.3d 557 (4th Cir. 1998).

In Dibuo, the Court reaffirms the law in our circuit that not every procedural violation of the IDEA warrants granting the relief requested. Before any relief can be afforded, the Court (or hearing officer) must proceed beyond the finding of any procedural violation of the IDEA to further analyze whether the procedural violation actually interfered with the provision of a FAPE to a child:

> Most recently, in MM, we relied upon our decision in Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997) to reiterate that [HN6] "when . . . a procedural [violation of the IDEA] exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA." MM, 303 F.3d 523, 533, 2002 WL 31001195 at *7.

Dibuo, *supra*, at 190.

Essentially, this standard has now been codified in the new law. IDEA 2004 Section 615(f)(3)(E)(ii). Any asserted procedural violation concerning this proceeding simply does not rise to the level necessary to constitute a loss of educational opportunity and denial of FAPE to the child. The parent complains that she was not able to fully participate in the process but the record shows this claim to be meritless. #41, #72.

The determination of the IEP's reasonableness at the time of its creation is limited to the information known to the IEP team when it wrote the IEP. See Adams v. State of Oregon, 195 F.3d 1141, 1150 (9th Cir. 1999) (IEP "was reasonably developed based on information available to the [multidisciplinary team] including information from the parents").

Rowley and subsequent court decisions have also been careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators.

In Hartmann v. Loudoun County, the court stated:

> Although section 1415(e)(2) provides district courts with authority to grant 'appropriate' relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section 'is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' (citations omitted)... [t]hese principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most

> appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

See also Springer v. Fairfax County, 134 F.3d 659, 663 (4th Cir. 1998) (holding that "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task"); Barnett v. Fairfax County School Board, 927 F.2d 146, 151-52 (4th Cir.), cert. denied, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and Tice v. Botetourt County, supra, at 1207 (once a "procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals" – rather, the court should "defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides").

Accordingly, hearing officers must not succumb to the temptation to substitute their judgment for that of local school authorities in IEP matters. Arlington County Sch. Bd. v. Smith, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

IDEA defines FAPE as special education and related services that (i) have been provided at public expense and under public supervision and direction; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary school education in the state involved; and (iv) are provided in conformity with an IEP. 20 U.S.C. § 1401(8).

In determining the quantum of educational benefit necessary to satisfy IDEA, the Rowley Court explicitly rejected a bright-line, single standard test. Instead, educational benefit "must be gauged in relation to the child's potential". Rowley at 185 and 202; see also, Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985).

Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1000-1001 (4th Cir. 1997); Johnson v. Cuyahoga County Comm. College, 29 Ohio Misc.2d 33, 498 N.E.2d 1088 (1985).

The proposed placements of the child within , her neighborhood school, pursuant to the proposed IEPs provided the child the support to learn and progress academically in the least restrictive environment. Tr. 255, 259, 295-297, 533, 864, 939-940, 1012, 1035, 1104-1105, 1110-1112, 1146-1148, 1265-1266, 1301, 1335-1336, 1363-1364.

The IDEA 2004 like the IDEA 1997 requires that children with disabilities be educated in the least restrictive environment ("LRE") and have the opportunity to be educated with non-disabled children to the greatest extent possible. 20 U.S.C. § 1412(A)(5); see, also 34 C.F.R. § 300.550(b).

Removal of disabled children from the regular education environment should only occur when the nature or severity of the disability is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily. Id. LRE is a mandate to all public schools which must be considered by the appropriate multi-disciplinary IEP Team in programming for children.

The LEA has looked at the child's strengths, weaknesses and progress in light of her disability and has proposed IEPs in which her weaknesses, both scholastically and socially can be addressed, but where her academic strengths can also be developed, accommodated and built upon. The LEA's proposed IEPs also provided the child a regular opportunity to promote her socialization skills and participate in activities with non-disabled students in certain areas, as mandated by the LRE requirement.

The parents bear the burden to establish by a preponderance of the evidence that the LEA has failed to provide their child with FAPE concerning the issues they raised in this proceeding and they have not sustained this burden.

The LEA is reminded of its obligations concerning 8 VAC 20-80-76(I)(16) to develop and submit an implementation plan to the parties, the hearing officer, and the SEA within 45 days of the rendering of this decision.

Right of Appeal. This decision is final and binding unless either party appeals in a federal District court within 90 calendar days of the date of this decision, or in a state circuit court within one year of the date of this decision.

ENTER: 3/19/07

John V. Robinson

John V. Robinson, Hearing Officer