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Dispute Resolution &
Administrative Services

VIRGINIA:

Department of Education
Special Education Due Process Hearing

PUBLIC SCHOOLS)
Petitioner,)
)
v.) In Re:
)
MR. AND MRS.)
Respondents.)

HEARING OFFICER DECISION

THE PARTIES

(herein " ") is a twelve year old child in sixth grade at Middle School in Public Schools (" "), the local education agency (LEA) and the petitioner in this due process hearing, was represented by Kathleen S. Mehfoud, Esq. and Patrick T. Andriano, Esq. of Reed Smith, LLP. The parents of Mr. and Mrs. ("parents"), the Respondents, were represented by James J. Wheaton, Esq., Thomas R. Waskom, Esq., and Tameka M. Collier, Esq., of Troutman Sanders, LLP.

PROCEDURE

A request by for a due process hearing was filed with the Virginia Department of Education on October 11, 2005.[1] This hearing officer was appointed on October 12, 2005. Notice of the request for the due process hearing was received by the parents on October 13, 2005. On October 23, 2005, the parents, by counsel, filed a Response to Request for Due Process Hearing.[2] On October 28, 2005, the parents, by counsel, objected to the sufficiency of notice of a due process hearing.[3] On November 1, 2005, this hearing officer determined that the notice was sufficient.[4]

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[1]SB Exhibit 1: Request for Due Process Hearing
[2]P Exhibit 2: Response to Request for Due Process Hearing
[3]Objection to Sufficiency of Due Process Notice, October 28, 2005
[4]Determination Regarding Sufficiency of Due Process Notice, November 1, 2005

The first pre-hearing conference was held by telephone on October 17, 2005. Thirty days from the date the notice of the request for due process hearing were then allowed for a resolution meeting between the parties. Mediation was requested by the parents, but did not agree to it. When there was no resolution by the parties by November 12, 2005, the applicable time lines for the due process hearing commenced. The date the hearing officer decision was due was December 27, 2005.[5]

The second pre-hearing conference was held by telephone on October 28, 2005. Issues regarding some subpoenas were resolved. The availability of a report of an evaluation done of the student at Center was discussed, but remained unresolved.[6]

The third pre-hearing conference was held by telephone on November 14, 2005. At the conference, the issues, relief sought, and a timeline for the case were discussed. Due to conflicts of schedules of both parties, a scheduled medical procedure for one of the attorneys, unavailability of witness during the holidays, and at the request of both parties, the hearing officer determined that it was in the best interests of that an extension be granted. The date the hearing officer decision was due was extended to January 20, 2006.[7]

The fourth pre-hearing conference was held in Richmond on December 9, 2005. The requests by the parents' counsel for the production of a privilege log and to talk to school witness before the hearing were denied. The attorney for did not agree to accept service of subpoenas for school employees. The parties announced they had come to agreement regarding 's eligibility, and that eligibility and classification were no longer issue to be determined by the hearing officer.[8]

The fifth pre-hearing conference was held by telephone on December 30, 2005. Issues regarding the availability of witnesses were resolved. The parents, by counsel, had no objections to the schools' exhibits 1-131 coming into evidence. ;' counsel agreed to list parent's exhibits to which she objected within two days. In order to complete the hearing in three days, it was agreed to begin the hearing at eight a.m. each morning.

The due process hearing was held on January 5 (8:00 a.m. - 7:00 p.m.), January 6 (8:00 a.m -

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[5]Notes: Attorney Telephone Conference, October 17, 2005
[6]Notes: Attorney Telephone Conference, October 28, 2005
[7]Initial Pre-Hearing Report, November 29, 2005
[8]Pre-Hearing Conference Notes, December 9, 2005

6:00 p.m), and January 9 (8:00 a.m. - 7:20 p.m), 2006 at the School Board Conference Room. Testimony was received from the following thirteen witnesses:

1. , School Psychologist,
2. 6th Grade Science & Language Arts Teacher, Middle School
3. , 6th Grade Math & Reading Teacher, Middle School
4. 6th Grade History Teacher, Middle School
5. 6th Grade LD Teacher, Middle School
6. former Paraprofessional, School
7. Special Education Supervisor,
8. , Educational Evaluator, Institute
9. , Speech Pathologist in private practice
10. ; 's 4th Grade Teacher, School
11. , 5th Grade Teacher, Elementary School
12. , Special Education Teacher,
13. , 's Father.

One hundred and eighty-five exhibits were received into evidence. Exhibits 1-131A are identified as School Board (SB) Exhibits. Exhibits 132-174 are identified as Parent (P) Exhibits.

Due to the amount of testimony, the court reporter needed at least two weeks to prepare the transcript, which was past the date, January 20, 2006, that the decision was due. (In fact, the last of the transcripts was received by the hearing officer on February 3, 2006.) At the request of the parties, and in the best interest of , the date the decision was due was extended until February 17, 2006.[9] Due to the death of the hearing officer's father on February 9th, the hearing officer sent notice to the parties and the LEA on February 16th that the decision would be completed by February 24, 2006. The decision was rendered on February 27, 2006. The hearing officer bases her decision on the testimony of witnesses and the exhibits that were admitted into evidence. [10]

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[9]Extension of Time for Written Decision, January 13, 2006
[10]Notice of Delay of Written Decision, February 16, 2006

ISSUES

When filed for due process, they asked for the resolution of Issues 1, 2, and 3.[11]

Issue 1: Whether the determination by the on July 20, 2005 that is eligible for special education services, including categorizing as a child with mental retardation is correct.

Issue 2: Whether should implement the proposed 6th grade IEP developed by the IEP team on September 28, 2005, including a change of placement from the regular classroom to a self-contained special education setting for four periods a day.

Issue 3: Whether the school should administer the Virginia Alternate Assessment Program when the parents refuse to consent.

In the Response to the Due Process Notice, the parents asked for resolution of Issues 4, 5, and 6.

Issue 4: Whether the IEP team meetings have met the legal requirements including the notice to the parents of participants, and the inclusion of key personnel at the IEP meetings.

Issue 5: Whether the proposed IEP meets legal requirements and is appropriate for in the following areas: description of present level of performance, placement and program, and accommodations and related services.

Issue 6: Whether the current IEP is being implemented including accommodations and related services to help succeed in his current placement.

Before the hearing, the parties reached agreement regarding Issue 1, both agreeing that is a child eligible for special education services, and that the hearing office did not need to decide the category under which is eligible for special education services. Therefore, Issue 1 will not be addressed in this decision.

On the third day of hearing, the parties also reached agreement regarding the speech and language services for , including the amount of services, how the services would be delivered, and the goals and objectives for speech and language services. Also, the parties agreed that occupational therapy services were not at issue.[12] Therefore, the areas of speech and language

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[11]For easier analysis and reading of this decision, the issues are renumbered from the Pre-hearing Report.

[12]Transcript, Day 3, Pages 221-222

and occupational therapy as related services will not be addressed in this decision.

FINDINGS OF FACT

1. has the chromosomal condition known as Down Syndrome. He has a history of problems involving speech, vision, hearing, fine and gross motor skills, and has cognitive skills in the very low range.

2. was first found eligible for special education services by on January 10, , at the age of years, months.

3. Since kindergarten, has been placed in a regular classroom and has received educational benefit from this placement which has included special education services in the regular classroom, including curriculum modifications, accommodations, and related services. Some of the related services and reading instruction were provided in 20 to 30 minute pull-out sessions.

4. regular education fourth grade teacher testified that learned and progressed in the regular fourth grade class in the areas of math, reading, spelling, social studies, using a fourth grade modified curriculum and accommodations. had assistance from a paraprofessional in the regular classroom and assistance from a special education teacher both in the regular classroom and in a 30 minute daily pull-out reading program. was not disruptive, those who came in the room to help were not a classroom disruption, and, when occasional was distracted, she was able to redirect him to his work, usually with just a tap on his desk, and a reminder to finish his work. The teacher estimated that she spend 30 minutes a day working with or with his special education teacher or paraprofessional to modify the curriculum for all subjects. received good grades on his 4th grade report card (A's, B's, one C), based on his effort.

5. 's fifth grade IEP, signed as agreed by parents on September 17, 2004, placed in a regular fifth grade class with three hours a day of assistance by a special education teacher in an inclusion setting with extensive accommodations and modifications.

6. fifth grade regular education teacher testified that learned and made progress in the regular fifth grade class in the areas of math, reading, social studies, science, writing skills, using a modified 5th grade curriculum with accommodations. again

had assistance from a paraprofessional in the regular classroom and assistance from a special education teacher both in the regular classroom and in a 30 minute daily pull-out reading program. was occasionally disruptive in the regular class, especially after having ear surgery in March, but generally could be redirected by the teacher or the paraprofessional in class. The teacher estimated that she spent one hour a week preparing for curriculum, and thirty minutes out of a five hour day individually instructing . 's report card of A's and B's was based on his effort.

7. The special education teacher from Elementary School taught for six years, from kindergarten through grade five. In fourth and fifth grades, she spent thirty to forty-five minutes daily modifying the curriculum for , as well as spent thirty minutes daily instructing one-on-one in reading. In addition, she spent time teaching and other inclusion students in the regular classroom. made academic progress in reading, writing skills, and to a lesser degree, mathematics in fourth and fifth grades.

8. had the same paraprofessional assisting him in the regular classroom for grades two through five. She worked with in the regular classroom, helped him with his work, and modifying the curriculum, based on direction from 's teachers. She saw make progress academically and socially through the years, but felt that the fifth grade curriculum was hard for .

9. In the summer of 2005, prior to 's 6th grade year, triennial evaluations were conducted. Testing results showed that there was not a discrepancy between ability and achievement. 's achievement scores (basically first grade level) were commensurate with his low cognitive ability, which placed his achievement far below his same-age peers.

10. In August, 2005, a draft IEP was prepared in a meeting which included the special education supervisor and the 6th grade regular education and special education teachers, related services providers from the middle school where would be attending in 6th grade. regular and special education teachers from the 5th grade were not invited to the meeting.

11. In the spring of 's 5th grade year, his special education teacher prepared a draft of the PLOP for 's 6th grade IEP. Except for parts of the first paragraph having to do with the triennial evaluation and eligibility (which are not at issue in this decision), the proposed 6th grade IEP PLOP presented at the onset of the September 28th meeting is a copy of that

draft with a few significant omissions and changes:

1. In the first paragraph, "He does well in cooperative and partner learning situations." was omitted;
2. In the second paragraph, " 's summary states that cognitive skills show a pattern of variability often seen in children diagnosed with Down syndrome." was omitted;
3. At the end of the fourth paragraph, "... and has been very successful." was omitted;
4. In the fifth paragraph, in sentence, " is able to sit and sustain attention for 30 minute periods", the words "with support" were added at the end. In next sentence "Significant gains in maturity, accepting redirection and overall independence have been notice," the word, "Significant" was omitted at the beginning. The following sentence was also changed by the addition of the italicized words: He requires *significant* additional instruction for new tasks and concepts*, as well as significant modifications and interventions*.;
5. In the seventh paragraph regarding fifth grade math skills, " did well when working with fractions with like denominators, with geometry, graphing, measuring, angles, mean, median, range & mode and using a variable." was omitted. Therefore, the sentence following that in the IEP, "Once the concept had been taught and practice, he could follow through and solve like problems independently." referred back to learning money and time instead of the above-listed skills;
6. In the tenth paragraph, " does particularly well with people and map skills." was omitted.

12. The draft IEP completed in the summer before started 6th grade included a placement change to self-contained classroom. The special education supervisor stated in her testimony that she strongly believed that should be placed in the Mental Retardation (MR) self-contained class for all academic subjects. It is clear to this hearing officer that the changes made to the proposed 6th grade PLOP were made to bolster the determination by the special education supervisor prior to starting 6th grade that needed to be placed in the MR self-contained classroom.

13. The meeting for 's sixth grade IEP was held on September 28, 2005. At the meeting

were the required school personnel from the middle school, the Special Education Supervisor, both parents, the fifth grade regular education teacher, and the special education teacher that had taught in grades K-5. The parents were given adequate notice of the meeting by a letter dated September 22, 2005, with a telephone confirmation on September 27, 2005. The notice included the positions, but not the names of those invited to attend the meeting.

14. The IEP team meeting was chaired by the special education supervisor and was a hostile environment in which questions by the parents were rudely put down and discounted. The IEP meeting, which according to the minutes kept by personnel lasted for 6 hours and 45 minutes, was continually referred to as the "8 hour" IEP meeting.

15. The four page PLOP was reviewed line by line by the IEP team. Some changes that the parents requested were incorporated by the team. Other changes were not. On the first page of the PLOP, when the parents requested that the following line be deleted, "Mr. and Mrs. also want to incorporate this statement from the report:", the request was denied. While it was appropriate to incorporate the statement that followed, the fact that the parents wanted the statement in the report is not needed. That the special education supervisor denied this simple request of the parents is indicative of the hostility in the meeting.

16. The goals and objectives of the proposed IEP were changed at the IEP meeting on September 28, 2005, to include some of the changes proposed by the parents. The school personnel absolutely refused to include any goals for social studies and science, other than the generic reading goal to improve vocabulary.

17. Extensive accommodations and modifications were listed in the proposed 6th grade IEP, including a page of accommodations and modifications requested by the parents. One accommodation previously included in IEPs and not in this one was paraprofessional support in core academic subjects. The second page of accommodations and modifications did not list the frequency, location or duration of the items listed.

18. The IEP team determined that met the criteria for participation in the Virginia Alternate Assessment Program (VAAP), an alternative to Standards of Learning (SOL) testing. The parents and, initially, the 5th grade special education teacher disagreed with that

determination.

19. The VAAP Administrator's Manual (SB Exhibit 150) includes codes for when the child is not assessed. One of the codes is "Refusal" for a parent or child refusal of the assessment. The special education supervisor testified that a parent can refuse to have the child assessed with the VAAP or the SOL testing.

20. The proposed 6th grade IEP changed the placement of from regular classes to a special education self-contained classroom for 4 of the 7 periods plus 20 minutes of home room daily.

21. The parents did not agree to many elements of the IEP including the parts of the present level of performance (PLOP), some of the goals and objectives, the proposed participation of in the Virginia Alternate Assessment Program (VAAP), the proposal that receive a special diploma at the end of grade twelve, and the proposed placement in a self-contained special education classroom for 4 of 7 periods daily.

22. Since the last agreed upon IEP was the 5th grade IEP, that IEP is in place as the stay-put IEP while this case is being resolved. The accommodations and modifications of the curriculum that are needed for to succeed in the general curriculum including paraprofessional support in core academics, study guides, copy of class notes, math charts, calculator, enlarged font, shortened assignments, shortened spelling lists, modified assignments/tests, assignment notebook communication log parent/staff, flexible schedule, and access to computer programs/word processing have been inconsistently provided for during the 6th grade.

23. One of the accommodations on the 5th grade IEP was a communication log between parents and teachers. While this was used effectively in the previous years, the 6th grade special education teacher did not use it effectively, especially in keeping the parents informed as to the assignments and tests, answering questions regarding special educations services being provided, and refusing to relate behavioral concerns to the parents.

24. Although the paraprofessional assigned to assist in the 6th grade did not testify due to illness, it was reported that she missed some weeks of school and a substitute was used. The 6th grade teachers reported that the paraprofessional was not able to keep on track in class, nor could she consistently redirect him when behaviors were inappropriate.

25. At the hearing, the 6th grade teachers testified that was a disruption in class, that he had significant behavior issues, that he was not working on the 6th grade level, that he took up to half of the class time of the regular teacher for individual instruction and behavioral issues, and that the teachers had to spend hours of extra preparation time for

26. The first 6th grade teacher to testify said that she believed was learning and receiving educational benefit from his inclusion in the regular 6th grade classes. The next three 6th grade teachers made it clear that they believed had learned nothing in their classes. He has been given failing grades in all core academic classes since starting 6th grade.

27. The testimony of following three witnesses was of little value regarding the decision on the issues in this case: the school psychologist (who had little contact with and had not attended the IEP meetings); the speech pathologist in private practice (since speech services are no longer at issue); and the private educational evaluator (who tested and whose test results were not disputed).

28. The testimony of the special education supervisor lacked credibility. She testified that the child received no educational benefit from 5th grade. This conflicted with the teachers that had known and taught in the elementary school. She testified that science and social studies goals were not on the IEP because those subjects were SOL subjects, an explanation which did not make sense when math, another SOL subject, had goals on the IEP. She blamed the parents for not making the report available to the school for the triennial evaluation in the summer of 2005. Yet this results of this report were in the proposed PLOP prepared by the special education teacher in May, 2005.

29. When the special education supervisor was asked if the parents would accept any class in a special education class, her answer was, "None. No. No, self-contained class at all. That did not answer the question whether the parents would accept *any* special education class. The father in his testimony made it clear that the parents had previously accepted a pull-out special education reading class, had, in fact, suggested it for fourth and fifth grade, and would have been willing to accept a special education class in reading for 6th grade had it been offered in the 6th grade IEP meeting. Nothing less at least four periods daily of special education in a self-contained classroom for was proposed by the school personnel at the 6th grade IEP meeting.

30.

ANALYSIS OF FACT AND LAW

The U.S. Supreme Court has recently addressed the issue of the burden of proof in special education due process hearing. Addressing the burden of persuasion that was at issue in Maryland due process hearing, the court concluded that "the burden of persuasion lies where it usually falls, upon the party seeking relief." *U.S. Supreme Court, 04-698, November 14, 2005; 105 LRP 55797.* In this case, Public Schools is the party seeking relief, and they, therefore have the burden of proof.

Issue 2: Whether should implement the proposed 6th grade IEP developed by the IEP team on September 28, 2005, including a change of placement from the regular classroom to a self-contained special education setting for four periods a day.

The parties agree that is a child with a disability who needs special education and related services to receive a free appropriate public education (FAPE), pursuant to PL 108-446: Individuals with Disabilities Education Improvement Act of 2004(IDEA 2004). *20 USC §§1400 et seq.* One of the requirements in providing a FAPE is that the Least Restrictive Environment (LRE) requirement that, "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *20 USC §1412(a)(5).* The Virginia Court of Appeals in *White* stated, "The IDEA favors mainstreaming children by requiring that disabled children be taught with non-disabled children, to the maximum extent possible, and by requiring that the disabled child be placed in the least restrictive environment, consistent with the child's needs. *White v. School Bd. Of Henrico County, 36 Va.App. 137 at 146, 2001.*

In order to find that the proposed IEP should be implemented, the hearing officer would need to find that the change of placement of the child from placement in the regular classroom with special education services to placement in four self-contained special education classes and three regular education classes was the least restrictive environment for this child.

The hearing officer must give "appropriate deference to the decisions of professional

educators." *MM v. Sch. Dist. Of Greenville County, 303 F.3d 523, 533, 4th Cir. 2002.* In this case there is conflicts in the testimony of the professional educators, all employee of the LEA. This hearing officer finds credible and gives due deference to the testimony of the professional educators that worked with daily over a period of years in Elementary School. These educators testified that , although not working at grade level in all academic areas, was working on grade level curriculum modified to his level, he learned and received educational benefit from his inclusion placement with modified curriculum and special education and related services, was able to work up to 30 minutes independently on modified grade level materials, was not a serious behavior problem or disruption in class, could be easily redirected if off-task, was well liked by peers and adults, interacted socially with peers, and did not take so much of the educators time that other students in the mainstreamed class had their educational opportunities unduly compromised.

The testimony of the 6th grade teachers presented such a different picture of than his previous teachers had shown. He was a disruption in class; he had significant behavior issues; and he took up too much time of regular teacher. The focus of the testimony of the sixth grade staff is that, even with accommodations, this child can not do the work at the 6th grade level. Under the law, this is not the standard. The legal standard which the school system must meet is to provide a program in which the student would receive "some educational benefit." *Doyle v. Arlington County, 806 F.Supp.1253(E.D.Va. 1992), Board of Educ. v. Rowley, 458 US 176, 102 S.Ct. 3034 (1982).*

The three-part Hartmann (DeVries) test is that mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or, (3) the disabled child is a disruptive force in a regular classroom setting. *Hartmann v. Loudoun County Board of Education, 118 F.3d 966 at 1001, 4th Cir. 1997. DeVries v. Fairfax County School Board, 882 F.2d 876 at 879, 4th Cir. 1989.*

I find that has received and would receive educational benefit from his mainstreamed classes. This has been achieved in the regular classroom for in grades K-5 as seen by overwhelming evidence in this case. Even in grade 6, his language arts and science teacher agreed that has learned in her regular classes. is not learning at the same pace as the other

sixth graders. He is learning at a pace commensurate with his ability. The courts have ruled since *Rowley* that the child has to receive educational benefit, not that he has to learn on grade level.

I cannot agree that has received only marginal benefit from mainstreaming. The PLOP, especially the one prepared by his special education teacher of six years in May 2005, lists significant gains he has made. Despite his difficulties with time and money, he did well working with fractions with like denominators, geometry, graphing, measuring, angles, etc. His work samples show abilities to use capitalization and punctuation when writing paragraphs. He does particularly well with map skills and with spelling. His teacher reported he can answer factual comprehension questions in reading, but has difficulties with inferences. He gets along well with adults and peers, and has been happy in his classes. This is much more than marginal benefit.

On the other hand, would benefit from instruction in a small group for reading. He benefitted from the individual instruction thirty minutes daily in reading from the special education teacher in grades four and five. At the time this IEP was proposed the third week of September, I find that the benefit from small group setting for reading outweighed the benefits from being in the mainstream classes. Although would benefit from small group instruction in reading, and the testimony showed that the parents had agreed to this in the past and were open to this at the time of the IEP meeting, that was not what was offered at the IEP meeting. made the determination that should receive four academic classes in a self-contained setting.

As to whether is a disruptive force in the regular class setting, there is no evidence that prior to the September 28 IEP meeting that was a disruptive force. In fact, one of the 6th grade teachers clearly stated in the IEP meeting that 's behavior was not a problem. Under IDEA 2004, The IEP Team shall, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. *IDEA 2004 Sec. 614.(d)(3)(B)(i).* No behavioral plan was suggested by anyone at the IEP meeting. Prior IEPs never listed behavior as an issue. In the hearing, the elementary teachers and paraprofessional testified that did occasionally need redirecting, but it was generally just a tap of the hand or trip to the restroom.

The sixth grade teachers testified that there were disruptive behaviors in class, including shouting out and self-stimulating behaviors. I have several problems with considering those behaviors. First, since the behaviors occurred after the September 28 IEP meeting, I do not believe

it is proper for me to consider the behaviors when determining whether the September IEP is appropriate. Second, it appeared from the testimony that the teachers and paraprofessional in the 6th grade did not effectively deal with the behaviors when they occurred. Third, the teachers and especially the 6th grade special education teacher, neither suggested an IEP meeting to discuss a behavior plan nor not let the parents know about the behaviors through the communications log or any other means in order to extinguish the behaviors.

I find that, under the three-part Hartmann test, should be mainstreamed for his classes in order to receive a FAPE in the LRE. has not met their burden of proof that the placement on the IEP must be changed to provide a FAPE. Therefore the proposed IEP that includes a change of placement to self-contained classes should not be implemented.

Issue 3: Whether the school should administer the Virginia Alternate Assessment Program when the parents refuse to consent.

In IDEA 2004, there is a provision that allows the LEA to file for due process if the parents do not consent or fail to respond to a request for consent for an **initial** evaluation to determine if a child qualifies for special education. 20 USC 1414(a)(1)(D)(ii). The corresponding provision in the Virginia Regulations is 8 VAC 20-80-54.G.2.b. There is no similar provision in IDEA 2004 which allows the LEA to file for due process if the parents do not consent or fail to respond for consent for a reevaluation or for State assessments. *20 USC1414.(c)(1-3.* While IDEA 2004 outlines the duty of the IEP team to determine whether a child should take an alternative assessment of a State assessment, it gives no provision for the LEA to go to due process if the parents disagree with the IEP determination and withhold consent for the alternative assessment. *20 USC 1414 (d)(1)(A)(i)(VII).*

In this case, the parents refused to consent to the administration of the VAAP, a State assessment. The VAAP is not part of an initial evaluation, nor even the triennial evaluation that was conducted in the summer of 2005. The fact that the IEP team decided that the child should take the VAAP is not sufficient. The parents have a right to refuse consent for the State assessment. This hearing officer sees no authority to determine that the school can assess a child on the VAAP when the parents refuse to consent.

Issue 4: Whether the IEP team meetings have met the legal requirements including the notice to the parents of participants, and the inclusion of key personnel at the IEP meetings.

The only IEP team meeting in dispute in this case is the September 28, 2005 meeting regarding the proposed 6th grade IEP. The parents received notice of the participants--by title, not by name—prior to the meeting. The parents contend that they are entitled to receive prior notice of the names of the participants, not just the titles. They wanted to know specifically which current regular education teachers would be there. They wanted to know if the child's previous teachers would be attending the meeting.

In the Procedural Safeguards section of the Virginal Regulations, the notice of an IEP team meeting must "indicate the purpose, date, time, and location of the meeting and who will be in attendance;" *8 VAC 20-80-70.A.1.b.(1)(i).* The regulations do not specify whether "who will be in attendance" requires the name of the person or whether the title of the participant is sufficient. There are two letters to Livingston from the Office of Special Education Programs (OSEP) which indicate that the LEA could elect to give the names, they only need to indicate in the notice the positions of those in the LEA that will attend the meeting. *21 IDELR 1060, Letter to Livingston, OSEP, 1994; 23 IDLR 564, Letter to Livingston, OSEP, 1995.* Finding no legal authority to the contrary, I find that the notice giving the titles and not the names of the participants is sufficient notice.

An IEP team is composed of the parents, not less than one regular education teacher of the child, not less that one special education teacher or special education provider, a representative of the LEA, an individual who can interpret the instructional implications of evaluation results (can be the same as one of the above), other individuals at the discretion of the parent or the LEA, and whenever appropriate, the child. *20 USC 1414 (d)(1)(B).* For the September 28, 2005, IEP meeting, those in attendance included the parents, one of the 6th grade regular education teachers, the 6th grade special education teacher, the 5th grade regular and special education teachers, a speech therapist, an occupational therapist, a school administrator, and the special education supervisor. While the parents would have liked to have all the 6th grade teachers attending the meeting, the minimum requirement for attendees was fulfilled.

Issue 5: Whether the proposed IEP meets legal requirements and is appropriate for in the following areas: description of 's present level of performance,

placement and program, and accommodations and related services.

Having found under Issue 2 that the proposed IEP did not meet the legal requirement for to receive a FAPE by placement in the LRE, the hearing officer gives no further discussion of that issue here.

An IEP is required to include "a statement of the child's present levels of academic achievement and functioning performance, ...". IDEA 2004 20 USC 1414 (d)(1)(A)(i)(I). The Virginia Regulations offer more specificity to the requirements for the present level of performance:

> The IEP for each child with a disability shall include:
>
> 1. A statement of the child's present level of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum ....
>   a. The statement should be written in objective measurable terms, to the extent possible. Test scores, if appropriate, should be self-explanatory or an explanation should be included.
>   b. The present level of performance should directly relate to the other components of the IEP.
>
> 8VAC 20-80-60.F.1.

In evaluating the appropriateness of the description of 's present level of performance (PLOP) on the proposed IEP, a review of the preparation of the PLOP. The original draft of the PLOP was prepared by the 5th grade special education teacher in May, 2005. The proposed PLOP was then changed in August, 2005 BEFORE started 6th grade to remove some of the successes and skill advances that described present level of performance at the end of 5th grade. By removing these parts of the PLOP, a true picture of 's present level of educational performance is not given.

As the Virginia Regulations quoted above state, the PLOP must be written in objective measurable terms, to the extent possible. The inclusion of prefaces such as "Mr. and Mrs. also want to incorporate this statement from the report:", "The parents say," or "The parents note," are not objective. Either the statements that follow the preface are included in the PLOP by agreement of the IEP team or they are not. The preface is not needed, and, in fact, implies that the parents want the statements in, even if the rest of the team is simply tolerating including the statements just to show that the parents had input into the PLOP.

Because the PLOP did not accurately state true level of educational performance and the PLOP was not written in objective terms, I find that the PLOP was not appropriate.

The appropriateness of the placement and program has been addressed in the analysis of Issue 2 above. The issues regarding related services were resolved by the parties during the hearing. The accommodations outlined by the proposed IEP were extensive. The one accommodation that was removed from the previous IEPs was the inclusion of a paraprofessional to assist in core academic classes. The explanation given by the special education supervisor was that he would be in the MR class for academic classes and would not need a paraprofessional assigned to him.

It is another instance in which the predetermined placement determined what was written in the IEP. "If the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input." *Doyle v. Arlington County School Board, 806 F. Supp. 1253 at 1262, E.D.Va. 1992.* The school system in this case had made up its mind in August that should be placed in the MR self-contained class. Although the parents did attend the subsequent IEP meeting and changes were made to the IEP with their input, they were denied the opportunity for any *meaningful* input into the child's placement.

's success in the mainstreamed classes in earlier grades was due partly to the assistance from the paraprofessional. Now that is in a new school, with new teachers and classes and a more difficult curriculum, the assistance from the paraprofessional is more important than ever for to succeed in learning the general curriculum. Because the accommodations did not include assistance from a paraprofessional, I find that the accommodations are not appropriate for to succeed in the least restrictive environment.

Issue 6: Whether the current IEP is being implemented including accommodations and related services to help succeed in his current placement.

The issue regarding related services, which including occupational therapy and speech and language services has been settled by the parties during the hearing and will not be addressed here. The issue remains about the implementation accommodations of the current IEP during the 6th grade year. During adminstrative or judicial proceedings, the child remains in the current educational placement. *20 USC §615.(j). 8 VAC 20-80-76,E.1.* The current placement, from the 5th grad IEP, is inclusion in the general education classes with three hours a day of assistance from a special education teacher. The accommodations listed in that IEP include *inter alia* paraprofessional in core academic classes, study guides, copy of class notes, calculator, shortened assignments, modified

assignments tests and grading, communication log parents/staff, flexible schedule for test, and access to computer programs/word processing. The testimony in this case convinced this hearing officer that the accommodations and modifications were provided to Andrew inconsistently in the 6th grade so that Andrew could not succeed in his current placement.

DECISION

As required by the Virginia Regulations (8 VAC 20-80-76.J.17.), this hearing officer determines as follows:

a. The requirements of notice to the parents were satisfied;

b. The child has a disability;

c. The child needs special education; and

d. The local educational agency provided a free appropriate education prior to September 2005, but has not provided a free appropriate education since then, in that the current IEP (5th grade stay-put IEP) is not being implemented to assist the child to succeed in his current placement and the proposed IEP is not appropriate in that the proposed placement is not the least restrictive environment for the child.

Pursuant to 8 VAC 20-80-76.K.11., The disposition of the issues presented for decision and determination of the prevailing party on each issue are as follows:

As to Issue 2: Whether the school should implement the proposed IEP developed by the IEP team on September 28, 2005, including a change of placement from the regular classroom to a self-contained special education setting for four periods a day, I find that the proposed IEP placement is not the least restrictive environment, and therefore should not be implemented. Prevailing Party: Parents

As to Issue 3: Whether the school should administer tests including the Virginia Alternate Assessment Program, when the parents refuse to consent, I find that there is no authority for a hearing officer to authorize a school to administer such test over the parents' lack of consent. Prevailing Party: Parents

As to Issue 4: Whether the IEP team meetings have met the legal requirements including the notice to the parents of participants, and the inclusion of key personnel at the IEP meetings, I find the IEP team meetings have met the legal requirements including the notice to the parents of

participants and the inclusion of key personal at the IEP meetings. Prevailing Party: LEA

As to Issue 5: Whether the proposed IEP meets legal requirements and is appropriate for in the following areas: description of 's present level of performance, placement and program, and accommodations and related services. I find that the proposed IEP is not appropriate for in the following areas: description of 's present level of performance, placement and program, and accommodations. Prevailing Party: Parents

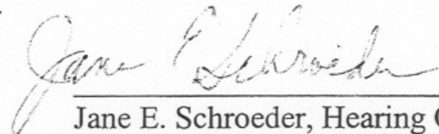
As to Issue 6: Whether the current IEP is being implemented including accommodations and related services to help succeed in his current placement, I find that the current IEP is not being implemented to help succeed in his current placement. Prevailing Party: Parents

Under 8 VAC 20-80-76(I)(16), the LEA must develop and submit an implementation plan to the parties, the hearing officer and the Virginia Department of Education within 45 days of this decision.

APPEAL RIGHTS

A decision by a hearing officer shall be final and binding unless the decision is appealed by a party is state circuit court within one year of the issuance of the decision or in a federal district court. See 8 VAC 20-80-70.O.1.

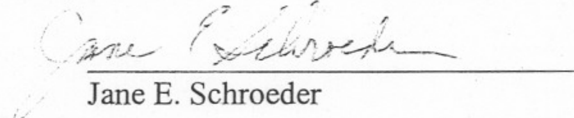
Entered this 27th day of February, 2006.



Jane E. Schroeder, Hearing Officer

CERTIFICATE OF TRANSMITTAL OF THE DECISION

A copy of this Decision of the Hearing Officer was sent to those listed on the attached Distribution list by U.S. mail, facsimile, and/or e-mail when possible, this 27th day of February, 2006.



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Received
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Dispute Resolution &
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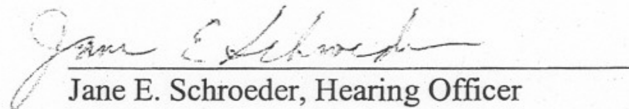
PUBLIC SCHOOLS Petitioner, v. MR. AND MRS. Respondents.	)))))))	In Re:

AMENDMENT TO HEARING OFFICER DECISION

APPEAL RIGHTS

A decision by a hearing officer shall be final and binding unless the decision is appealed by a party in a federal district court within 90 calendar days of the issuance of this decision, or in a state circuit court within one year of the date of this decision.

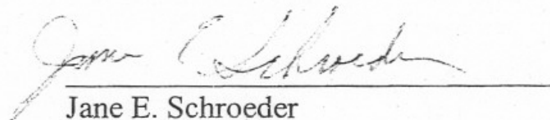
Entered this 27th day of February, 2006.



Jane E. Schroeder, Hearing Officer

CERTIFICATE OF TRANSMITTAL OF THE AMENDMENT OF THE DECISION

A copy of this Amendment to Hearing Officer Decision was sent to those listed on the attached Distribution list by U.S. mail, facsimile, and/or e-mail when possible, this 27th day of February, 2006.



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