VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS

CASE CLOSURE SUMMARY REPORT

School Division: XXX
Name of Child: XXX
Counsel Representing LEA: Rodney Young
Party Initiating Hearing: Parents

Name of Parents: XXX
Date of Decision or Dismissal: 7/12/04
Counsel Representing Parent/Child: *pro se*
Prevailing Party: XXX

Hearing Officer's Determination of Issue(s):

Issue #1: The student is not a child with a disability pursuant to IDEA and is not in need of (nor eligible for) special education and related services.

Issue #2: The Student is not disabled and is therefore not entitled to a Section 504 plan.

Hearing Officer's Orders and Outcome of Hearing:

The Parents did not meet their burden of proving the Student's eligibility under either the IDEA or Section 504.

1- *Notice requirements to the Parents were satisfied.*
2- *The Child does not have a disability.*
3- *The Child does not need special education and related services.*
4- *The LEA is providing a FAPE to this non-disabled Child.*

The LEA prevailed on all issues. This matter is hereby dismissed.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Krysia Carmel Nelson

Krysia Carmel Nelson, Hearing Officer

Dated this 12th day of July, 2004

INTRODUCTION

This matter came for hearing on July 6 and 7, 2004, in The County, Virginia, before a duly appointed Hearing Officer. Present in person in addition to this Hearing Officer and the Court Reporter were the Parents, counsel for the LEA and the LEA's representative, its Director of Pupil Services.

The due process hearing was requested in writing by the Parents on May 26, 2004, and this Hearing Officer was assigned to hear the case on May 28, 2004.

The Parents allege that the Student has a learning disability and by reason thereof is eligible for special education services under the Individuals with Disabilities Act ("IDEA"). The Parents also allege that the Student is disabled with a learning disability within the meaning of Section 504 of the Rehabilitation Act and by reason thereof is eligible for a Section 504 plan.

The LEA has repeatedly found the Student ineligible under both IDEA and Section 504, and maintains that the Student does not have a qualifying learning disability.

In the course of a two-day hearing, both the LEA and the Parents presented the testimony of witnesses. This Hearing Officer heard the testimony of: the High School's Director of Pupil Services, the Student's Assistant Principle, the Student's Guidance Counselor, the Student's English teacher, Science teacher, History teacher and Reading teacher, as well as one of the High School's Special Ed Teachers, and two expert witnesses, a Clinical Psychologist and an Independent Speech Language Pathologist ("Independent SLP"). Through documentary evidence, statements and opinions of the following individuals were introduced: the Student's Math teacher, an Independent School Psychologist, a Pediatric Psychologist, the LEA's School Psychologist, a LEA Teacher, an Audiologist, and two speech pathologists employed by the LEA ("LEA SLP #1" and "LEA SLP #2").

SUMMARY

The Student is a rising 10th grader at The High School. He has been found ineligible under IDEA and Section 504 on several occasions, the most recent of which was in May of 2004, as a result of which the Parents requested this due process hearing. The Student's IQ was measured at least twice in 2003, with both Full Scale IQ scores (86 and 91) falling in the average range. The Student's academic performance has evidently declined in academic subjects in recent years: a solid B student in the 6th and 7th grades, he achieved mostly C's in the 8th grade, but received two D's, one B and three C's in the 9th grade, ending the 9th grade year as a solid C student.[1] The Student failed his 8th grade English SOL, but passed the 9th grade World Geography SOL in the 8th grade. As a result of failing the 8th grade English SOL, the Student participated in a remedial reading program at The High School in the 9th grade. At the beginning of his 9th grade year, testing indicated that the Student was reading at approximately a 7th grade level. As measured by his progress in that remedial reading class, the Student was testing at an upper 8th grade reading level by the end of his 9th grade year. His Reading teacher testified that she believed he ended his 9th grade year reading comfortably at the 9th grade level. The Reading teacher further explained that while she felt the Student's independent reading level was at the 8th grade level, he would be able to function in a classroom in which the instructional level did not exceed the mid-10th grade level.

[1] Although a glance at the Student's report cards shows consistent achievement of A's, a closer examination of the subject areas is necessary as most of the Student's higher grades in recent years have been in non-academic subjects. His performance in academic subjects is much less impressive when considered without reference to non-academic subjects. In the 6th grade, all his grades in academic subjects were Bs. In the 7th grade, he got Cs in Math and Science, Bs in Reading, English, Spanish and Computers, and As in Civics and Economics. In the 8th grade, he received no As, and his only Bs were in Remedial Reading and English: in all other academic subjects he received Cs – Math, Spanish, Science, Geography, and Reading. By the 9th grade, he is at best a solid C student.

At the beginning of the 9th grade, the Student was referred to what The High School calls "Student Study": a program that reviews a student's individual needs and in collaboration with the student, the student's parents and teachers, devises an accommodation and assistance plan for the student. Such a plan can provide for such accommodations as preferential seating, counseling, tutoring, mentoring, untimed exams etc. The Student was provided with several such plans and was afforded the opportunity to work with tutors within the LEA. The Student did not take advantage of the LEA's tutors but instead received private tutoring services that were paid for by his Parents.

The Student's teachers believe that the Student's lackluster academic performance is a result of his lack of motivation. They describe the Student as pleasant and respectful, but unable to "stay on task" and being more interested in socializing with his peers during class-time than on focusing on instruction and in-class work. The Student's History teacher, who also coaches him in track, observed that after he started participating in track the Student's grades in her class improved and that he was more motivated to perform in class (perhaps in a more focused effort to please her as a result of their improved out-of-class contact and relationship). The Student's Science teacher and Reading teacher also testified that the Student performed well in class and stayed engaged in assignments he found more interesting. For example, a rocket building project in science class and reading units done on the computer. Various teachers testified that the Student's grades were negatively impacted by his failure to turn in or complete homework assignments.

The Parents and their experts believe that the Student's has academic difficulties as a result of a learning disability. They believe that the student has a reading disability and that his reading comprehension skills are impaired to such a degree that he is simply unable to keep up in class. Accordingly, they believe that the Student's perceived "lack of motivation" and alleged "behavior problems" are evidence of his struggles and manifestations of frustration arising from his learning disability.

The Parents argue that the Student is at risk of academic failure because he is not receiving the specialized educational and support services to which he is entitled as a learning disabled student under IDEA and Section 504. Concerned with his academic performance, they want to improve his current level of functioning. The Parents argue that the Student has "solidly average intelligence" but cannot achieve solidly average grades by putting forth "average effort." They contend that he has a learning disability manifested by his weakness in reading that significantly impairs his major life activity of attending school. They fear that his learning disability will also impair his social interactions with his peers and his ability to learn to operate a motor vehicle. They argue that he needs specialized instruction in the form of support outside of the classroom in order to succeed academically. They also believe that the Student should be found eligible under IDEA because he needs a functional behavioral assessment, which requires eligibility.

The LEA maintains that the Student does not have a learning disability. The LEA argues that repeated testing and evaluations, conducted both within and outside of The High School setting, do not demonstrate that the Student has either a specific learning disability, nor that there is any significant discrepancy between the Student's cognitive ability and his achievements, nor that he requires any specialized education in order to succeed academically.

While these *pro se* Parents presented their case in a remarkably skillful manner, they failed to prove the Student's eligibility by a preponderance of the evidence. It is my conclusion that while the Student may suffer from some disorder that causes him difficulties in reading comprehension, he does not have a learning disability that makes him eligible under either IDEA or section 504. There was no allegation that the LEA did no satisfy IDEA's parental notice requirements. Thus I find:

1- Notice requirements to the Parents were satisfied.
2- The Child does not have a disability.

3- The Child does not need special education and related services.
4- The LEA is providing a FAPE to this non-disabled Child.

DISCUSSION AND CONCLUSIONS OF LAW

Introduction

The purpose of the IDEA is to guarantee children with disabilities access to a free appropriate public education. See *20 U.S.C. §1400(d)(1)(A).* Under the IDEA, a school system conducts an initial evaluation to determine if a child qualifies for special education or related services in the form of an Individualized Education Program ("IEP"). See *20 U.S.C. §1414(d)(1)(A).* To conduct its evaluation, the school sets up an Individualized Education Program Team ("IEP Team") comprised of the parents, at least one teacher of the child, a special education teacher, a representative of the local education department, "an individual who can interpret the instructional implications of the evaluation results," and any other individuals with special expertise. See *20 U.S.C. §1414(d)(1)(B).* If the IEP Team fails to certify a student for an IEP, 20 U.S.C. §1415(f) permits the parent to request a due process hearing, which the Parents in this case have done.

The purpose of Section 504 is to ensure that disabled individuals have the opportunity to participate in or benefit from the aid, benefit, or service of any program receiving federal financial assistance. See *29 U.S.C. §794(a).* Programs receiving federal financial assistance include public schools. See *29 U.S.C. §794(b)(2)(B).* Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap in programs receiving federal financial assistance. *29 U.S.C. §794(a).* It provides in relevant part, "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Here, the parents are only asking me to determine whether the Student is "a qualified individual with a disability" and hence eligible for a section 504 plan, in light of the LEA's determination to the contrary.

The IDEA Claim

The Individuals with Disabilities Education Act ("IDEA"), *20 U.S.C. § 1400* et seq., was enacted, in part, "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." *Cedar Rapids Community Sch. Dist. v. Garret F.,* 526 U.S. 66, 68, (1999) (quoting *20 U.S.C. § 1400*(c)); see *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 188-89 (1982). The instruction must "meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP [individualized education program]." *Rowley,* 458 U.S. at 189. An IEP is defined in the IDEA as a written statement for a child with a disability that is developed in a meeting involving a local or State special education representative, the teacher, and the child's parents. See *20 U.S.C. § 1401*(a)(20). The statement must include, among other things, the specific educational services to be provided to an eligible child. *Id.* Recognizing that educational policy and practice are traditional State and local functions, in enacting the IDEA, Congress did not prescribe any substantive standard of education, instead seeking only "to open the door of public education to handicapped children on appropriate terms." *Id.* at 192; see *Daniel R.R. v. State Bd. of Educ.,* 874 F.2d 1036, 1044 (5th Cir. 1989) (citing *Rowley,* 458 U.S. at 189, 207). Accordingly, implementation responsibilities are delegated to the State educational service agencies -- in this case, the Virginia Department of Education -- by means of financial incentives. See *20 U.S.C. § 1401*(a)(7) (defining "State educational agency") and § 1412 ("Eligibility requirements"). A local educational agency, such as the LEA in this case, also qualifies to receive federal funds if it provides a free appropriate public education consistent with the IDEA. See *id.* § 1414(a).

There are three requirements for IDEA eligibility: a child (1) must have a qualifying disability; (2) that adversely affects educational performance; and (3) must, "by reason thereof, need special education and related services." *20 U.S.C. § 1401(3)(A)(ii)*. In determining eligibility, a committee is obliged to assess the totality of the circumstances. The regulations promulgated by the Virginia Department of Education have been approved by the U.S. Department of Education and establish eligibility criteria for special education that are consistent with the IDEA. "Specific learning disability" is defined at 8 VAC 20-80-10 as:

> A disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; of mental retardation; of emotional disturbance; or of environmental, cultural, or economic disadvantage.

Id. The Virginia regulations set forth the criteria for determining the existence of a specific learning disability in a child. One of those criteria asks whether there is a "severe discrepancy between achievement and intellectual ability in one or more" areas, one of which is reading comprehension. 8 VAC 20-80-56 (G)(2)(e).

The Student's Eligibility Under IDEA

1. Qualifying Disability

It is clear at the outset that the parties do not even agree on whether or not the Student has a qualifying disability. The Parents' evidence on this point comes from the Independent School Psychologist, the Independent Clinical Psychologist and the Independent SLP. The Independent School Psychologist did not testify at the hearing, but her report was admitted into evidence. She diagnosed the Student as having a "Learning Disorder – Not Otherwise Specified." This diagnosis, in her August, 2003, report seemingly contradicts some of the findings in the report, namely: "Given [the Student's] commensurate academic skills and cognitive abilities, there is no evidence of a specific learning disorder in reading, math, or written expression." P-33[2]. The report continues, however, "[the Student's] learning pattern contains strengths and weaknesses that should not be ignored. His weaknesses with abstract reasoning are evidenced in most of his testing. This weakness can interfere with his reading comprehension, test taking, and thought formulation skills. He will likely need additional help in school to understand new material." The Clinical Psychologist who evaluated the Student concurred with the diagnosis of the Independent School Psychologist, but further elaborated in testimony that she felt the Student met the DSM IV criteria for a reading disability, but that his processing problems added to that diagnosis to justify the broader diagnosis of LD-NOS. The Independent SLP who testified as an expert for the Parents had not expressed a diagnosis for the Student prior to the hearing, and her report (P-19) noted in her summary of testing that his language standard scores were "well within norms for chronological age." Upon direct questioning from the Hearing Officer, the Independent SLP opined that the Student had an expressive language disorder, but conceded on cross-examination by LEA counsel that the diagnostic criteria for such a disorder were not met in the Student's case, and that she lacked sufficient information to make a diagnosis in the Student. I reject the Independent SLP's diagnosis as without foundation or support, and will not afford it any weight.

The Clinical Psychologist characterized this as a "close case," and had even participated in the eligibility committee meeting that concluded the Student's ineligibility. While at the hearing the Clinical Psychologist leaned towards a finding of IDEA eligibility, she conceded that at the eligibility committee meeting she had agreed with the finding of ineligibility. The Clinical Psychologist opined that since IQ measurement can be difficult, it is not

[2] Exhibits admitted into evidence are denoted as either P-# or S-#.

unusual to see some discrepancy between scores, but that higher global IQ scores are statistically the most valid scores because it is easier to under perform than over perform on such tests. Accordingly, she validated the full scale IQ score of 91 obtained by the Licensed School Psychologist who tested the Student "thoroughly" several months prior. See P-22. The Clinical Psychologist's testing of the Student with the Wechsler Individual Achievement Test – Second Edition, resulted in a Reading score of 88, at the lower end of the average range but commensurate with his IQ score of 91.

Upon consideration, it is difficult to see why the Clinical Psychologist felt this case is "close." While she noted that the Student's scores "demonstrate fluency weaknesses", "slow processing" and "discrepancies", she at no point testified that she interpreted the discrepancies to be *severe* or that the Student was *unable* to learn as an average person, or *substantially* learning impaired. Her opinion that the Student does not "function" as well as the average person does not support a finding of learning disability as that term is defined by law.

No other testimonial or documentary evidence supports the Parents' position. The Licensed School Psychologist who evaluated the Student in December, 2002, and again in August, 2003, (P-13, P-33) found no central auditory processing disorder in the Student. The Pediatric Psychologist who evaluated the Student in August, 2003, made no diagnosis after concluding "there is no learning disability or disturbances to intellect, memory or concentration and attention skills." He tested the Student as having a Full scale IQ of 86, but did not find the Student to be suffering from anxiety or depression. No one ever diagnosed the Student as having ADD or ADHD. The Student passed every hearing test he'd been given and scored "average" or "within normal limits" on all tests administered to him by the Audiologist and various speech language pathologists.

The Parents failed to meet their burden on this point, and accordingly I find that the Student does not have a qualifying disability.

2. Adverse Effect on Educational Performance

Having concluded that the Student does not have a qualifying disability, no further analysis on the question of IDEA eligibility need be pursued. However, recognizing that reasonable minds might differ on the degree or characterization of the learning difficulties from which this Student might suffer, it is noteworthy that this second requirement for IDEA eligibility has not been met. This Student, who is by all accounts of average intelligence, has demonstrated no worse than average academic performance in his recent educational career. Of greater significance than the recent dip in his GPA (which is attributed to lack of motivation by his teachers) are the academic successes the Student has demonstrated in the recent past. For example, his grades in 6th and 7th grade were better than average with several A's. The Student took a 9th grade level class in the 8th grade, and (while still in the 8th grade) took and passed the 9th grade SOL test for that subject. Furthermore, testimony indicated that the Student's course load is directed toward achievement of an advanced (as opposed to standard) diploma. This Student is challenging himself in classes required for an advanced diploma *and is still making passing grades*. This is not a case where the Student is taking the least academically challenging courses available at his high school and failing classes needed to obtain a *standard* diploma.

While there is no dispute that the Student has recorded some disappointing results on discrete subtests of various standardized tests, the fact that he has undergone *extensive* testing cannot be overlooked. The Student has a documented weakness in reading, recognized by the LEA and addressed by the Student's placement in a 9th grade remedial reading class (in response to his having failed the 8th grade English SOL), and thus common sense dictates that his performance on a reading comprehension subtest will yield a weak score. But a weak subtest score, while perhaps considered statistically significant by some, does not overcome the significance of a solid composite score that even the Parents' expert witnesses admitted was the more statistically valid score. But even the Parents' experts were unable to testify that any of the disappointing subtest scores presented a discrepancy that was so

severe and significant as to positively indicate the presence of a learning disability. Almost to the contrary, they indicated that the "potential" significance of the observed testing discrepancies simply warranted further testing.

But we cannot lose sight of the forest for the trees: perhaps the most relevant comment that can be made vis-à-vis the import of the extensive testing results that were presented during the course of the hearing is that the question that must be answered is not whether a learning disability has an adverse impact on a child's performance on standardized tests, but whether there is an adverse impact on the child's *educational performance*. What do we see if we put aside all the test results in this case and just look at the Student's educational performance as measured by his passing grades, his advancement from grade to grade, progress vs. regression, actual progress in class (demonstrable academic benefit as testified to by the student's teachers), and grade equivalent test scores? *See, Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). This Student is passing his classes, advancing from grade to grade, progressing (even in the area of reading) without regressing, and his teachers (particularly his Reading teacher) testified that he is making actual progress in class. His grade equivalent reading scores are improving and have improved *dramatically* in the past year. He started the 9th grade reading on barely a 7th grade level and he will start the 10th grade reading on a 9th grade level. It almost defies common sense to conclude that a student of average intellectual ability who can make two years of progress in one year, in any educational area, is being adversely affected by a learning disability. The Parents and their expert witnesses did not dispute that the Student made progress, but only argued that his progress was not as great as they would have hoped to see, and did not come easily.

While the Parents attempted to make much of the fact that the Student struggles with his schoolwork, teacher testimony indicated that the Student's efforts were lacking. Other than the Parents' arguments, there was no *evidence* to support their position. There is a vast difference between "trying and failing" and "failing to try." But, as noted above, the degree to which the Student is or is not trying is virtually moot given that he is *not failing*. He may not be sailing, but he is not failing.

3. Special Education

Having come this far in my analysis, it is noteworthy that even if the Parents had succeeded in meeting the first two requirements for IDEA eligibility, they did not meet the third. To succeed on the third requirement the Parents would have to prove that the Student's condition requires special education. IDEA and the Virginia regulations tell us that special education is "specially designed instruction . . . to meet the unique needs of a child with a disability." Specially designed instruction "means adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction – to address the unique needs of the child that result from the child's disability; and to ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children." *34 C.F.R. § 300.26*

The Director of Pupil Services testified that the High School offers a menu of assistance, accommodations and special instruction to its students as needed. On one end of the spectrum are accommodations and assistance that are available to all students, and on the other end of the spectrum are services that would fall within the realm of "special education," and are available only to those students who are found IDEA eligible. Such services include access to special education teachers, special education resource rooms, residential placements and one-on-one self-contained learning environments. The Student has been receiving accommodations and assistance throughout his 9th grade year, as noted above, including tutors, preferential seating, behavior intervention plans and untimed tests.

It is critical to note that the Clinical Psychologist, who testified as the Parents' expert witness and opined that the Student required special education services in order to access the general curriculum, offered recommendations for the "special education services" the Student needed and in so doing perhaps identified the crux of this dispute – to-wit, a misunderstanding about what does, and what does not, constitute "special education." The Clinical Psychologist identified numerous accommodations and interventions that have been in

place for the Student, and may continue to be available to him, obviously despite his ineligibility under IDEA. For example, she recommended: setting clear expectations for performance and behavior; making sure the Student is paying attention before presenting him with information; preferential seating; repeating and emphasizing key points; additional time during testing; formal instruction in note-taking; use of a notebook or calendar for recording homework assignments; setting aside time in advance of test dates for studying; in preparing for tests, review materials in advance more than once. Additional recommendations were geared towards having the Student himself take steps that would help him be more thoughtful, thorough and attentive in his study habits. But none of her recommendations rise to the level of "specialized instruction" as contemplated by IDEA and the special education resources made exclusively available to learning disabled students. The Parents themselves did not seem to understand that after-school tutoring is not what is contemplated by the legal definition of "specialized instruction."

Accordingly, I find that the Student is not eligible for special education under the IDEA.

The Section 504 Claim

The Rehabilitation Act was enacted to promote, among other things, the inclusion and integration of persons with disabilities into mainstream society. See *29 U.S.C. § 701.* To this end, §504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a). In the education field, the Rehabilitation Act complements the IDEA and the corresponding Virginia regulations. Whereas the latter authorities require federally funded State and local educational agencies to provide special education and related services to students who meet specified eligibility criteria, §504 of the Rehabilitation Act prohibits such agencies from discriminating against students with disabilities. The federal regulations promulgated under §504 with respect to education provide:

> A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

34 C.F.R. § 104.33(a).

§504 incorporates the same definition of "handicapped" as the Americans with Disabilities Act ("ADA"), and thus a student claiming eligibility under §504 must first show that he is "disabled" within the meaning of the ADA. See *Rhoads v. FDIC,* 257 F.3d 373, 387 (4th Cir. 2001). The ADA defines a "disability" in part as "a physical or mental impairment that substantially limits one or more of the major life activities." *42 U.S.C. § 12102(2)(A).* Examples of major life activities are "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *29 C.F.R. § 1630.2(i).* The determination of whether an individual is disabled is an individualized inquiry, particular to the facts of each case. See *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 483, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999). "The phrase 'substantially limits' sets a threshold that excludes minor impairments from coverage under the ADA." *EEOC v. Sara Lee Corp.,* 237 F.3d 349, 352 (4th Cir. 2001). "Substantially limits" means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(i)-(ii).

The Student contends he is disabled because his learning disorder substantially impairs him in the major life function of "attending school." Since "attending school" is not actually a recognized major life function, I find that the Student is attempting to contend that he is substantially impaired in the major life function of learning. This contention must be supported with particularity. See *Albertson's v. Kirkingburg,* 527 U.S. 555, 566 (1999). The Student must demonstrate an inability to learn as the average person in the general population can learn, or show that he is significantly restricted as to the condition, manner or duration under which he learns when compared to the average person. *29 C.F.R. § 1630.2(j)(i).*

The record strongly suggests that the Student is capable of learning as well as or better than the "average" person. His success in school, if measured by GPA, demonstrates as much. He has never failed an academic course. He passed a 9th grade SOL in the 8th grade. He has made progress in his major area of weakness, reading, and is reading almost on grade level. All of these activities require learning. The Parents have not shown that the Student has performed them in a below average manner. At most, the Parents have demonstrated the Student has difficulty with reading, but I cannot conclude on this evidence alone that the Student is substantially impaired in his learning. Cf. *Leisen v. City of Shelbyville,* 153 F.3d 805, 808 (7th Cir. 1998) (Plaintiff's inability to secure "paramedic certification does not show that she was substantially limited in . . . learning, any more than the fact that a particular individual might not be able to pass a course in physics or philosophy would allow an inference that all learning activity was substantially limited.").

The record evidencing that the Student has learning disabilities consists of a report of a psychologist. Its purpose was not to compare the Student's ability to learn with that of an average person in the general population and, not surprisingly, it does not provide a basis for doing so. This deficiency is particularly crucial in a case like this one in which the person claiming a significant limitation on his ability to learn has a demonstrated record of academic achievement. No evidence in the record remotely suggests that the Student is *unable* to learn. The question is not whether the Student is able to learn *as well and as easily as* the average person in the general population can learn, but whether the Student is *unable* to learn as the average person in the general population can learn. "Inability" and "difficulty" are not synonymous. In this case, the Parents did not establish the Student's inability to learn; they at best alleged that he has difficulty attaining average grades. It is again noteworthy that neither the Parents nor the Student testified on the Student's behalf, and the report of the Independent Speech Language Pathologist who testified as an expert on the Student's behalf notes, "[The Student] denied any difficulty in school and stated the reason he was at my office [for evaluation] was because his Mom brought him there." (P-19 at page 1).

Accordingly I find that the Student is not disabled within the meaning of the ADA and Section 504.

IDENTIFICATION OF PREVAILING PARTIES

Pursuant to 8 VAC 20-80-76 (K)(11), this Hearing Officer has the authority to determine the prevailing party on each issue that is decided. Having found that the Student is not disabled within the meaning of the ADA and Section 504, and is not eligible under IDEA, the Hearing Officer identifies the LEA as the prevailing party on all issues.

APPEAL INFORMATION

8 VAC 20-80-76 (O) Right of Appeal

1. A decision by the hearing officer in any hearing . . . shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court. The appeal may be filed in either a state circuit court or 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 in 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

The LEA is responsible to submit an implementation plan to the parties, the hearing officer, and the Virginia Department of Education within 45 calendar days.

Krysia Carmel Nelson

Krysia Carmel Nelson, Hearing Officer

Dated this 12th day of July, 2004

CERTIFICATE OF SERVICE

I, Krysia Carmel Nelson, do hereby certify that this 12th day of July, 2004, I e-mailed a copy of this decision to the parties in this matter: to the parents – and to counsel for the LEA Rodney Young – , pursuant to their request that the decision be issued electronically and delivered in this manner.

cc: Dr. Judy Douglas (jdouglas@mail.vak12ed.edu)