04-117

CASE CLOSURE SUMMARY REPORT

Public Schools
School Division

Name of Parents

Name of child

January 6, 2005
Date of Decision

John F. Cafferky, Esq.
Counsel representing LEA

Gerard S. Rugel, Esq.
Counsel representing Parents/Child

Party Initating Hearing

Spilt
Prevailing Party

Hearing Officer's Determination of Issues:

(1) IEP's proposed by PS did not provide FAPE because they were not "appropriate" and violate IDEA.

(2) The Parent's private placement was not reasonably calculated to enable the child to receive educational benefits.

(3) PS was found to be not in violation of the Sec.504 of the Rehabiliation Act of 1973 for alleged retaliation.

(4) PS violated procedure in one unjustified instance.

Hearing Officer's Orders and Outcome of Hearing:

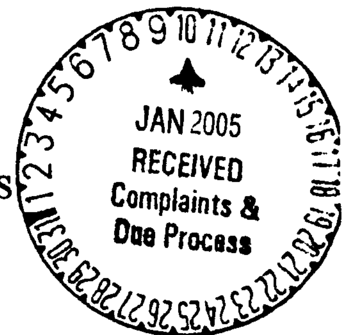
PS ordered to provide and appropriate education to include reliable and intensive one-on-one instruction in the child's academic studies.

PS ordered to provide compensation and compensatory services for certain related services obtained privately.

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 days.

FRANKLIN P. MICHELS
Printed name of Hearing Officer

Franklin P. Michels
Signature



VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES

Public Schools School Division	Name of Parents
Dr. Interim Superintendent	Name of Child
John F Cafferky, Esq. Counsel representing LEA	Gerard S. Rugel, Esq. Counsel representing Parents/Child
Franklin P. Michels Name of Hearing Officer	Party Initiating Hearing

POSTHEARING REPORT AND DECISION

SUMMARY OF CASE

This matter concerns a request for a due process hearing initiated by and , (Parents) on behalf of their son, , 16 years old, who has multiple disabilities which qualifies him for services under The Individuals with Disabilities Act (IDEA), 20 U.S.C. Sec. 1400 *et seq.* and Federal Regulations, 34 CFR 300. In requesting a due process hearing the Parents assert that the Public Schools (PS or School) has failed to provide with a free appropriate public education (FAPE) and that the School has committed a number of procedural violations. Among these is the charge that the School was in violation of Section 504 of the Rehabilitation Act, 34 C.F.R. Sec.104.61 by allegedly retaliating against in bringing criminal charges for violating compulsory attendance laws.

At the request of both the parties, continuances have been granted thus extending the completion of this case beyond 45 days. The original date of July 8, 2004 was arbitrarily set to comply with the regulations pending a meeting of the parties. At the conference the parties justified a continuation as needed for the extensive preparation for a lengthy hearing. The parents and the parties agreed it was in 's best interest and it was acknowledged that he would continue with his present instruction. Continuations to September 20 and to October 25 were justified as being in 's best interest to permit the parties to schedule and complete various tests and evaluations. It was found that the continuations were in 's best interest. This case has a long history of disagreement between the parents and the school including appeals to the Virginia Department of Education, a due process hearing and mediation. The parents concerned about their child with disabilities have availed themselves of all the protections which is provided for in the law which they have every right to do. To dismiss the proceeding, however, on the ground that the parties in requesting evaluations were not prepared to go to hearing would only have resulted in a new request for hearing likely to present some of the same problems and further delay a resolution of the matter. For a discussion of the

justification for the evaluations see the August 12, 2004 transcript of prehearing conference and the hearing officer orders of August 13 and October 10, 2004.

The hearing was preceded by a number of prehearing telephone conferences and by three recorded in person conferences on June 18, July 30 and August 12, 2004. The June 18 conference discussed matters in preparation for the hearing including issues, proper parties and statutes and burden of proof. The July 30 conference covered matters such as burden of proof, place of hearing and the issuance of subpoenas. On August 12 the conference involved the Schools request for evaluations of which was granted. A phone conference of October 5 resulted in an order directing an independent educational evaluation.

The hearing in this matter was conducted at , VA Evidence was taken from October 25, 2004 to October 29, 2004 and on November 2 and 5, 2004. In view of the extensive testimony taken and the large number of exhibits as well as the fact that the transcript was not to be available for at least two weeks, the parties requested on the record and were granted an extension to December 15, 2004 to file post hearing briefs. This was found to be in the best interest of who continues in his present place of instruction. At the request of PS the date for filing was later extended to December 17, 2004.

In special education matters in Virginia and upon request, due process hearings are provided for in the "Regulations Governing Special Education Programs for Children with Disabilities in Virginia" (Virginia Regulations) Section 3.4A5, *et seq.* as well as under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. Sec. 1400 *et seq.* and the Federal Regulations, 34 CFR 300.506.

ISSUES

(1) As a substantive matter was denied a free appropriate public education?

(2) Was denied a free appropriate public education as a result of alleged procedural violations by the Public Schools?

(3) Are the Parents entitled to reimbursement for costs related to their claim of a home base educational program for including related services?

(4) Did PS take retaliatory action against in violation of Section 504 of the Rehabilitation Act of 1973?

FINDINGS OF FACT

1. was born and was 16 years old at the time of the hearing. He is a likeable adolescent with a sense of humor. He has been diagnosed as having mental retardation, a significant communication disorder and oral motor apraxia. (School Exh. 96) has a significant verbal apraxia which means he has difficulty in oral motor planning. Oral motor involves strength and coordination in the mechanisms of speech. Oral apraxia makes it difficult for to formulate words. also has mild or moderate autism. (Tr. 326-327).

2. A psychological evaluation was conducted on in in 1991 when he was 3 years old and he tested at age equivalents ranging from one year to 2 years, six months. A speech/language evaluation conducted in October 1992 at Children's Hospital of revealed a severe delay in receptive and expressive language skills and limited oral motor skills. An occupational therapy evaluation conducted at the same hospital in September of 1992 revealed delays in gross motor and fine motor skills. At five years, one month a developmental evaluation at the University of conducted by Dr. revealed an IQ of 42 and a mental age equivalent to two years, five months. The scores from tests indicated that displayed significant delays in cognitive functioning as well as adaptive behavior and that he met the criteria as having moderate mental retardation. (School Exh. 9)

3. was tested numerous times since the age of three. Educational and psychological tests generally ranged from mild to moderate levels of mental retardation with severe speech and language deficits. went through a triennial evaluation in April 1996, prior to leaving , and was found eligible for continued special education services as a student with mild retardation and with additional speech/language impairment. (School Exh. 11)

4. When tested by the Public Schools in a psychological evaluation in September 1996, was found to demonstrate limited intellectual abilities both verbally and nonverbally. Nonverbal measures of intellectual abilities revealed functioning within the mild to moderate range of mental retardation. , it was found, needed a highly structured, small class environment with intense language intervention. (School Exh.11)

5. A private neuropsychologist, consulted by the parents in September 1996, Dr. , found that meets the neuropsychological standards for a Pervasive Developmental Disorder, Not Otherwise Specified including traits/characteristics of atypical autism. (Parents Exh. 19A, Vol. II)

6. In April 1996 in the Public Schools an independent educational program (IEP) was prepared for which placed him as non-categorical with speech and language instruction in the third grade at Elementary School in . (Parents 2A, Vol. I)

7. was examined and tested by Dr. , MD on October 1, 1996 upon referral by Dr. and he was in agreement with the assignment of pervasive developmental disorder or atypical autistic disorder.

8. was given augmentative communication evaluation at the Kennedy Krieger Children's Hospital in September 1998 when he was eleven old. On receptive language, a test revealed receptive vocabulary skills at the three year, ten month age equivalency. Expressive communication tests revealed numerous sound production errors. The institution recommended that needs a picture based augmentative communication system. (Parents 21, Vol. II)

9. In December of 2000, was given an auditory processing evaluation by Dr. , an audiologist. was found to have significant problems processing auditory-verbal information at the levels of decoding and memory. The Doctor recommended that use some alternative augmentative communication device (AAC) in order to effectively communicate with people. (Parents Exh. 26, Vol. II). In a

subsequent assessment in December 2001, Dr. , associated with Psychiatric and Neuropsychological Associates, recommended that not be a candidate for a training program such as that offered by Lindamood-Bell Learning Processes. (Parents 30A, Vol. II) Doctor later reversed himself recommending Lindamood-Bell after meeting with the Washington, D.C. director of Lindamood-Bell who convinced him that the organization had designed an individualized program for . (Parents 30B, Vol. II)

10. In the eight grade, 's IEP developed July 17, 2001 found him eligible for free appropriate public education or FAPE in the areas of mild retardation and speech and language impairment. He was assigned to attend Middle School. The IEP, which parents did not sign, states that presents verbal apraxia which creates significant difficulty with oral motor planning (ability to motorically make sounds and sequencing of sounds/words). Also was found to have a significant deficit with his short term memory which is critical to his language development. (School Exh. 31)

was given a psychological evaluation by the Public Schools on September 20, 2001 and October 2, 2001 when he was in the eight grade at Middle School. His overall intellectual abilities were measured to be within the moderate to mild range of retardation. (School Exh. 23)

11. attended Middle School in the eight grade in the school year 2001-2002. He was taught by in a class of six students with two assistants. Ms. was with in six out of the eight class periods. Educational activities included one-on-one reading and working with to recognize his letters and to sound out words. She also used a program called Touch Math. The class was multisensory and very language based. used a specially designed computer independently. The teacher used a lot of visual clues. , assisting technology resource teacher, created different IntelliTalk overlays so that had the picture with the word to help him write his own sentence. The class included community travel such as to the Post Office or a grocery store to learn life skills. The teacher invited peer tutors who would come for 30 minutes a day and would work on different assignments such as reading with the students. The teacher was in frequent contact with the parents. (Tr. 638 *et seq.*)

School Exhibit 35 is a list of 's team, the PE teacher, the speech and language clinicians, the teacher, cluster director and others. The team would meet periodically to discuss the degree of 's progress and possible problems. (Tr. 651)

12. Upon leaving Middle School, was considered for transition to high school for the school year 2002-2003. The IEP prepared for on June 11, 2002 states the area of disability to be "multiple disabilities". in addition to other courses was provided 2 hours per week of speech and language, 1&1/2 hours per week of physical education and 1/2 hour per week of written language. Other courses include reading, independence/communication/community, communication: articulation and oral motor as well as math skills. (School Exh 48) was scheduled to attend High School.

The parents on June 11, 2002 in a letter rejected the School's proposal for the school year 2002-2003 and informed the School that they intended to enroll privately. (School Exh. 70)

13. Extended school year services (ESY) in an IEP for the summer of 2003 were offered by the School. A number of services were included in the IEP with which the parents did not agree. Speech and Language service for three hours per week was among the services offered and the parents accepted that service. (School Exh. 66, Tr. 346,347)

14. Though the parents had privately placed they requested an IEP for the school year 2003-2004 and the IEP team met and prepared a proposed IEP. It provided services to include a transition plan, life skills, written expression, contextual reading, sight word skills, decoding skills, communication sign language, communication and articulation/oral motor. All the services were to be delivered in special education setting on a regularly scheduled basis. It offered per week three hours of speech and language and one hour of autism resource among other related services. (School Exh. 72) The parents rejected this proposed IEP and elected to enroll privately.

15. Since 2002 the parents have enrolled in a private facility named Lindamood-Bell Learning Processes located in Washington, DC. This institution is not considered a school in that it is not designed to provide a curriculum to students such as science, history, social studies and English. It does not call itself a school and is not accredited by any organization. The programs offered are designed to develop underlying skills such as phonemic awareness, symbol imagery and concept imagery.(Tr. 834) The teaching is done one-on-one between the student and the clinician. (Tr. 228-230, 372) One of the programs used is called "Visualizing and Verbalizing" where the student will describe a picture or mental image.(Tr. 860-861) The use of sign language is not a normal part of the program. (Tr. 883)

was given the standard battery of tests at Lindamood-Bell which show a very minimal progress. 's scores are significantly below his age and grade level. (Tr.. 881) remains unable to perform any of the standard test items. (Tr.. 933) He has shown no improvement in Peabody Picture Vocabulary Test scores. (Tr.. 376)

, however, has become more independent and has made progress in his underlying skills. (Tr.. 889-893, 383-384)

16. In the course of this proceeding, an IEP was prepared to the 2004-05 school year on September 28, 2004. Somewhat similar to the previous year IEP it offers a transition plan, communication: sign language, articulation/oral motor, pragmatic skills, oral language and expressive oral language/syntax as well as life skills, functional math, reading-sight words, decoding skills, contextual reading, reading comprehension and written expression. All the services are to be provided in a special education setting on a regularly scheduled basis. Among other services the IEP proposed per week 9.75 hours for autism, 12 hours mentally retarded and 3 hours of speech and language. The parents rejected this proposed IEP and continued to send to Lindamood-Bell. (School Exh. 100)

DECISION

The school issues in this matter center on whether the individualized educational program (IEP) prepared for in each of the three school years of 2002-03, 2003-04 and 2004-05 by the Public Schools (PS or School) were "appropriate" as that term is defined in The Individuals with Disabilities Act (IDEA) cited

above and also whether the School is responsible for procedural violations in connection with these programs.

is 16 years old and as noted in the findings has significant disabilities which have been diagnosed as mental retardation (MR), speech and language deficiencies and mild to moderate autism. He is extensively disabled and he is very limited mentally. In a current psychological assessment of by the School psychologist, Dr. , in August 2004 he was assessed with a nonverbal IQ of 43 and verbal of 44. Most of his cognitive age equivalency score were found to be in the 3 1/2 to 5 1/2 range. (School Exh. 96). As related in the findings, consistently has been found to be very limited cognitively.

While the various experts that testified all agreed on 's need for special education, his extensive deficiencies presented a challenge to educators. The director of Lindamood-Bell testified that was the most challenging student they had encountered. There were differences among professionals on the type of alternative augmentative communication device (AAC) appropriate for and the need for and the use of sign language. Dr. first disapproved of Lindamood-Bell training and later reversed himself.

As noted, the substantive issue herein concerns the School IEP's for the years 2002 to 2005. These IEP's are all proposed and were rejected by the parents who instead enrolled in a private facility, Lindamood-Bell Learning Processes. Accordingly, for these years there is no evidence of what progress may or may not have made under the proposed IEP's. There is some evidence concerning 's IEP for the school year 2001-02 when he attended Middle School in the 8th grade although that IEP is not in issue.

In the 8th grade, 's IEP called for education is such subjects as communication: oral language, articulation as well as structured reading and writing. Finding No.11 details 's education at . He was taught by who is a licensed special education teacher in Virginia and was in her 7th year of teaching. She had six students in her class and two assistants. She worked with 4 to 5 hours per day including a one-on-one reading program. She would encourage him to recognize letters and to sound out letters. used AAC devices including the Intellitalk where he had a picture with the word to help him develop sentences. He also used the Tech/speak. There was almost daily contact with Mrs. . Ms. testified that had made progress, that he had improved on vowel sounds, that he was self correcting and more independent and finally in testing he improved his ability to count and to recite the alphabet. (Tr. 661-683) At the same time met very few of his goals for the 8th grade. He made no significant progress.

has consistently shown limited cognitive functioning. Dr. , special education teacher for Public Schools, has been doing educational testing since 1971. She administered several tests to in 2001 and found that he was functioning at the pre-kindergarten to kindergarten levels in academics which are age equivalents of 3 to 5 years old. (School Exh. 29) She again tested in August 2004 and got standard scores that were fairly similar to those obtained in 2001. (Tr. 196). She testified that is reading at a pre-first grade level with some knowledge of first grade level words and that he is still working on learning the alphabet

and cannot count beyond the number 5. Tests by others confirm low cognitive level. At Lindamood-Bell, tests found that 's scores fell below the first percentile. The Director testified that the tests administered show minimal progress and that his scores are significantly below his age and/or grade level. (Parents 44A,Vol 5; Tr. 881) Dr. testified that based on 's history of evaluations, it is not realistic to believe that he will have any kind of rapid expansion in academic skills.(Tr. 1655)

In such circumstances, it is a reasonable conclusion that 's academic progress will be at a slow pace and will be minimal. While he does have considerable strengths in living and domestic skills. his cognitive level prevents him from making large or quick academic strides. Dr. testified that given the consistency of his ability scores across the years, the likelihood is that his academic skills are not going to get beyond probably second grade.(Tr. 122) Dr. , called by the Parents, testified that cognitively there will be some limits to what can gain. (Tr.. 1523-24)

, based on the evidence, made no significant progress in 8th grade.

The parents have produced some testimony to the effect that has made progress at Lindamood-Bell. The director, , testified that although tests show has made little progress, he had made great progress in that the underlying skills have continued to develop.(Tr. 893) Dr. testified that while there has been no progress in terms of standardized scores or percentiles he did progress in functional communication and therefore functional progress. (Tr. 1558) He said that the criterion he uses is whether the child can communicate and initiate more than a single utterance. Mrs. testified that progressed from knowing 3 words to reading 150-180 words. (Tr. 1342). has made some progress at Lindamood-Bell but academic progress is not shown. He did not progress at all on standardized tests. The determination of functional progress may be helpful but it is highly subjective. Dr. testified that based on her experience and training a person such as with an IQ within the 40's, academic skills are always going to be a serious weakness. (Tr. 1670) She also testified that 's auditory and visual memory is pretty much fixed and the solution is to work around this weakness. (Tr. 1658)

At the conclusion of ' education in the 8th grade, he was still enrolled in the Public Schools. Thus, the School had the record of 's performance to aid in the preparation of an appropriate IEP for the 9th grade in the 2002-03 school year. The proposed IEP dated June 11, 2002 is School Exhibit 58. The parents did not give their consent to this IEP and later chose to placed privately. The program in this IEP as detailed in Finding No.12 provided for education in a broad array of academic subjects and other skills. was specifically scheduled for 2 hours per week in speech and language.

Although was not then enrolled in Public Schools, the parents in the summer of 2003 requested an IEP for the school year 2003-04 and the meeting for the IEP was held on August 25, 2003. The proposed IEP is in evidence as School Exhibit No. 72. As with the 2001-02 IEP, this program also provided for education in basic subjects and also provided special accommodations to address 's needs. The time for speech and language was increased to three hours per week. For more detailed discussion of this IEP reference is made to Finding No. 14 herein. The 2003-04 was not approved or accepted by the parents.

The third and final IEP in dispute in this proceeding is that for the school year 2004-05. The IEP meeting in this instance was held on September 28, 2004 and the program was received in evidence as School Exhibit 100. This proposed IEP addresses 's special needs including communication: sign language, articulation/oral motor, oral language, expressive oral language/syntax, decoding skills and other skills and subjects. was scheduled to receive three hours per week of speech and language as well as other specific special services. The parents did not approve or consent to this IEP noting their opinion that " requires one to one instruction in a distraction free environment with an individualized curriculum and program developed and monitored by a qualified autism specialist trained in Applied Behavior Analysis (ABA) Applied Verbal Behavior (AVB)and sign language." They also stated he needed sign language instruction and other services.

The 2004-05 proposed IEP was prepared after the request for a due process hearing had been made in this matter and after the proceeding had commenced. Counsel for the School argued and I accept the contention that the Regulations require the hearing officer to include in written findings, among other things, a determination of whether the "Local educational agency is providing a free appropriate public education" (8 VAC 20-80-76 J 17 d). To make this determination it was deemed to be necessary to prepare a current IEP.

On all of the three IEP's the parents did not give their consent or accept the programs proposed and went for private placement. Thus these programs were never implemented and, accordingly, there is no factual way to determine the progress might have made.

The substantive question, as noted, is whether the 2002 to 2004 IEP's provided with FAPE and more specifically with an "appropriate" education. The courts in special education cases regularly cite the decision of the U.S. Supreme Court in Board of Education v. Rowley 485 US 176, 206-207 (1982) in which the court set out a two part test to determine whether a child is receiving a free appropriate public education: first, has the LEA complied with the procedures set forth in the law and second, is the individualized education program developed reasonably calculated to enable the child to receive educational benefits. An appropriate program need not maximize a child's potential or provide the best possible education, it need only provide educational benefit in the least restrictive environment.

, as found in the findings and pointed out above, has the misfortune to have multiple disabilities. He has been diagnosed as having mental retardation, speech and language deficits including apraxia, the inability to produce speech, and mild to moderate autism. His mental retardation with an IQ in the 40's is such that his academic skills will probably not get beyond the second grade. The parents have been sending to Lindamood-Bell Learning Processes, a private placement which is not a school and which attempts to develop underlying skills such as where a student will describe a picture or mental image to a clinician. All of the instruction is done on a one-on-one basis. The institution does not teach sign language nor does it employ alternative augmentative communication devices.

The parents contention essentially is that must learn underlying skills for him to be able to learn and take in information and make sense of it. This argument on its

face seems plausible. What good is exposure to reading and math and other academic subjects if cannot read and may not know what is going on? The difficulty with this approach is that, as explained above, with his low IQ has a limited cognitive level. The standard tests show no academic improvement after two years at Lindamood-Bell though he has acquired some new words. All the experts who testified agreed that is limited on academics, though there is some potential for improvement. As school psychologist, Dr. , expressed it, while academic skills will always be a serious weakness with the answer is to try to work around it.

Also, to accept the parents claim of a need for a solely one-on-one instruction would be to preclude 's access to any normal interaction with peers. At present at Lindamood-Bell, relates predominately with adults. The School experts were in agreement that needs to be in a classroom with other students. Dr. , school psychologist, who evaluated , recommended what she termed a multi-pronged approach to addressing his educational needs. This would put the emphasis on developing many functional or survival kinds of reading and writing skills as well as vocational skills. (Tr. 120) She testified that it would be an injustice to to be in a program exclusively devoted to developing basic academic skills like sounding out words.(Tr. 122) She further stated she was opposed to a program exclusively one-on-one because it does not allow to enhance his social skills or the ability to compromise and to get along with his peer group.(Tr. 125) According to her testimony, needs individual instruction as well as small group experience.

Dr. , a resource teacher at Middle School when was a student there and who had spent time with him, testified that it is important for to be with peers because they will provide role models and he will have a chance to prepare for life.(Tr. 222-223) , a communication disorders specialist for Public Schools, met in his school setting and also did formal evaluations in 2001 and 2004. (Tr. 319-320) It was her opinion that would receive the services he needs within the school program in that he would get both individualized attention as well as the ability to use skills in a general program and in a less restrictive environment.(Tr. 371)

's mother, , in her testimony disagreed with the School professionals and repeatedly averred that needs intensive one-on one education in a distraction free environment though it is not clear that she means exclusively one-on-one. She asserted that one-on-one provides immediate correction, feedback and rewards.(Tr. 1231,1285,1295,1335) Dr. also testified that needs the one-on-one program provided by Lindamood-Bell.(Tr. 1578)

, private speech pathologist who works with on his speaking skills, gave the opinion that he needs continued one-on-one using a total communication system. She also testified that she did not believe that would benefit from peer interaction.(Tr. 1141,1142-43)

was very critical of most aspects of the School IEP's. One of her objections concerns or seems to concern not so much the design as the implementation. For instance, the IEP's do not require specific hours of one-on-one instruction; rather it is left to the teacher to use the time as she deems most appropriate. , special education teacher, testified that the one-on-one service was based on individual needs.(Tr.

791) There is also the assertion that High School, where was scheduled to attend, is not appropriate because he would be unable to cope with the alleged noise and confusion. Dr. testified that he visited the school and was afraid that it, being a large school, would be overwhelming for . He also found it noisy at least in the hallways and the cafeteria.(Tr. 1571) . special education teacher at , testified that noise in the classroom was minimal; that six people don't make that much noise. Also, that the students are supervised at lunch.(Tr. 1782). With the help of the teachers and the assistants, was able to cope with the school environment in the 8th grade so now that he is older there is no reason why he would not be able to do so again.

The parents argue that should learn only academics, like the ability to learn new words, and that he will have plenty of time to learn occupational skills later in life as when he is in his 20's. A key consideration in 's case is whether he needs to be taught work related skills at his age. The Parents have urged that such learning be delayed until he is older but they have presented no convincing professional evidence to support this position. As observed above, 's ability to learn in academics is severely limited though there is some room for progress. He is now 16 years old and so I agree with the School professionals that in the few years he still has in the school, he will profit from the interaction with peers and to the exposure to working skills.

In light of the above discussion, I do not believe that the Lindamood-Bell program offers an appropriate education even with the related services provided by the Parents. simply has no room to grow and mature in that environment.

A relevant inquiry is whether the IEP's in question were reasonably calculated to enable to receive educational benefit. When compared with his current placement, they provide small group instruction as well as some one-on-one in subjects designed to improve his academics and social and living skills. Nevertheless, there is a problem and that is, as the record clearly shows, he will be in a mostly group setting.(Tr. 125,364, 525,785-86) The record reveals that has a short attention span and that he needs personal attention.

There is no question that needs one-on-one instruction particularly on his reading skills. The witnesses generally agree on this and such instruction was provided for in the IEP's in dispute but on a very limited basis. 's teacher at Middle School has clearly indicated in her data sheets and otherwise that he needs extensive one-on-one instruction. In one narrative she wrote" needs monitoring to stay on task and requires one-on-one instruction. When doesn't have some one monitoring he does not work. has poor retention". (Parents Exh. 22, Vol.VI). Other professionals who have examined and tested indicate his need for instruction on a one-on-one basis. The record includes two video tapes showing being taught and these most vividly illustrate his need for close personal attention. (Parents Exh's 93 and 94) It is very clear to me that is in need of personal instruction in all of his academic subjects. needs both group experience as proposed by PS as well as intensive personal instruction.

The critical question is whether the IEP's in dispute were designed to provide some educational benefit. While providing a broad list of subjects mostly in a small group setting, the IEP's fail to provide the intensive personal attention that

requires. In short, he needs intensive one-on-one instruction to aid him in academics. He needs personal attention to keep him on task. While is severely disabled the professionals are generally agreed that he can learn and make progress. The approach of the PS which leans heavily on a classroom group study is not sufficient to provide with an appropriate education.

In the complex circumstances of this proceeding, in which both sides have skillfully presented their case, my conclusions on the substantive issue of FAPE ultimately rests on two points which I believe are well established by the record: (1) that PS did not provide with an appropriate education because he needs more intensive one-on-one instruction to provide academic progress to the extent of his ability and (2) the private placement at Lindamood-Bell, entirely one-on-one, was not an appropriate education because it was too restrictive and it didn't show significant progress. There is no contradiction here, in my opinion, because an exclusive one-on-one program does not necessarily assure success. needs both the experience of group teaching and the interaction with peers as well as an intensive one-on-one academic program.

In conclusion on the substantive issue, I find that the PS proposed IEP's, while comprehensive are not "appropriate" because they rely heavily on a group setting and do not provide constant and reliable one-on-one instruction to in his academics. I further find that Lindamood-Bell did not provide with an "appropriate" education.

CLAIM FOR HOME BASED PROGRAM
&
CLAIM FOR SERVICE PLAN

The Parents contend that they have provided a home based program for including the placement at Lindamood-Bell, a program for his communication disorder, and other claimed services. The Parents rely on 8 VAC 20-80-64 c.2 which states that home based instruction shall be made available to children whose IEP requires delivery of services in the home or "other agreed upon setting". The Parents interpretation of this section expands its meaning in that the instruction was given was neither in the home or at an agreed upon setting. Moreover, no IEP required the delivery of services in the home. There is no evidence that the Parents ever requested a home based program at an IEP meeting. (Tr. 470) The novelty of the approach which the Parents now designate as a home based program is of sufficient importance that it should have been raised and resolved at the IEP meetings. Clearly, it was not a program that was agreed upon. There is case law suggesting that claims not raised at the IEP meeting may be denied. Sauer v. Johnson 3 IDELR 266 (ED VA 2002; Vipperman v. Hanover County School Board 22 IDELR 76 (ED VA 1995). In the circumstances, this claim is denied.

The Parents also contend that PS is obligated to provide services under the procedures established in 34 CFR Sec 300.403 and 300.450 *et. seq.* whereby students with disabilities placed in private schools are provided special education services. Section 300. 403 does not grant an individual right. Sec. 300.454 (a) (1) states: "No private school child with a disability has an individual right to receive some or all of the special education and related services that a child would receive if enrolled in a public school" Accordingly, this claim is denied.

RETALIATION CLAIM UNDER SEC. 504

The Parents contend that the PS took retaliatory action against Mrs. in violation of Sec. 504 of the Rehabilitation Act of 1973. While counsel for the PS for the purpose of this hearing did not object to the hearing officer exercising jurisdiction over the 504 claim, it is nevertheless remarkable in a case concerning FAPE, that a matter is to be resolved relating to an individual not a part of the FAPE proceeding on a seemingly unrelated issue. However, the Parents cite Weber v. Cranston 18 NDLR 18 (1st Cir. 2000) holding that Weber's claim of retaliation is literally related to identification, evaluation or educational placement of her child and that she had to invoke the due process hearing procedures of IDEA before filing her retaliation claim in Federal Court.

Counsel for PS argues that the claim is time barred because the Parents failed (1) to file their notice of claim with School within 180 days and (2) to file a request for a due process hearing within one year of the alleged violation which occurred, at the latest, January 28, 2003. Parents do not dispute the time of the alleged violation but they do dispute the claim that the matter is time barred.

There is no disagreement that the U.S. Fourth Circuit and the U.S District Court in Virginia have held that for the purpose of borrowing the appropriate state statute for the Rehabilitation Act, which contains no time limits and notice provisions, is the Virginia Rights of Persons with Disabilities Act, Va. Code 51.5.40 *et. seq.* The cases cited are Wolsky v Medical College 1 F. 3rd 222,224 (4th Cir.1993) cert. denied, 5108 U.S. (1994), Smith v. Isle of Wright County School Board 284 F. Supp. 2nd 270 (E.D. Va 2003) and Manning v Fairfax County 176 F. 3rd 235,238 (4th Cir. 1999).

Sec. 51.5-42 which prohibits discrimination against persons with disabilities provides, among other things in part B, that "this" section shall not apply to "any public or private institution which is subject to the requirements of Sec 22.1-215...." The Parents argue that this means their claim is exempted. School counsel contends that the section by its wording applies only to 51.5-42 and not to Sec. 51.5-46 which sets a limit of one year for filing and 180 days for notification of the claim. School counsel cites Smith v Isle of Wright County School Board, *supra.* In Smith the court upheld the 180 day notice requirement. I conclude that the claim of Mrs. under 504 of the Rehabilitation *Act* is time barred.

Furthermore, the evidence does not support the contention that the School was retaliating against Mrs. . She contends that the School retaliated against her by bringing the charge intending to intimidate her into removing from Lindamood-Bell and thereby reducing its exposure to the Parent's claim for reimbursement. (Tr. 1384) However, the Parents at that point had not made a claim for reimbursement. Other evidence supports a conclusion the School was acting to enforce State requirements for school attendance. (Tr. 1719-1730) I conclude that the claim of retaliation under Sec. 504 is time barred and is not supported by the evidence.

RELATED SERVICES

Sign Language. The Parents have requested compensation and compensatory services for related services with respect to sign language. (Tr. 1293) In 2002 the Parents asked for five sessions per week, each session 30 minutes per day of individual sign instruction by a qualified sign language instructor.(Parents Exh. 10A, Vol. I) Mrs.

testified that if uses a sign it cues his brain to get the word out.(Tr.1293) , a sign language instructor tutored one-on-one in signing and testified that has made progress in signing words to having 150 words some ten times what he had before.(Tr. 981) Ms. started with in August 2002 with instruction once a week for one hour.(Tr.977)

There is little or no dispute about 's need for sign language to communicate effectively. The 2004 IEP provides for sign language instruction stating " needs to increase proficiency with sign to effectively communicate his thoughts, feelings and ideas in the educational setting" (School Exh. 100). The School proposed one hour of sign instruction. (Tr. 1876) In 's case, the use of signs is clearly of educational benefit. Because the PS did not provide an appropriate education for , the parents are entitled to compensation for the sign language he received privately.

Speech and Language Instruction The Parents have also requested it appears both compensation and compensatory service for speech and language instruction. Since is diagnosed with apraxia, an oral motor weakness, he needs help in increasing his oral motor skills. The School IEP's have recognized this need. The latest IEP includes under communication, articulation/oral motor as a service. (School Exh. 100)

, a private speech pathologist, worked with from February 2003 to July 2004 three evenings a week for one hour instructing him in reading, comprehension speech, articulation and muscle control. (Tr. 1115) She worked with full time from February 2003 to July 2004. (1119, 1155) Because PS was not providing FAPE, I conclude that it should pay for the service privately provided. Also, Parents are entitled to some compensatory service for the period not covered by the private provider.

PROCEDURAL MATTERS

The Parents allege sixteen procedural violations, some of which were considered and resolved above. The others are referred to below.

Items 1, 11 and 13 The Parents make three allegations respecting the location, maintaining and cataloging of records. One is the charge of a violation of 54 CFR Sec. 300.346 for asserted failure to locate and share documents. Mrs. testified that she was not able to obtain some records except under subpoena. (Tr. 1346-47) Another charge, citing among other regulation 8 VAC 20-80-70 A1, is that the School failed to catalogue and maintain 's educational records including E-Mails. Additionally, the Parents charge a violation of 8 VAC 20-80-70 G.4 because the School allegedly failed to provide the Parents with a list of the types and locations of educational records. Mrs. testified that E-Mails were not in 's educational record and that while a list was provided it was inadequate. (Tr. 1368-69) None of these matters of procedure are related to specific IEP'S. The School offered no specific evidence on the issue of record location and maintenance. I conclude that there were record failures; however, I find that this was a technical failure and did not deny an educational opportunity.

Item 2 This charge concerns a service plan and was considered and ruled on above.

Item 3 The Parents charge a violation of several code sections and 8 VAC 20-80-62 B. 6 claiming that the School refused to discuss 's progress, if any, in the IEP's for 2002-03 and 2003-04. Mrs. testified that the IEP team never discussed 's annual goals and that they never brought documentation on recent evaluations to the meetings. (Tr. 1349-50) The School offered no specific evidence on this charge. Other than Mrs. 's testimony there is no evidence of what was discussed. However, at the 2003-04 meeting, s 8th grade teacher, , was on the IEP team so there was ample opportunity to discuss his goals. Additionally, The team would typically spend 3 to 4 hours at a meeting and in the summer of 2003 there were four or five meetings. Thus, there was ample opportunity to discuss every aspect of 's education. The evidence here is insufficient to prove a violation.

Items 5 and 12 The Parents additionally charge a number of procedural violations with respect to IEP' meetings. One such claim is that the IEP team was prohibited from discussing the placement of in the Lindamood-Bell program allegedly in violation of 8 VAC 20-80-64 and various code sections. Mrs. testified without reference to any specific IEP that the parents wanted to discuss the option of Lindamood-Bell and were told that there would be no discussion. (Tr.1351-52) Furthermore, the Parents claim that in violation of 8 VAC 20-80-56 C4 and 20-80-62 E6 the team failed to reach a consensus such as on the matter of the Lindamood-Bell program. On this issue the School presented testimony of several witnesses who asserted that the matter of placement at Lindamood-Bell was discussed at all the meetings. (Tr. 526)

(Tr. 1697-98) It is clear in the record that the School did not find Lindamood-Bell an appropriate placement for . who visited Lindamood-Bell along with another School member, , testified that there was a great deal of discussion about that program by the school system members of the IEP team. (Tr. 226-227). Possibly the matter was not discussed to the extent that the Parents wanted, but I find that it was discussed and in the circumstances there is no violation.

Items 9, 10,14 and 15 The Parents charge procedural violations in other matters involving IEP meetings. (1) They assert that the School failed to notify them that transitional services would be discussed at an IEP meeting in violation of the U.S. Code and 34 CFR Sec. 300.346 (b). (2) They claim that the IEP for the 9th grade failed to involve a person knowledgeable about resources and placement options and about autism alleging violations of 34 CFR Sec 300.344 and 104.35 (c). The Parents offered no specific evidence in support of these allegations. However, as to the second charge, testified that all the speech clinicians had experience in autism (Tr. 1791. Also team members, , teacher, , Special education teacher and , communication disorder specialist, all had knowledge of resources and options. For lack of evidence, I find no violation on these two claims.(3) Items 14 and 15 deal with notice and timing of meetings. The Parents charge that the School violated 8 VAC 20-80-62 D1&D2 when it failed to provide adequate and timely notice of the IEP meeting of August 25, 2003 and that the School would not change the meeting hour to late afternoon or evening. (Tr. 1369-71) The School claimed it could not require staff to work beyond contract hours and proposed a number of alternative dates. The regulation requires only a mutually agreed time and place and normally this would be in usual business hours. The Parents did attend the meeting. (School Exh. 72) I conclude

that these claimed procedural violations were not of such a nature as to deny an appropriate education.

Item 4 The Parents allege a violation of 34 CFR Sec 300.344(a) by the School's failure to invite 's teacher from Lindamood-Bell to the IEP meeting for the school year 2003/04. Mrs. testified that the School did not invite anybody from 's program at Lindamood-Bell to participate in the meeting. (Tr.1350-51) The School did not offer evidence denying the failure. I conclude this was a procedural violation.

Items 6 and 7 The Parents charge procedural violations by the School's failure to provide appropriate "prior written notice" with respect to its refusal to place at Lindamood-Bell and with respect to a proposal to provide with an AAC device in violation of 8 VAC 20-80-70 C. Mrs. testified that she requested prior written notice but that what she received did not meet the requirements of the regulation. (Tr.1352-53 and1366) The School did not offer evidence specifically in response to this charge. I conclude there was a failure of full response in these two instances but given all the circumstances especially that was not enrolled in PS and that the AAC matter was discussed in an IEP, I find the violations to be technical and not such as to deny the opportunity for an appropriate education.

Item 8 This concerns the alleged violation of 504 of the Rehabilitation Act and the matter was discussed and decided above.

Item 16 Finally, the Parents citing 8 VAC 20-80-60 E 1&2 and other provisions of law charge the PS with failure to ensure that assistive technology devices were made available to . In one instance PS required a return of a device which Matthew allegedly was using in his Lindamood-Bell program. According to the regulation it is up to the IEP team on a case by case basis to determine if a child needs access to a device to receive FAPE. The evidence is insufficient to find that the team made an incorrect determination and this claim is denied.

REIMBURSEMENT CLAIMS

The Parents have requested reimbursement for the costs of private placement at Lindamood-Bell, compensatory education services, travel costs and costs for defending Mrs. on the charges in the compulsory education matter. In my view Parents are not entitled to the costs for placement at Lindamood-Bell because of my finding that it did not provide with an appropriate education. The Parents have referred to court cases in which the courts have awarded relief but in general these were situations in which the private placement provided appropriate education. The rule appears to be succinctly stated in a recent Sixth Circuit case as follows: "Parents are entitled to retroactive reimbursement if the school district failed to provide the student with a FAPE and if the private placement chosen by the parents was reasonably calculated to enable the child to receive educational benefits." (underlining supplied) Deal v. Hamilton County Board of Education (6th Cir. December 16, 2004) 42 IDELR 109. That is not the case here where the private placement is found not appropriate. However, the Parents will be granted relief for some related services. I find no grounds for providing Parents with other relief requested.

CONCLUSIONS

1. is a child with disabilities and is entitled under IDEA to a free appropriate public education and related services.

2. The IEP's developed by the Public Schools are not "appropriate" because they fail to provide with sufficient and reliable one-on-one instruction in his academic courses and violate IDEA. needs both one-on-one and small group instruction. PS also violated procedure in one unjustified instance by failing to invite 's teacher to an IEP meeting.

3. The one-on-one training provided to by Lindamood-Bell Learning Processes Center did not provide him with a placement reasonably calculated to enable him to receive educational benefits because it failed to offer group experience and because he made no academic progress as shown in standardized tests. Therefore, the Parents are not entitled to reimbursement for the private placement at Lindamood-Bell.

4. The claim of a violation of Sec.504 of the Rehabiliation Act of 1973 is time barred and is not supported by the evidence.

5. Because the PS did not provide an appropriate education, Parents are entitled to reimbursement for private sign language instruction and for reimbursement and compensatory service for private speech and language instruction.

ORDER

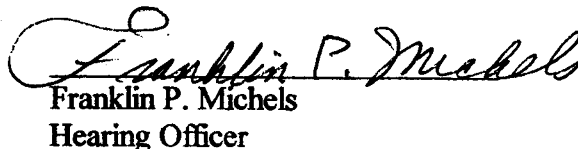
IT IS ORDERED that Public Schools provide with an appropriate education which will include reliable and intensive one-on-one instruction is his academic studies.

IT IS FURTHER ORDERED that Public Schools provide the Parents in this proceeding with relief as follows: (1) compensation for the private tuition costs for sign language instruction from September 2002 to January 2005 and (2) compensation for tuition for private speech and language instruction from February 2003 to July 2004 and compensatory services of three days a week for one hour to cover the gaps from September 2002 to February 2003 and from September 2004 to January 2005.

IT IS FURTHER ORDERED Public Schools submit an implementation plan to the parties, the hearing officer and to the Virginia Department of Education within 45 calendar days of the date of this decision.

RIGHT OF APPEAL A decision by the hearing officer in any hearing , including an expedited 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. 8 VAC 20-80-76 O

Date 1/6/05



Franklin P. Michels
Hearing Officer