

## CASE CLOSURE SUMMARY REPORT

*(This summary sheet must be used as a cover sheet for the hearing officer's decision at the hearing of the special education hearing and submitted to the Department of Education before the hearing officer's decision is rendered.)*



Schools  
School Division \_\_\_\_\_

\_\_\_\_\_  
Name of Parent(s)

\_\_\_\_\_  
Name of Child

August 5, 2004  
Date of Decision or Dismissal

Kathleen S. Mehfoud., Esq.  
Counsel Representing LEA

N/A (Pro se)  
Counsel Representing Parent/Child

Parents  
Party Initiating Hearing

Split  
Prevailing Party

Hearing Officer's Determination of Issues(s):

1. Whether LEA failed to provide a FAPE to child by failing to implement fully his IEP for the 2002-2003 academic year;
2. Whether LEA's proposed 2003-04 IEP for child, with academic classes in regular classroom supported by Resource class, was reasonably calculated to provide a FAPE;
3. Whether LEA's proposed 2004-05 High School IEP for child, with academic classes in regular classroom supported by Resource class was reasonably calculated to provide a FAPE;
4. Whether parents entitled to recover reimbursement for their costs of enrolling child in

Hearing Officer's Orders and Outcome of Hearing:

Child received a FAPE under 2002-03 IEP and 2003-04 IEP was reasonably calculated to provide a FAPE. Parents may not recover reimbursement for private school expenses. Proposed 2004-05 IEP not reasonably calculated to provide a FAPE.

LEA ordered to prepare revised IEP for Child for 2004-05 school year.

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 was previously mailed 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.

Peter B. Vaden  
Printed Name of Hearing Officer

  
Signature

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EDUCATION



In Re: } Findings of Fact  
Due Process Hearing } and  
} Decision

For the Parents and  
\_\_\_\_\_

*Pro se*

Counsel for  
Schools:

Kathleen S. Mehfoud, Esq.  
Reed Smith LLP  
901 East Byrd Street, Suite 1700  
Richmond, VA 23219-4068

\_\_\_\_\_

This matter came to be heard upon the request of \_\_\_\_\_ and  
(the "Parents"), the parents of \_\_\_\_\_ ("\_\_\_\_\_") for an Impartial Due  
Process Hearing under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §  
1400 *et seq.*, and the Regulations Governing Special Education Programs for Children with  
Disabilities in Virginia (the "Virginia Regulations"). The Parents assert a number of issues which  
they allege show that \_\_\_\_\_ was denied a Free Appropriate Public Education ("FAPE") by  
\_\_\_\_\_ Schools ("\_\_\_\_\_") during the 2002-03 school year and that  
\_\_\_\_\_ must pay for \_\_\_\_\_'s tuition and expenses at the \_\_\_\_\_ School for the summer 2003 term and  
the 2003-04 and 2004-05 school years. \_\_\_\_\_ contends that \_\_\_\_\_ was provided a FAPE  
for his 2002-03 school year at \_\_\_\_\_ Middle School and that it offered a FAPE to  
\_\_\_\_\_ under its Individualized Education Programs ("IEP") for the 2003-04 and 2004-05 school years.  
In addition, \_\_\_\_\_ contends that for procedural reasons, the parents are not entitled to  
reimbursement for \_\_\_\_\_'s private school expenses already incurred.

received the Parents' written request for this due process hearing on June 21, 2004. On June 22, 2004, provided information to the Parents on their procedural rights and safeguards, low cost legal assistance and voluntary mediation. The due process hearing was held before the undersigned hearing officer on July 19, 20 and 23, 2004 at 's offices in , Virginia. The Parents decided to open the hearing to the public.

was not present for the hearing. was represented by Director of Special Programs, and by counsel. The hearing was transcribed by a court reporter. The Parents and counsel for submitted written summation memoranda.

#### ISSUES ALLEGED BY THE PARENTS

In the Parents' written summation, they assert three issues for decision by the hearing officer. These are: (1) 's alleged failure to implement the 2002-03 IEP for at Middle School; (2) 's alleged failure to offer a FAPE to for the 2003-04 school year; and (3) 's failure to offer a FAPE to under its IEP prepared for the upcoming, 2004-05, school year. For their remedy, the Parents ask that be ordered to pay for 's private education at School retroactive to the summer of 2003 .

#### BURDEN OF PROOF

As the parties initiating this due process proceeding, the Parents bear the burden of proof. *See Weast v. Shaffer ex rel Shaffer*, 2004 WL 1688326 (4<sup>th</sup> Cir. 2004).

### FINDINGS OF FACT

Having carefully considered all testimony and arguments presented at the hearing of this matter, and taking into account the credibility and accuracy of the evidence, I make the following findings of fact by a preponderance of the evidence:

- is a fourteen year old student now enrolled in the year-round program in the Eighth Grade at , a private school in , Virginia. 's permanent residence is at the Parents' home in , Virginia;
- In May 1999, when was a third grader at Elementary School (" School") in , the Special Education Eligibility Committee found him eligible for IDEA services due to Other Health Impairment ("OHI") (Attention Deficit/Hyperactivity Disorder);
- Under his IEPs at School through the 2000-01 school years, had a successful learning experience and made satisfactory educational progress;
- For the 2001-02 school year, was promoted to the Sixth Grade at Middle School (" "). His 2001-02 IEP provided for instruction for all academic classes in the regular classroom with one period (approximately 75 minutes) in the Resource class every other day. ( operates on a block scheduling system where students generally attend each class only every other day.) The IEP accommodations included, *inter alia*: Organization: daily assignment sheet to be checked by teacher, homework instructions clear and provided in writing, weekly notebook check, use of word processor and spell

checker, priority for computer use, writing software available (Co-Writer and Inspiration), training for use of writing software, legible copy of lecture notes in content areas, and one-on-one TA assistance in the Resource setting;

- Upon a complaint filed by the Parents, the Virginia Department of Education Office of Due Process and Complaints ("ODPC") issued a Letter of Finding that [redacted] was in non-compliance with special education regulations for failing to provide all of the specified accommodations in [redacted]'s 2001-02 IEP. ODPC directed corrective action, including, *inter alia*, submission of an assurance statement that [redacted] would comply with all state and federal regulations regarding the proper implementation of an IEP. Upon [redacted]'s appeal, ODPC's Letter of Finding was upheld by a Virginia Department of Education hearing officer;
- Following [redacted]'s May 2002 triennial eligibility evaluation, Learning Disability ("LD") was added as a secondary disability. ADHD was retained as [redacted]'s primary disability;
- [redacted]'s 2002-03 IEP for the Seventh Grade at [redacted] included accommodations similar to those contained in his Sixth Grade IEP, with the notable change that he was no longer provided a one-on-one teaching assistant in the Resource class. Mrs. [redacted] gave her permission for the implementation of [redacted]'s 2002-03 IEP;
- All of [redacted]'s Seventh Grade classes were taught in the regular classroom except for his Resource class. [redacted] was placed in advanced honors sections for

Seventh Grade language arts and math;

- Through the fall of 2002, the Parents and \_\_\_\_\_'s teachers reported repeated occurrences of \_\_\_\_\_'s misplacing assignments, not turning in homework, forgetting about tests, not taking his planner to class, and similar issues. The Parents attributed these problems to \_\_\_\_\_'s ADHD disability;
- In January 2003, the IEP team approved an addendum to \_\_\_\_\_'s Seventh Grade IEP to provide that \_\_\_\_\_ would record all assignments in his planner with teacher reminders, to be signed by the teacher. \_\_\_\_\_ was to bring his homework folder to his Resource teacher each morning upon arrival at school;
- In the Seventh Grade, \_\_\_\_\_ began to show significant behavior problems in some classes which the Parents believed were caused by his disabilities. \_\_\_\_\_ received in-school discipline resulting in loss of class time;
- In March 2003, \_\_\_\_\_'s IEP team met with \_\_\_\_\_'s psychologist present. The team approved another IEP addendum to put in place a Behavior Intervention Plan for \_\_\_\_\_ to address noncompliance and inability to accept constructive criticism appropriately. Also in March 2003, the IEP Team declined the Parents' request for a one-on-one organizational aide for \_\_\_\_\_ in his Resource class and declined to provide after-school tutoring;
- In April 2003, pediatric psychiatrist \_\_\_\_\_, M.D. began to follow \_\_\_\_\_ for depression, following the onset of a major depressive episode that the Parents dated to December 2002. Since then \_\_\_\_\_ has been actively treated for depression with prescribed medications. According to Dr. \_\_\_\_\_' June 18,

2004 report, 's psychiatric diagnoses include Major Depression (in partial remission), ADHD, Specific Learning Disorder NOS and Pervasive Development Disorder NOS (mild);

- Prior to April 16, 2003, the Parents unilaterally enrolled ' in School's 2003 summer program to work on his weak study skills and to teach him organizational skills. The Parents did not request to provide Extended School Year ("ESY") services to and they did not, at that time, request to pay for 's summer enrollment at ;
- 's IEP Team met on June 11, 2003 to develop his Eighth Grade IEP. The accommodations developed by the IEP team were similar to those from prior IEPs at , including academic classes in the regular classroom with instruction in the Resource room for one period every other day. The Parents did not give their permission for the implementation of this IEP;
- In a letter dated June 16, 2003, the Parents informed principal, , and the IEP Team of their objection to 's continued instruction in the Resource class. The Parents' opposition was focused primarily on the Resource class' distracting environment and the paucity of one-on-one instruction time from the Resource teacher. The Parents sought alternative methods of direct instruction for , including tutoring, coaching or mentoring, or restructuring the curriculum.
- In a response notice dated June 23, 2003, 's Special Education Coordinator, , wrote that the IEP Team would consider the



alternatives requested by the Parents in a future meeting. In the same letter, Ms. [redacted] sent the Parents notice of the IDEA procedural safeguards.

- On August 11, 2003, [redacted] wrote the [redacted] Resource class teacher, [redacted], that the Parents had enrolled [redacted] at [redacted] for the winter term so that he might continue to thrive academically and socially and receive the appropriate support for his disabilities. She wrote that the Parents could not put [redacted] back into the environment [redacted] that [redacted] found to be so negative and hostile. Mrs. [redacted] wrote that they were also keeping [redacted] at [redacted] because of his psychiatrist's recommendation that it was an important component to treating his depression. Prior to enrolling [redacted] at [redacted] School for the 2003-04 school year, the Parents did not consider whether [redacted] would pay for [redacted]'s private school placement. They did not then request [redacted] to pay for his [redacted] School costs;

- [redacted] School focuses on students through the Ninth Grade with learning disabilities as well as emotional issues, social and organizational skills. All of [redacted]'s teachers at [redacted] School have endorsements in Special Education. While at [redacted] School, [redacted] has, by all accounts, made very satisfactory progress academically and with his social and behavioral issues.

- [redacted] was reevaluated for IDEA eligibility upon the Parents' request in early 2004. Based largely upon neuropsychological testing by [redacted]; Ph.D. and an auditory processing evaluation by audiologist [redacted], the basis of [redacted]'s eligibility was changed to LD (Primary Disability) and OHI (Secondary



Disability). The report concluded that \_\_\_\_\_'s processing deficits appeared to affect his learning more than his Attention Deficit/Hyperactivity Disorder ("ADHD") diagnosis.

- On May 4, 2004, \_\_\_\_\_'s IEP Team met to develop an IEP for \_\_\_\_\_'s Ninth Grade at \_\_\_\_\_ High School. The IEP services and accommodations are similar to those offered to \_\_\_\_\_ in his Eighth Grade IEP at \_\_\_\_\_, including one period every other day in the Resource class. The IEP provides that \_\_\_\_\_ will take all tests in the Resource classroom using earplugs and study carrels. The Parents did not give their permission for implementation of this IEP and they filed their request for a due process hearing.

#### DECISION

The principal issues alleged by the Parents in this due process proceeding are the following:

1. \_\_\_\_\_'s failure to provide a FAPE to \_\_\_\_\_ by failing to implement fully his IEP at \_\_\_\_\_ for the 2002-2003 academic year.
2. The inadequacy of \_\_\_\_\_'s IEP placement in a Resource class for the 2003-04 school year at \_\_\_\_\_ after such placement had failed to provide FAPE for the 2001-02 and 2002-03 school years.
3. The inappropriateness of the IEP offered for \_\_\_\_\_ for the 2004-05 school year at \_\_\_\_\_ High School because of the lack of appropriate placement, accommodations and related services based on \_\_\_\_\_'s identified individual

needs.

For their remedy, the Parents seek reimbursement of their expenses incurred for private placement of \_\_\_\_\_ at \_\_\_\_\_ School for the 2003 summer term and for the 2003-04 term and they ask that \_\_\_\_\_ be ordered to pay for \_\_\_\_\_'s tuition and expenses at \_\_\_\_\_ for the 2004-05 academic year.

\_\_\_\_\_ responds that tuition reimbursement would be inappropriate because \_\_\_\_\_ received a FAPE in the Sixth and Seventh Grades at \_\_\_\_\_ and was offered a FAPE under the 2003-04 Eighth Grade IEP and because the Parents did not comply with IDEA private placement notice requirements. \_\_\_\_\_ further alleges that the IEP it has offered \_\_\_\_\_ for the 2004-05 school year at \_\_\_\_\_ High School would provide a FAPE.

I. Notice Requirement

I find that the notice requirements to the Parents for this present due process proceeding were satisfied.

II. Eligibility for Special Education Services

The Virginia Regulations require that I make a determination of whether \_\_\_\_\_ has a disability. *See* 8 VAC 20-80-76.J.17.b. A child with a disability means a child determined to have a qualifying impairment, who by reason thereof, needs special education and related services. *See* 8 VAC 20-80-10. \_\_\_\_\_ and the Parents agree that at all times concerned, \_\_\_\_\_ has been eligible for and needs special education and related services. In the most recent Special Education Eligibility Summary from February 2004, the eligibility committee decided that \_\_\_\_\_ was eligible based upon LD (Primary Disability) and OHI-ADHD (Secondary Disability). Mrs. \_\_\_\_\_ signed the eligibility summary to reflect her agreement with this determination.

III. Reimbursement to Parents for \_\_\_\_\_'s 2003-04 Enrollment in \_\_\_\_\_ School

When a state receiving IDEA funding fails to provide a FAPE, the child's parent may remove the child to a private school and then seek tuition reimbursement from the state. *Sch. Comm. of Burlington v. Dep't of Ed.*, 471 U.S. 359, 369-70, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). The parent may recover if (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parents were appropriate to the child's needs. *Id.*, 471 U.S. at 370. *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 320 (4<sup>th</sup> Cir. 2004). The cost of reimbursement may be reduced or denied (1) if at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or if ten business days prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the foregoing information. *See* 20 U.S.C. § 1412; 8 VAC 20-80-66.B.4; *Cf. Pollowitz v. Weast*, 90 Fed.Appx. 438, 2001 WL 390035, 186 Ed. Law Rep. 90 (4<sup>th</sup> Cir. 2001) (applying Maryland law).

In this proceeding, the Parents seek reimbursement from \_\_\_\_\_ for the cost of \_\_\_\_\_'s enrollment at \_\_\_\_\_ School during the summer of 2003 and for the 2003-04 school year. As a prerequisite to recovering reimbursement for their \_\_\_\_\_ School costs, the Parents must establish that \_\_\_\_\_'s Eighth Grade IEP was inadequate to offer \_\_\_\_\_ a FAPE. In determining whether an IEP is appropriate and whether the school system has fulfilled its obligations to provide a student with FAPE, the proper inquiry is twofold. *See Board of Educ. v.*

*Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982): (1) whether [redacted] has complied with the IDEA's procedural requirements in developing and implementing the IEP and (2) whether [redacted]'s Eighth Grade IEP was "reasonably calculated" to enable [redacted] to receive educational benefits. *See id.*, 478 U.S. at 206-07; *DeVries By DeBlacy v. Fairfax County School Bd.*, 882 F.2d 876, 878 (4<sup>th</sup> Cir. 1989).

A. Procedural Requirements

Although the Parents contend that [redacted] failed to provide and implement consistently the accommodations required in [redacted]'s Sixth and Seventh Grade IEPs<sup>1</sup>, there was no evidence that [redacted] did not comply with the procedural requirements in developing [redacted]'s Eighth Grade IEP. (The IEP was not implemented because of the Parents' unilateral decision to remove [redacted] from [redacted].)

B. Was [redacted]'s proposed Eighth Grade IEP reasonably calculated to provide a FAPE?

The second prong of the *Rowley* inquiry is whether [redacted]'s proposed Eighth Grade IEP for [redacted] was "reasonably calculated" to enable [redacted] to receive educational benefit. *See Rowley*, 458 U.S. at 206-07. FAPE standards are satisfied "when the state provides the disabled child with 'personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.'" *A.B. ex rel. D.B. v. Lawson, supra*, 354 F.3d at 330, *citing Rowley, supra*, 458 U.S. at 203. IDEA "emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP." *Board of Educ. of Montgomery*

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<sup>1</sup> The parents' complaints are substantiated in part by a finding of non-compliance with the requirements of the Sixth Grade IEP by the Virginia Department of Education Office of Due Process and Complaints

*County v. Brett Y*, 155 F.3d 557 (Table, Text in WESTLAW), Unpublished Disposition, 1998 WL 390553 (4th Cir. 1998).

The Parents argue that \_\_\_\_\_'s proposed Eighth Grade IEP would not have provided a FAPE because the IEP continued the Resource class model from Seventh Grade under which the Parents contend \_\_\_\_\_ did not receive a FAPE. \_\_\_\_\_ argues the converse, that \_\_\_\_\_ derived significant and meaningful educational benefit under his Seventh Grade IEP, and that the Eighth Grade IEP was appropriate because it continued the same special education model. I find that the evidence establishes that \_\_\_\_\_ did receive a FAPE under his Seventh Grade IEP at \_\_\_\_\_'s special education teacher at \_\_\_\_\_, testified that \_\_\_\_\_ passed all of his classes with A's, B's or C's. Ms. \_\_\_\_\_, observed that \_\_\_\_\_ struggled initially in his advanced honors math class, but with the teachers' assistance, he showed improvement and was able to do well. His advanced honors language arts teacher, Ms. \_\_\_\_\_, testified that \_\_\_\_\_ "did well" in her class, obtained A and B grades, and scored an advanced pass in writing on the Virginia Standards of Learning ("SOL") test. \_\_\_\_\_'s Special Education Coordinator, \_\_\_\_\_, testified that standardized testing, performed by \_\_\_\_\_ School shortly after \_\_\_\_\_ completed Seventh Grade at \_\_\_\_\_ showed that \_\_\_\_\_ was at grade level in reading and mathematics.

The Parents' evidence, if correct, tends to support their claim that \_\_\_\_\_'s Seventh Grade teachers failed to implement fully the IEP, but does not refute \_\_\_\_\_'s position that \_\_\_\_\_ nonetheless received significant educational benefit under his Seventh Grade IEP. ( \_\_\_\_\_'s Resource teacher, Ms. \_\_\_\_\_, testified to the contrary that the accommodations were implemented.) Because I find that the evidence that \_\_\_\_\_ made educational progress in

Seventh Grade is not credibly refuted, for purposes of this issue of the appropriateness of the Eighth Grade IEP, it makes no difference whether \_\_\_\_\_'s Seventh Grade IEP accommodations were fully implemented.<sup>2</sup> *C.f., MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 534 (4<sup>th</sup> Cir. 2002), *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir.1990) ("[The child] has benefitted educationally from the instruction provided under the Board's IEP. Federal law requires no more.")

Having concluded that \_\_\_\_\_ received a FAPE under \_\_\_\_\_'s Seventh Grade IEP, I must find that the Parents have not met their reimbursement claim burden of proof to establish that \_\_\_\_\_'s proposed IEP for \_\_\_\_\_'s Eighth Grade school year was inadequate to offer him a FAPE. As previously stated, the Eighth Grade IEP offered by \_\_\_\_\_ essentially would have continued the services and accommodations provided in \_\_\_\_\_'s Seventh Grade IEP, notably including academic classes in the regular classrooms and one period every other day in the Resource class. The Parents are not therefore entitled to recover reimbursement for their costs of placing \_\_\_\_\_ at \_\_\_\_\_ School for the 2003-04 school year.<sup>3</sup>

IV. Reimbursement for \_\_\_\_\_'s Summer Session Enrollment at \_\_\_\_\_

The Parents also seek reimbursement for their costs of enrolling \_\_\_\_\_ in \_\_\_\_\_ School's 2003 summer session. Under the Virginia Regulations, a school system must provide

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<sup>2</sup> The LEA's failure to implement fully an IEP is of course a serious matter, which parents may address by filing a complaint with the Office of Due Process and Complaints (as \_\_\_\_\_'s parents did in 2001) or by timely requesting a due process hearing.

<sup>3</sup> Were the Parents' otherwise entitled to reimbursement, the cost of reimbursement could be reduced or denied due to the Parents' not having given \_\_\_\_\_ the required prior notice of their intent to enroll \_\_\_\_\_ at \_\_\_\_\_ School at public expense. *See* 20 U.S.C. § 1412; 8 VAC 20-80-66.B.4.

extended school year ("ESY") services only if a child's IEP team determines on an individual basis that the services are necessary for the provision of a FAPE to the child. 8 VAC 20-80-60.1.2. ESY services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. *MM v. School District of Greenville County, supra*, 303 F.3d at 538. The Parents decided to enroll in School's 2003 summer session to work on his weak study skills and to teach him organizational skills. They adduced no evidence that they had sought ESY services from for the summer of 2003 or that 's 2002-03 school year gains would have been significantly jeopardized if he were not provided with ESY services. The Parents therefore may not recover reimbursement from for 's 2003 summer school costs.

V. Appropriateness of 's Proposed 2004-05 IEP for  
has proposed an IEP for 's Ninth Grade year at High School. The Ninth Grade IEP closely follows the IEPs developed for at would be placed in the regular classroom for all classes, except for one period every other day in the Resource class. In addition, would provide 15 minutes per week of counseling by the high school guidance counselor to assist with the transition from School. The proposed IEP lists the following classroom and testings accommodations:

Preferential seating; will record assignments in assignment book and teacher in each class will check and initial; Will not be penalized with a lowered grade for poor penmanship; If work is illegible he may present orally or by computer; Legible copies of lecture notes and class work sheets (peer or teacher generated); Visual reminder to reread directions, recheck and edit work; Expectations clearly defined; All tests will be taken in Resource [classroom] using earplugs and study carrel.



The Parents did not give permission for this IEP to be implemented because they contend that it lacks key supports, accommodations and related services and does not take into consideration [redacted]'s needs to access the general curriculum in a small, low stimulation, classroom environment.

Returning to the *Rowley* two-part inquiry, *See Rowley, supra*, 471 U.S. at 206-07, I find first that there is no evidence that [redacted] has not complied with the IDEA's procedural requirements in developing the 2004-05 IEP. However, in light of changes in [redacted]'s situation since the Seventh Grade IEP was developed, notably the evaluations and recommendations of [redacted]'s psychiatrist, neuropsychologist and audiologist, I find that the evidence establishes that [redacted]'s proposed Ninth Grade IEP is not reasonably calculated to enable [redacted] to receive educational benefits.

In July 2003, [redacted]'s pediatric psychiatrist, Dr. [redacted] referred [redacted] for a neuropsychological testing/evaluation. Dr. [redacted] was concerned that during the course of his evaluation with [redacted] he presented "in a somewhat unusual fashion, suggestive of something more than an individual with ADHD and Learning Disabilities." Parents' Exhibit 14 Dr. [redacted] observed that [redacted] appeared to him to struggle with characteristics of an Aspergers/Nonverbal Learning Disorder ("NVLD") spectrum disorder. [redacted], Ph.D., [redacted] of the University of Virginia's Pediatric Neuropsychology Lab, evaluated [redacted] in September 2003. Dr. [redacted] found clear evidence of auditory inattention in the presence of ambient noise and referred [redacted] for a central auditory processing evaluation at the University of Virginia Speech-Language-Hearing Center. Parents' Exhibit 13 The audiologist, [redacted], found that [redacted] had an impairment in his speech discrimination abilities in noise. Parents'

Exhibit 8 At the Parents' request, [redacted] reevaluated [redacted] for special education eligibility in February 2004. Relying largely upon the findings of Dr. [redacted] and audiologist [redacted] the eligibility committee found that [redacted]'s primary disability had become LD. ADHD was changed to a secondary disability. The eligibility committee reported that [redacted]'s processing deficits appear to affect learning more than his ADHD diagnosis. School Board Exhibit 56

Dr. [redacted] and Ms. [redacted] testified at the due process hearing. Dr. [redacted] stated that [redacted] has several special kinds of needs including lingering depression, problems in the auditory sphere, major attention deficits, and some features of Aspergers disorder. He opined that it was necessary that [redacted] be taught in a small classroom setting that would allow a good deal of close interaction with the teacher and where the amount of ambient distraction was reduced. Ms. [redacted] testified that because of [redacted]'s impairment of auditory discrimination, if he is to be taught in a classroom with more than 10 students, it is essential that [redacted] have full time use of an FM training system. This is an ear device which receives direct transmission of the teacher's voice from a microphone worn by the teacher.

Dr. [redacted] and Ms. [redacted]'s opinions were supported by a written report from [redacted]'s psychiatrist, Dr. [redacted], M.D., which stated that [redacted] needs intensive support at the time instruction is being offered due to the interplay of his struggles with distractibility, auditory discrimination and other neurologic processing deficits. Dr. [redacted] opined that support for [redacted] needs to be provided in a highly structured, low stimulation environment. Parent's

Exhibit 4

The Ninth Grade IEP offered to [redacted], which provides for academic classes in the regular classroom, disregards Dr. [redacted]'s and Dr. [redacted]' recommendations for small class

sizes and support in a highly structured, low stimulation environment. The IEP Team omitted Ms. [redacted]'s alternative recommendation of an FM training system because the team doubted that [redacted] would use it. [redacted]'s experts, Coordinator for Special Education and Resource teacher, [redacted] both opined that the Ninth Grade IEP offered for [redacted] is appropriate, but they neither contradicted nor even directly addressed the opinions of Dr. [redacted], Dr. [redacted] and Ms. [redacted] concerning the effect of large classroom noise and ambient distractions on [redacted]. Nor did they explain how the concerns of Dr. [redacted] and Ms [redacted] were addressed in the IEP. [redacted] School Psychologist, [redacted] opined that [redacted] could be educated in a regular classroom, but with the modifications provided by audiologist [redacted] (which are omitted in the IEP).<sup>4</sup> IDEA requires great deference to the views of the school system's experts. *See, e.g., A.B. ex rel. D.B. v. Lawson, supra*, 354 F.3d at 328. However in this case, Ms. [redacted]'s and Ms. [redacted]'s opinions about the appropriateness of the Ninth Grade IEP were conclusory and did not address the concerns of Dr. [redacted] and Ms. [redacted], upon whose reports [redacted]'s eligibility committee had relied only four months earlier. I find that [redacted]'s failure to address [redacted]'s reported need for small class size (or the FM trainer alternative) in his IEP makes it unlikely that [redacted] would benefit educationally from the IEP as it is now written.

High School has an extensive range of options for special education support.

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<sup>4</sup> Former [redacted] School Psychologist [redacted], Ph.D. opined that the majority of [redacted]'s education should take place in a regular classroom with accommodation and some Resource support. Dr. [redacted] has had no contact with [redacted] since she chaired his 2002 eligibility committee and she did not address the specifics of Dr. [redacted]'s or audiologist [redacted]'s recommendations. I discount the importance of her testimony with respect to the issue of the appropriateness of [redacted] 2004-05 IEP.

Ms. [redacted] testified that there were collaborative classes and self-contained classes in addition to the resource class option.<sup>5</sup> [redacted] is also able to provide the FM trainer recommended by Ms. [redacted] for [redacted]. Therefore, although I find that [redacted]'s proposed Ninth Grade IEP is not reasonably calculated to provide a FAPE to [redacted], it appears that [redacted] has existing or available services and accommodations which it could provide [redacted] that would meet the requirements of IDEA and the Virginia Regulations. The appropriate remedy is for the IEP Committee to revise [redacted]'s Ninth Grade IEP to address the class size concerns and [redacted]'s auditory discrimination disorder to which Dr. [redacted] and Ms. [redacted] testified – not to place [redacted] in a private school at public expense.

#### ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. [redacted] Schools shall convene a meeting of [redacted]'s IEP team to prepare a revised Ninth Grade IEP for [redacted] in conformity with this decision.
2. The Parents' request for other relief in this due process hearing is denied.
3. [redacted] Schools shall develop an implementation plan within 45 calendar days of the date of this decision which must state how and when this


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<sup>5</sup> Ms. [redacted] explained in her testimony that the Least Restrictive Environment consideration was a factor supporting regular classroom placement for [redacted]. The Least Restrictive Environment requirement reflects the IDEA's preference that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled." See 20 U.S.C. § 1412(a)(5) (2000); 34 C.F.R. § 300.550(b)(1). However, this preference for "mainstreaming" disabled students is not absolute; § 1412(a)(5) permits the delivery of educational services to disabled students in less integrated settings as necessitated by the student's disability. *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir.2004). See *AW ex rel. Wilson v. Fairfax County School Bd.*, 372 F.3d 674, 681 (4th Cir. 2004)

decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing, the hearing officer and the Virginia Department of Education.

Right of Appeal Notice

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.



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Peter B. Vaden, Hearing Officer  
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(434) 923-4044

August 5, 2004