

Local Hearing

State Le(Appeal _____

03-099

CASE CLOSURE SUMMARY REPORT



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

Public Schools
School Division

Name of Parents

Name of Child

Date of Decision

Esg.
Counsel Representing LEA

Esg.
Counsel Representing Parent/Child

Parents
Party Initiating Hearing

Public Schools
Prevailing Party

Hearing Officer's Determination of Issue(s): Whether Parents, after unilateral withdrawal of Child from School, are entitled to reimbursement for The costs of: a) ESY placement of Child at i Clinic, b) private schooling of Child at Academy for the and school years, and c) various treatment and evaluation costs?

2: Whether School's proposed IEP's for Summer ESY Services and School Year are appropriate (Rowley)?
Hearing Officer's Orders and Outcome of Hearing:

- 1) Parents are not entitled to any reimbursement; and
- 2) The ESY IEP and IEP for Child's proposed by School are and were reasonably calculated to provide Child with FAPE.

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.

Printed Name of Hearing Officer

Signature

A telephonic pretrial was held on June 26, resulting in a First Pretrial Order denying Parents' request for an expedited hearing and setting the above dates for the hearing and decision. At the request of both parties a second pretrial conference was held by the undersigned on July 10, at the Monitoring and Compliance Office of _____, Mrs. _____, Mr. _____ and Mr. _____ (Monitoring & Compliance, _____) attended. At this time, Parents advised the undersigned that their _____ would be attending ESY at the _____ facilities in Washington, D.C. They again requested that _____ pay for said program. _____ refused. Parents requested a continuance in order to obtain counsel. Upon proof that such extension would not adversely impact the education of Student, it was granted. (See Second Pretrial Order)

Parents retained _____, Esquire. Upon a showing by Parents' counsel, joined in by _____ counsel, that no educational injury would occur to Student (since he would be attending private schooling for both the ESY and the _____ school year) the undersigned ordered the trial herein to begin on August 13, _____ and continue thereafter until concluded. (See Third Pretrial Order dated July 17, _____)

Testimony was taken on August 13, 14, 15, 21, 26 and September 4, _____. By agreement of the parties (there being a showing that no injury would occur to Student who is in private school) briefs were set for October 6 and October 13, _____ (Reply), and a final decision by November 4, _____. This decision followed.

II.

ISSUES

Parents, at the Second Pretrial Hearing, refused the continuing offer by _____ to re-open the _____ IEP in order to consider their concerns (See e.g., Tr. 1812, School Ex.126). Parents advised the undersigned at the Second Pretrial Conference that they had reached their tolerance limit with _____ and henceforth were going to educate their son at private schools. Accordingly, by agreement between the parties, in which the undersigned concurs, the issue in this case is whether Parents are entitled to reimbursement for the expenses of past and future private schooling for their son. More specifically:

1. Are Parents entitled to be reimbursed for the expenses, including transportation, of educating their _____ at _____ Clinic for the _____ ESY?
 - a. Is the IEP prepared by _____ for Student for the _____ ESY reasonably calculated to provide _____ with an appropriate ESY education plan?; and if not
 - b. Will _____ clinic services provide Student with an appropriate ESY education?

2. Are Parents entitled to be reimbursed for the expenses, including transportation, of educating their _____ at the _____ Academy for the school years _____ and _____ ?

a. Is the June 19, IEP proposed by reasonably calculated to provide Student with a free appropriate public education ("FAPE"), and if not;

b. Will the proposed schooling at provide Student with an appropriate education?

3. Is liable for the costs of Student's ocular remediation over the past two (2) years by Dr. ?

4. Is liable for the costs of evaluations by Parents' experts?

5. Were there procedural defects at the June 19, IEP meeting of such magnitude as to require to pay for Student's private education at Clinic, , remediation by Dr. and the expenses of various evaluations by Parents' experts?

III

SUMMARY OF TESTIMONY

(a)

Ms. _____

Ms. _____, who has a Masters Degree in Special Education, is the special education ("special ed") department head at _____ (Tr. 31 - 36). She has over 13 years of experience in special ed (Tr. 36). She is fully familiar with Student often going into _____ classes at _____. She participated in all of _____ IEP Committee meetings at _____, and was in frequent contact with Parents (Tr. 39 - 44). She described Student as "a very engaging young man who wants to do well", and "who tries very hard" (Tr. 45), but whose academic performance is well below grade level (Tr. 44 - 45, 50)^{1/} due to _____ processing deficits (Tr. 51 - 52). Student according to Ms. _____ also is emotionally fragile and tends to withdraw (Tr. 50). _____ tested well below grade level (Tr. 402 - 405), School's Exs. 40, 60), in some areas as much as 4 years (Tr. 408-9).

Ms. _____ pointed out that when Student first came to _____ in the 9th grade, it was agreed by Parents and _____ that _____ would be placed in special education classes for _____ core subjects (Biology, Written Expression (English), Social Behavior, Reading, Math) (Tr. 60 - 62). _____ also was in a Basic Skills class where he could decompress and talk over his problems, get help with homework, testing and the like (Tr. 60 - 62).

Student's special ed classes, except for Basic Skills, consisted of ten or fewer learning disabled students comprised of the same peer (age) group (Tr. 62 - 63), Basic Skills while containing less than ten students but might have some students from different peer groups

^{1/} Based upon testing performed by _____ Ms. _____ believed Student to be "Below Average" in his IQ functioning (Tr. 570-6).

(Tr. 60 - 62). divides special ed into two groups - one for learning disabled children (wherein student was placed) and another for emotionally disturbed students; each having their own program (Tr. 64 - 5).

Student, who received 75 hours of special ed per month, all taught in self-contained classes taught by certified special ed teachers, participated with the general student body in his non-core subjects, physical education and band (Tr. 61, Tr. 390-2).

Student received good grades and passed into the 10th grade. In this regard, Ms. pointed out that the grading system for special ed students gave special ed teachers broad discretion as to what weight to assign to test scores (See e.g. Tr. 79-80, 102-108). Thus, a student could achieve passing grades in special ed subjects even though test grades for those subjects was well below peer level passing (Tr. 102-108). The impact of this anomaly is that to earn a standard diploma students must pass the requisite minimum number of Standards of Learning (SOL's) tests. SOL's are content and grade specific. Therefore, a special ed student, such as here, could progress from grade to grade with peers and yet be unable to pass SOL's - and thus unable to obtain a standard diploma (Tr. 102-108). In this situation, according to Ms. , a special ed student could earn a "modified" standard diploma (Tr. 106-8) which required only an 8th grade SOL passing grade in two subjects. Parents were told about this grading anomaly (Tr. 107-110).

Parents pressed for "co-teaching" (sometimes called "team-teaching"). Under this method, special ed students are placed in the general class, taught by general ed teacher - but they have a special ed teacher or assistant assigned to them and proceed at a different pace and/or at a different peer level (Tr. 102-8). English was team-taught in the 10th grade (Tr. 391).

According to Ms. , Student received the modifications, teachings and accommodations called for by IEP (Tr. 394, 395-401). And, by comparing various test scores, Ms. testified that Student had made "genuine progress" in core subjects during the school year, as well as maintaining "place in line" as class advanced to the next grade level (Tr. 406-410). Ms. also believed that Student was progressing at or near cognitive level (Tr. 409).

A substantial part of Ms. 's testimony related to the IEP Committee meeting and the resultant proposed IEP for the school year. After some scheduling delays (due to efforts to have contract services available), the IEP Committee met at 2 P.M. (Tr. 421). Parents had advance oral notification confirmed by written notice, and attended (Tr. 418). At the beginning of the meeting Parents were given a draft of the proposed IEP (Tr. 461-3). A certain amount of information was in the draft at the start, and more was added during the meeting. This procedure was followed, according to Ms. , because the preparation of the IEP is a team process (Tr. 422-3, 461-3), and all the team members, including Parents, have the opportunity to provide their input (Tr. 422-424). Thus, as the meeting progressed various IEP team members hand wrote their comments, suggested long term and short term goals, accommodations and the like on the draft (Tr. 422-426, 429-230).

Ms. testified that the substance of the various goals and components of the IEP were discussed in front of Parents by team (Tr. 426-428). However, Parents, according to Ms. , were interested only in whether would place (at its expense) Student in the Clinic for the extended school year (ESY) - thus there was little or no discussion by Parents as to other matters in the IEP (Tr. 428). When refused to agree to (Tr. 440) - this because it believed it offered a more appropriate ESY plan (Tr. 440), Parents rejected the IEP (Tr. 428-429, 462-3). Col. left shortly thereafter advising the IEP team that it would hear from lawyer (Tr. 460).

Ms. went over the draft IEP proposed by or the school year testifying that was proposing 60 hours per month of special ed in self-contained classed for Student's core subjects which the IEP team felt was the "best environment" for Student (Tr. 432-3). A "team-taught class, however, was suggested for English (Tr. 433).

Ms. testified that wished to come up with a mutually agreeable IEP, as had been done in the past (Tr. 460), and would set up an additional meeting on the IEP if there were any aspects of the proposed IEP that Parents wished to discuss further (Tr. 438-9). According to Ms. , Parents were not interested in any further meetings (Tr. 439). Ms. testified, however, that the IEP prepared at the June 19, meeting was appropriate and would provide real educational benefit for Student (Tr. 461-2).

Ms. also described, in detail, the ESY IEP suggested by for the summer of 2003 (Tr. 430-440). It was Ms. opinion that proposed ESY IEP (which called for 120 hours/month of special education) was appropriate and would prevent regression from earlier taught matter. She felt this intensive program would be of real benefit - helping Student to address SOL's and possibly to obtain, as desired by Parents, a standard diploma (Tr. 441-2, 443, 447-454).

(b)

Ms. _____

Ms. , a certified speech and language teacher at , has 17 years of experience in this field (Tr. 116-117). She has been working with Student for two years (Tr. 120), teaching him to be able to decode words, their sounds and meanings (Tr. 121) as well as phonemic awareness (Tr. 122). She testified that every session consisted of retrieving earlier learned material and then building upon it (Tr. 128-129).

Ms. participated in the June 19, IEP meeting - suggesting that Student's speech and language sessions be increased in order to help him interpret information and logically connect it, this being an area where Student had difficulty (Tr. 132-133).

Ms. testified that Student had been making substantial progress with phonemics (Tr. 162-4) that she would be working with Student at if he returned. She was confident that she could provide with substantial educational benefit at for the next two years (Tr. 138-9). While she was positive that Student needed her services, she was unsure whether Student, even with her assistance, could pass all of SOL's (Tr. 147-8). Ms. was of the opinion, however, that by doubling speech and language services (as per the June 19, 2003 IEP) chances of passing his SOL's would be increased (Tr. 202-203).

(c)

Ms. is an experienced expert in special ed. She is familiar with the methodology (Tr. 210-213). According to Ms. there is no cure for processing deficits, which are neurological disorders. There are, however, numerous strategies to teach children with such deficits how to compensate for and remediate their disorder (Tr. 214, 219-223). markets but one type of compensation program (Tr. 221-222). utilizes other techniques (Tr. 220-221). Ms. was of the opinion that there is no single best answer. The best method to educationally address processing problems, according to Ms. , is via experienced special ed teachers with expertise in assessments who work with each child in order to find the best combination of strategies for that child (Tr. 222-3). According to Ms. , is doing as well as anybody else in the field (Tr. 229-231), particularly in helping a child with processing disabilities to pass their SOL's and earn a diploma (Tr. 231-2).

On rebuttal, Ms. , testified that she had reviewed the material supplied the prior day. She questioned whether was producing real results (Tr. 1476-9).

(d)

Mr. has been a school psychologist for 30 years. He is certified in Virginia, endorsed by the National Association of School Psychologists (Tr. 242-245), and has performed thousands of student psychological evaluations (Tr. 245). Most of his testimony related to his evaluation of Student in early (See School Ex. 61).

He first met with Student and Parents during the first quarter of Student's school year (9th grade) (Tr. 261). Since then he has been working with Student's teachers at on a continual basis regarding teaching methods for Student (Tr. 261-3).

In February, , after reviewing Student's earlier psychological tests and evaluations, he extensively tested and evaluated Student (School Ex. 61, Tr. 269-288). These revealed that Student had serious cognitive defects (Tr. 280), particularly with regard to

visual and audiological decoding (School's Ex. 61). And, further, that Student encountered greater cognitive difficulties as the subject matter became more complex and/or abstract (Tr. 286).

Mr. _____'s extensive evaluation, albeit suggesting a slightly higher IQ (namely 78)^{2/} than Dr. _____'s evaluation (Tr. 307), essentially confirmed the earlier psychological evaluations (Tr. 270-277, 298). According to Mr. _____, in view of Student's cognitive deficits and processing problems, it would "... not be reasonably probable for Student to pass his high school SOL's" (Tr. 362-3, 378-382). This because the high school SOL's in Math, Science and English required a substantial degree of complex and abstract reasoning which is the weakest portion of Student's cognitive functioning (See e.g., Tr. 312-314, 270-277, 288). According to Mr. _____, Student, when compared to _____ peers' IQ, would be in the lower 5% (Tr. 274).

Mr. _____ supported Student's education by way of self-contained classes utilizing concurrent visual and oral delivery of information.

(e)

Ms. _____

Ms. _____ is a speech - language pathologist called by Parents. She testified that she had been treating Student in _____ at _____ (Tr. 574), which for reasons not pertinent here dropped her services (Tr. 574-575).

(f)

Dr. _____

Dr. _____ is a clinical psychologist specializing in neuropsychology, who is well respected and published in his field (Tr. 597-599). He was asked by Parents to evaluate Student in order to ascertain Student's disabilities and advise on how best to ameliorate them (Tr. 605-6).

Dr. _____ evaluated Student in _____ (Parents' Ex. 41, Tr. 605). At this time, he determined Student's overall IQ to be 68 (Parents' Ex. 41), which is in the mildly mentally retarded to borderline range (Tr. 612-613). Dr. _____ tests reconfirmed that Student suffered serious auditory and visual processing deficits (Tr. 626, Parents' Ex. 41, Tr. 704-705). Dr. _____, however, was unsure of whether Student's low IQ was justified, this because Student's processing deficits adversely affected _____ ability to take tests (Tr. 613-620). He thus,

^{2/} An IQ of 60 - 69 is Mildly Retarded; 70-79 is Borderline; 80-89 is Low Average (Tr. 272-275).

believed that Student could function at a higher level, although in addition to processing deficiencies had "significant academic achievement difficulties extending down to basic reading capability".^{3/}

Dr. [redacted], in reviewing the proposed [redacted] IEP, felt that specific remediation of the Student's processing deficits had not be sufficiently addressed therein (Tr. 633-641). Dr. [redacted] further noted that as the scholastic task increased in difficulty Student's needs for assistance increased (Tr. 642). Dr. [redacted] believed that Student's IEP should include specific stated interventions to address [redacted] processing disorders (Tr. 648-652).

Dr. [redacted] also felt that the small improvement in Student's test scores in various subjects taken in [redacted] when compared with the results of similar tests taken in [redacted] were not significant (Tr. 655-660). However, he admitted that Student showed real gains in reading comprehension, written language and expression (Tr. 656-657).

Dr. [redacted] opined further the proposed program at [redacted] (which caters to children needing special ed) would be appropriate (Tr. 668). Dr. [redacted] added that when comparing a public school with a private school, for students with deficits similar to Student's he recommended private school placement (Tr. 667-669, 718).

Upon cross-examination, Dr. [redacted] confirmed that Student's processing deficiencies could not be cured - only minimized (Tr. 689-690). Dr. [redacted] was not sure the [redacted] intervention was an educational methodology (Tr. 698), but testified that it was one of accepted methodologies used to address processing deficits.

Dr. [redacted] agreed that there were not significant differences between his report and Mr. [redacted]'s (Tr. 702-703). Dr. [redacted] conceded that Student had been receiving some educational benefit at [redacted] (Tr. 711-12); and that the basic bone of contention here, according to Dr. [redacted], was what is enough - what is best - what should special ed provide as a minimum (Tr. 713). Dr. [redacted] concluded that Student would be better served by finding an employment skill that did not substantially rely upon academic skills - which required "whole host of supportive services to [be] able to improve [redacted] functioning" (Tr. 731). And, as per his report, Student needed to be given information slowly - visually and orally - in a smaller setting. Dr. [redacted] observed also in his report that he believed Student would encounter difficulties as his academics increased in difficulty - this because of his processing disorders which adversely impact [redacted] advanced cognitive functioning - thus alternatives to a standard academic program should be considered (Parents' Ex. 41, Recommendation 12).

^{3/} Parents argue that Dr. [redacted] placed Student's IQ at a minimum of "Average" (Parents' Brief p. 19), citing page 620 of the transcript. Dr. [redacted] actually testified: "...assuming the processing deficits were removed what you would see is at a minimum maybe average range for him (Tr. 620).

(g)

Dr.

Dr. is a clinical psychologist specializing in neuropsychology (Tr. 738-739), particularly in the area of biofeedback (Tr. 741). Dr. testimony was highly technical and based largely upon electroencephalographic tests he performed upon Student in 2003 in order to ascertain Student's disabilities and possible clinical interventions (Tr. 737-744).

Dr. testimony confirmed the evaluations of Dr. and Mr. , that Student has serious auditory and visual processing problems, but once information is received by (by repetition in brief concise parcels) can integrate it at a slightly higher level than cognitive IQ score would suggest (Tr. 758-767).

Dr. urged that Student be supplied with specific therapy aimed at utilizing the brain's ability to find alternative routes (called neuro-plasticity) (Tr. 770-771). Much of this therapy is more medical than educational (Tr. 770-771). However, according to Dr. some very good learning tools are now available (Tr. 771). While Dr. agreed with the long term and short term goals found in the proposed IEP (Tr. 784-786), he felt the IEP should be more specific in setting forth how information was to be provided (Tr. 783-786). He urged a concrete, standardized, repetitive process (Tr. 774-5), namely a repetition of basic skills, which, in turn, increase neural plasticity (Tr. 780-781, 785-787). And, in his opinion, an IEP should specifically set forth how the delivery of processing remediation would accomplish it (Tr. 786-787). Dr. also felt it would be difficult for a special ed teacher in a Basic Skills class to give the "kind of intense drilling", reinforcing and monitoring that is necessary to do the neural rewiring that is necessary for someone like [Student] to be able to excel in the areas of deficits (Tr. 821).

Dr. had no problems with goals set forth in the 2003 - 2004 IEP, but was concerned with the lack of specificity as to how this would be accomplished (Tr. 783 - 786).

(h)

L.O.D.

Dr. an optometrist, along with her associate Dr. , has been treating Student for over two years to correct deficiencies in binocular vision caused by convergence and vertical strabismus (Tr. 825-827). While Student has had two operations to correct his deficiencies in coordinating parallel movement of eyes, still needs further medical therapy to improve these problems (Tr. 826-829). is improving, but still has a way to go (Tr. 829).

In Dr. [redacted]'s opinion, because of Student's aforesaid ocular deficiencies, [redacted] is easily distracted and needs a small class (Tr. 832-833). Considering [redacted] processing problems, along with [redacted] vision problems, she felt [redacted] is best tested by combining verbal and visual input (Tr. 833).

(i)

Dr.

Dr. [redacted], a licensed school psychologist and experienced school administrator, is Head of [redacted] Academy (Tr. 855-6). [redacted] is a small private school catering to students with mild to moderate learning disabilities (Tr. 856). It is composed of students who have an IQ of 90 or above in either verbal or visual performance (Tr. 860). It agreed, however, to accept Student in the belief that [redacted] actual functioning was in the Low Average Range (Tr. 861-862). It currently has two students with similar interferences as Student; and these two students were able to "hold their own" (Tr. 863-864). The aim of [redacted] is to prepare its students for college or "post secondary options" (Tr. 856).

[redacted] has small sized classes, usually less than ten (Tr. 864), taught by content certified teachers, who are trained in areas of accommodations and alternate strategies (Tr. 866). [redacted] provides structure via pairing each student with a planner, who, on a daily basis, mentors the student (Tr. 866-867). However, it offers great flexibility for the student (Tr. 866) designing a program which is best suited for each student (Tr. 862-3). Thus, it provides ancillary services, such as physical and occupational therapy (Tr. 866). Speech language therapy is provided via [redacted] Speech Language teachers who are trained in the [redacted] techniques (Tr. 872). [redacted] also has available a "tremendous" amount of "assistive technology", such as the Kurzweil Scan reader, computer programs, headsets, graphic organizers and wireless laptop computers (Tr. 867-868). Information is presented visually and orally, usually concurrently (Tr. 870-871).

Student at [redacted] would continue [redacted] therapy (Tr. 878, 907).

At [redacted] Student would not be required to take an "SOL", in order to graduate (Tr. 864, 898). [redacted] does not prepare IEP's for its students. Instead it prepares a brief educational summary guide (Tr. 891-892).

Ms. [redacted] was confident that [redacted] could provide an appropriate education for Student - one which would fully capitalize on [redacted] strengths and abilities (Tr. 876).

(j)

Ms.

Ms. [redacted] is the clinic director for the Washington, D.C. [redacted] 4/ (Tr. 914). She testified that the D.C. clinic extensively tested Student, ascertained his processing deficiencies, met with Parents and proposed a 240 hour intensive processing remediation program for Student (Tr. 923). She discussed the three specific programs suggested for Student, namely a math program ("Cloud Nine"), Phonemic Sequencing ("LIPS") and a visualizing and verbalizing program ("Seeing Stars") (Tr. 919-921), as well as the essence of the [redacted] techniques (Tr. 958-967). She pointed out that these programs were given on a one-to-one basis by a trained clinician in one of two rooms each partitioned by cubicle dividers (Tr. 938). These rooms are in a suite located in an office building (Tr. 938-9). [redacted] is basically concerned with processing remediation as distinguished from educating.

(k)

Col.

Col. [redacted], Student's father, is [redacted] for the U.S. Air Force (Tr. 979). He requested the instant due process proceeding because he strongly believes that: (1) his [redacted], against Parents' request, has been improperly placed in self-contained classes (which according to Col. [redacted] - but denied by [redacted]) - contain emotionally disturbed children, who adversely impact Student's self-esteem; (2) that [redacted] has failed to provide - or removed earlier offered - related services; and (3) most importantly, that [redacted]'s proposed 2003-2004 IEP "... is an outright fraud" (Tr. 980-981).

Col. [redacted] testified that when he was transferred to the Washington, D.C. area in 1998, he moved to [redacted] in order to avail Student of the [redacted] system (Tr. 983-4). Student was enrolled at [redacted] Elementary, where [redacted] finished the fifth grade (Tr. 984). At that time [redacted] gave Student extensive tests (Tr. 985), which revealed Student's processing deficits.

Almost from the beginning, Parents and [redacted] were in conflict over a perceived denial of accommodations, services and placements (Tr. 991). Thus, for example, speech and language therapy was authorized in [redacted], removed in [redacted] and after much insistence by Parents, reinstated by [redacted] in [redacted] (Tr. 996-999). Further, according to Col. [redacted] was [redacted] Student was never provided with needed assistive technologies or peer help at [redacted] or [redacted] (See e.g. Tr. 1003-1005), although matters improved at [redacted] (Tr. 1004-5). And, according to Col. [redacted], Student's time at [redacted] Middle School was a nightmare (Tr. 1012-1013, 1219-1222).^{5/}

4/ [redacted] is a remediation clinic with some 44 centers scattered throughout the United States. (Tr. 977-978)

5/ Col. [redacted] reviewed many of the earlier school documents - not in issue here - to establish a pattern by [redacted] of failing to provide needed services and accommodations (Tr. 1038-1062).

Col. noted that Student, over Parents' wishes, was not placed with the general population when Student started at . At Student received core education in special ed classes (Tr. 1007). did take PE and band with the general school population (Tr. 1007). Student, in 2001, was placed in a general English class with co-teaching (team taught) instruction (Tr. 1011-1012). Col. also criticized for not utilizing standard texts in its special ed classes - which he felt caused homework problems and detracted from Student's ability to pass SOL's (Tr. 1024).

Col. reviewed Student's history with several of earlier SOL's, noting that Student obtained 398 in high school history, 382 in Biology and 374 in Algebra. 400 is passing (Tr. 1019-1023).

Col. then recited various proposals by Ms. - which if followed - in judgment, would prevent Student from obtaining a standard diploma, an important goal to Parents (Tr. 1027-1031). And, Col. was most upset at the failure of to provide Student with taped book texts - which he felt would be of great help to Student (Tr. 1030-1034).

Col. also objected strongly to the initial program at which gave Student reduced work - thereby diminishing opportunity to pass the high school SOL's. ^{6/}

Col. admitted that Parents had consented to the earlier IEP's - this because they couldn't afford the cost of a due process hearing. Finally in 2003, Parents drew the line and objected to the current proposed IEP (Tr. 1035-1036, 1007-1008).

Matters had earlier reached a boiling point, when in mid-2003, wished to change Student's designation from Multiple Disabilities to Learning Disabled. Col. felt this was part of a plan to excuse for its failure to provide needed services and accommodations (Tr. 1046-1048); that dealing with was like "talking to that wall" (Tr. 1050); and that simply chose to ignore Student's potential so it could go on to educating other kids (Tr. 1060). In May, , after three meetings, Col. said he finally prevailed upon to retain Student's designation as Multiple Disabilities (Tr. 1068-1070).

It was in this highly charged atmosphere that the parties approached the June 19, IEP meeting. Prior thereto Parents had investigated the program - which they felt was vital to Student's progress. Accordingly, Col. sent to the day before that meeting, an outline of his ESY presentation (Tr. 1083, 1095). If would agree to pay for this remediation; Col. intended to return Student to (Tr. 1083, 1096-1098). When around 4 P.M. refused, this, according to Col. , was the "final straw" (Tr. 1098). At 4 P.M. Col. (who had another appointment) left telling it would hear from his attorney (and/or see him in court) (Tr. 1099).

6/ Parents insisted that Student work towards a standard diploma (Tr. 1066)

A considerable time was spent by Col. minutely comparing each page of the IEP handed to him when the June 19, IEP meeting began at 2 P.M. and the IEP sent to Parents after that meeting had been concluded (Cf. Tr. 1086-1101). This comparison revealed many changes. In the initial IEP handed to Parents some pages consisted of xerox copies of pages in the preceding year's IEP (i.e., for). Comments and changes were then written to these pages at the meeting or shortly thereafter. Other pages revealed the addition of goals and short term objectives; some boxes for services were unchecked in the initial draft, but checked in the draft sent to Parents. Some changes were made to accommodate Parents. Other changes were directly contrary to their views. Some pages were seen and discussed; others not. And, the goal of Student being taught commensurate with ability as requested by Parents never appeared. Further, several of added comments were in different handwriting.

Col. felt that the differences between the two drafts revealed that the June 19, meeting was but a sham - particularly since many comments were in Col. 's eyes self-serving excuses by . And, Col. was adamant that much material on the copies mailed to Parents were not even discussed while he was present.

Given the long-standing dispute between Parents and (such as the refusal by to pay for) ESY services, the continuing refusal (in Col. 's eyes) by to try to teach Student up to full ability, and its failure to provide promised services) the differences between the initial IEP and the mailed IEP closed the door to any further trust by the Parents in the system (Tr. 1147-1148, 1280). Thus, Col. vowed that Student would never again return to system (Tr. 1147, 1280).

Upon cross-examination Col. detailed the extensive efforts Parents undertook to find the best remediation services to assist their (See e.g. 1235-1240); how Parents assiduously worked with their on a daily basis to help with homework, and that they expended every effort to further education (Tr. 1304-5).

Col. reaffirmed that he and his wife consented to all earlier IEP's; that they continually received copies of the procedural safeguards, and that they initiated no appeals (Tr. 1224-1225), thus were making no claims as to any earlier IEP's. He reiterated that Parents were absolutely opposed to agree to the June 19, IEP (Tr. 1280) and Mrs. objected to the June 19, draft at the appropriate place thereon (H.O. Ex. 1).

Col. repeated that he was greatly annoyed when did not appear interested in his presentation of his request for services at the June 19, meeting (Tr. 1259-1260); and he left the meeting very agitated (Tr. 1098). It is clear that this meeting broke down when it became apparent that Parents would not recede from their request that support ESY at and I would not agree to do so (Tr. 1272).

Col. summarized the basic differences between Parents and the School as one where () did not appear to recognize Student's true abilities and thus, had been and was proposing to teach at a lower level than is appropriate (Tr. 1294-1296, 1300-1301).

(1)

Mr.

Mr. , a special ed teacher at with 12 years of experience, was Student's case manager at (Tr. 1407, 1404). He taught Student in "Basic Skills" class - a small class specifically designed for special ed students to give them emotional support, to provide intervention with other teachers and to provide basic academic skills in reading, writing and math (Tr. 1404-1405). As Student's case manager, Mr. developed a very close relationship with Student (Tr. 1408-1410). He stated, that from a teacher's point of view, Student was a "wonderful student", pleasant, kind and eager to please - "somebody you want to be around" (Tr. 1412). Mr. then reviewed in some detail the educational and social progress made by Student in two years at (Tr. 1411-1420), noting that Student "matured a lot" (Tr. 1412) and academics improved substantially in second year (i.e., 10th grade) (Tr. 1420, 1421-1424).

Mr. said that Col. requested that de-emphasize tests and modify grading to emphasize effort and consistency with regard to Student, which was glad to do since this accommodation was not an unusual one for a student with Student's disabilities (Tr. 1426). Mr. , however, told Col. that would not promise that Student would never fail and that while would slow down the pace, Student would have to learn - mere effort alone would not suffice (Tr. 1427). Mr. added that:

"We were teaching -- we made sure that we taught the material required to pass the SOL for each end of course taught..."
We were also, in basic skills, teaching the skills he needed to pass the eighth grade SOL's, which are required for a modified standard [diploma]. So we were going to both" (Tr. 1428)

Mr. said that he encouraged Parents to consider a modified standard diploma so that there would be a back-up in the event Student could not pass all of high school SOL's (Tr. 1428). Parents, however, were aiming for a standard diploma (Tr. 1428).

Mr. testified that none of the special ed students in Basic Skills class were disruptive - disruptive students were not eligible for this class (Tr. 1429). Mr. further testified that Student had made very real progress in class - particularly in Math and English - over the two years at (Tr. 1432, 1433), Student according to Mr. , had done pretty well in the SOL's tests (Tr. 1435-6).

With regard to the mode of educating Student in core academics, Mr. favored a self-contained setting - and opposed team teaching - this because Student needed

personalized instruction (Tr. 1424, 1433-1434). Mr. _____ did not favor exclusive one-on-one teaching for Student because it might detract from Student's attitude and self-esteem (Tr. 1434). He also specifically detailed how the concurrent oral-visual teaching "worked best" for Student (Tr. 1423).

Mr. _____, as Student's case manager, participated in both the _____ IEP Committee meetings. He noted that Parents had approved of the _____ IEP. Mr. _____ agreed with the _____ IEP (including ESY for the Summer of _____), reiterating that Student was best taught _____ core subjects by special ed teachers in a self-contained setting (Tr. 1423, 1438-1439). Mr. _____ confirmed, that at the June 19, _____ meeting Parents had asked for _____ services and reimbursements for them. He said that the School's IEP Committee (including himself) carefully considered this but felt that _____'s proposed ESY (Reinforcing Foundations Class) was better suited to address Student's needs (Tr. 1445-1446).

Upon cross-examination Mr. _____ said that, while at the June 19, _____ IEP meeting he wrote various goals - namely for math, reading and written expression on the draft being circulated (Tr. 1451-1452). Mr. _____ again stated that it was his "professional opinion" that Student would not do well in general education class - that he was best served by self-contained instruction (Tr. 1455-1466) - He opposed co-teaching in a general class because Student could not learn at the rate of the general class (Tr. 1456, 1460, 1461), and needed extra and special attention (Tr. 1460).

(m)

Ms. _____

Mr. _____ was Student's special ed teacher in history (and highly praised by Col. _____ herein), which was taught in a self-contained class (Tr. 1486-1487). She described the class, and the various teaching strategies that she used - including hands on visual approaches (Tr. 1489-1497). Her Students use the same text books as the general students. She attempts to keep pace with the general class - and usually can do so - because with fewer students in her class she can give more personalized instruction suited to their needs (Tr. 1494-1496). Student did very well in her class - earning B's (he nearly passed her high school history SOL - achieving 398, 400 being passing) (Tr. 1525).

Ms. _____ attended the June 19, _____ IEP meeting (Tr. 1502), and with respect thereto, fully endorsed educating Student in _____ core subjects by way of self-contained classes taught by experienced special ed teachers (Tr. 1503). She was well aware of Student's processing problems and used various strategies to best supply information to Student (Tr. 1505-7). Her class with Student contained only 10th grade students [such being Student's grade] and she expects all to pass their SOL's (Tr. 1525). She opposed co-teaching Student in a general class (Tr. 1509, 1529-1532, 1539) reiterating that Student was best taught in a self-contained class (Tr. 1509).

(n)

Mrs.

It was stipulated that Mrs. would substantially repeat the earlier testimony of Col. Mrs.'s testimony therefore related primarily to difficulties encountered in setting up the June 19, meeting and the events occurring therein after Col. left.

Mrs. noted that due to difficulties in getting contract services to attend (required if reimbursement for private school tuition was to be given), the IEP meeting did not occur until 2 P.M. on June 19, . She felt the June 19, meeting was different from prior IEP meetings in that while let her talk, it took no action on her requests (Tr. 1557 - 1559). Mrs. added that there was no discussion in the meeting about the "Reinforcing Foundation" proposed for the ESY in (Tr. 1560) other than it would take the place of (Tr. 1560).

Mrs. reiterated that Parent (except for one subject) were opposed to self-contained classes and wanted Student team-taught (Tr. 1665-1669). Mrs. said she told the IEP Committee that she and her husband did not want Student in Basic Skills, which she felt were a waste of time and not as portrayed by Mr. at this hearing. Parents wanted to increase the speech therapy given by Ms. (Tr. 1860, 1562), and stressed that they had already spent \$25,000 for speech therapy - but that this could not go indefinitely (Tr. 1565). Mrs. noted that Col. left at 4 P.M., and that the meeting ended at about 4:50 P.M. - with little occurring after Col. left (Tr. 1562). She conceded that the focus of the meeting was about and the request for partial or total reimbursement (Tr. 1660-1). At about 4:30 P.M. Mr. asked her to sign the IEP, which she did, stressing that Parents did not consent or agree with it.

Mrs. felt that system could not provide what her needed (and had not done so over the past four years (Tr. 1577). Mrs. said that Parents looked at Academy, but rejected it because its program was similar to 's (Tr. 1575). After looking at Academy Mrs. testified that she and Col. felt it would be best for their (Tr. 1631-1633). She rejected any possibility of Student returning to PS (Tr. 1578) and said that the entire June 19, IEP was "a fraud" (Tr. 1577-1578), This latter comment being based upon (1) her belief that had not delivered what was promised in earlier IEP's; and (2) the extensive changes between the draft given to her at the inception and the draft after the June 19, meeting ended (Tr. 1586-1587). Ms. then compared the original draft and the mailed draft, noting that it contained pieces of earlier IEP's, and that many changes, insertions, modifications and the like - some of which were made after she left (Tr. 1586-1624). Mrs. after receiving the mailed IEP said it went against everything Parents wanted and was more restrictive than the IEP for the previous year (Tr. 1626). For these reasons she asked that Parents be reimbursed \$10,000 for services and that pay for Student's schooling at (Tr. 1576-1578).

(o)

Ms.

Ms. is the Resource Specialist for . She is the liaison, resource and administrative specialist with regard to the provision of special education at (Tr. 1723). She worked with Student and Parents since Student entered attending both of his IEP Committee meetings (Tr. 1723-1725). She is a certified experienced special ed teacher (School's Ex. 125-C).

Ms. arranged the June 19, - IEP meeting (Tr. 1728). She said she made every effort to coordinate the meeting with Parents - and thus was surprised when Col. excused himself part way through the meeting (Tr. 1729). She noted that as Col. left, he asked to have 's proposed IEP available so that he could share it with his attorney who would be speaking with 's attorney (Tr. 1729). Mrs. , however, remained on for a brief time (Tr. 1729-1730).

According to Ms. , Parents at this meeting were primarily interested in the ESY services [i.e., their request for reimbursement of services]. Thus, according to Ms. , the meeting was not "a really productive meeting" with regard to the proposed IEP (including ESY services) (Tr. 1731). Nevertheless, after Col. made his presentation seeking reimbursement for ESY placement, the IEP team attempted to cover Student's areas of need and other portions of the IEP (Tr. 1761-1765).

Ms. described in some detail the ESY proposed by . She pointed out that it was a comprehensive full day program, called "Reinforcing Foundations", designed to reinforce (i.e., prevent regression) of basic skills, gaining skills in reading and math, and having continued systematic remediation (Tr. 1732, 1735-1739). After talking to Parents, Ms. said that this class would target Student's unique needs, particularly in phonetic awareness, written expression and communication and would be provided in conjunction with services to be provided by a speech-language clinician (Tr. 1732-1733, 1735-1739). Ms. stressed to the Parents that the ESY class - which would be very small and taught by a special ed teacher, would have an additional resource teacher available (Tr. 1733, See School's Ex. 126). Col. asked that she confirm and explain the ESY in a letter which Ms. did (School Ex. 126, being her 5 page letter of July 3, , Tr. 1733). Mr. added that her letter of July 3, , also included a review of the school services Student would receive in : if returned to (Tr. 1734-5).

Ms. , testified that the program would not be meaningful or helpful to Student - " ... just not connect with meaningful learning opportunities for this Student." (Tr. 1740-1741) This also was the opinion of the IEP team (Tr. 1740). On the other hand, Ms. believed the "Reinforcing Foundation" program would be very helpful - would be connected to his academics - and would prevent regression (Tr. 1741-1745, 1746, 1789). Ms. testified, with regard to Student's IEP for the upcoming year, that it would be "educationally beneficial" for Student (Tr. 1746). She noted that the IEP identified areas of need, areas of weaknesses and provision of support to be supplied including speech language as well as other academics (Tr. 1746). She felt there

was an opportunity for social - emotional gains by Student at (Tr. 1746). She also indicated that she believed Student's Basic Skills class had been of great benefit to Student and that its continuation would be of real help to Student (Tr. 1747-1748).

Mrs. was convinced that Student was best taught in small, self-contained classes, and was opposed to a co-teaching format for Student (Tr. 1749-1750). In short, Ms. fully espoused the IEP, and ESY Summer IEP proposed by , which in her opinion, would provide very substantial educational benefits for Student. She also was of the opinion that the June 19, IEP proposed by constituted the least restrictive environment for educating Student.

Ms. was asked if she could explain why the copy of the June 19, IEP which was mailed to Parents was so different from the copy handed to them at the inception of that meeting. Ms. replied that the initial draft handed out at the inception of June 19, was but a starting point - an initial draft - which was amended, modified and expanded during the meeting by the various teachers present, each of whom, in their own hand (with their own pen) added his or her comments (Tr. 1766, 1788-1791, 1804). She stressed that during the June 19, meeting she was encouraging discussions, including that by Parents, urging each to focus on and include in the IEP the areas of Student's needs and how they were to be addressed (Tr. 1793).

Ms. also made clear that Parents were offered a follow-up on June 19, meeting; that was willing to reconvene the IEP meeting (Tr. 1812, School's Ex. 126). Parents declined (Tr. 1282, 1812).

IV.

DISCUSSION

FACTS

(a)

Early School Years

Student spent much of early school years overseas in schools run by the military. was diagnosed in 1995 as Learning Disabled ("LD") and entitled to special education services. The 1997 IEP for Student at School, AFB, Germany, indicated that was performing well below then grade level (4th) particularly in math, speech, reading and writing. (See Parents' Exs. 19 and 20) In remediation at , Student received a total time of 690 minutes per week in special education and 1,470 minutes in regular classes. (See Parents' Exs. 19 and 20)

Before proceeding further, two patterns of conduct by Parents which began early and persist to this day should be recognized:

First: Parents, both of whom are highly intelligent and deeply caring, are intensely involved in the education of Student, their only child. Second: Parents are convinced that Student would be best educated in a small general class (10 to 12 students) by a general education teacher with Student being assisted by a co-teacher trained in special education techniques. This dual teaching technique is sometimes referred to as "co-teaching" or "team teaching". The various _____, including _____, have, on the other hand, opted for a combination of general classroom teaching, combined with small self-contained special education classes taught by a certified special education teacher for _____ core academic subjects. Parents are opposed to self-contained classes and particularly the Basic Skills class which they believe contains disruptive co-students and teaches Student at a substantially lower level than _____ true potential warrants.

The IEP's at _____ reveal another pattern of conduct by Parents - namely, consenting to the pertinent IEP's despite their misgivings and then attempting to work within this system to achieve an optimum teaching methodology for their _____. Parents maintained this latter course of conduct until June 19, _____, when, with their patience exhausted, their _____ showing in their opinion insufficient educational progress, the window of _____ education fast closing, and _____ apparently having little regard for their views, they objected to the June 19, _____ IEP. They then initiated the instant Due Process hearing, removed Student from the _____ system, and now seek reimbursement for the costs of the private schooling of their _____ along with other reimbursements.

(b)

Student's Learning Disabilities

In order to appreciate the chasm that now separates _____ Public Schools (_____) and Parents, one must first understand Student's deficits, and how they adversely impact _____ ability to matriculate through school in a conventional manner.

Student had a complicated birth and it is speculated that at least some of _____ learning deficits may be related to prenatal and birth trauma. _____ was born with an ocular disorder known as "convergence and vertical strabismus", which prevents _____ eyes from working in parallel. _____ underwent two surgeries and has been in weekly therapy for the last two years. While the surgeries and therapy have ameliorated _____ problem, Student still does not have good binocular vision, has spatial deficits and _____ eyes tire quickly (Tr. 826-830). This, in turn, limits _____ ability to stay on visual task (See e.g., Parents Exs. 26, 27 and 40). In the view of Dr. _____ and Dr. _____, this ocular disorder suggests that Student is best taught in a small class environment (Tr. 832). Nevertheless, because Student has visual acuity in right eye of 20/20 and 20/50 in _____ left eye, with overall visual acuity of 20/20, _____ does not meet the criteria of a student "with visual impairment" (School Ex. 62)

Likewise, while Student had various ear problems when _____ was younger and still may have some listening weaknesses, _____ no longer exhibits substantial deficiencies in discriminating differences in sound frequencies. _____, therefore, cannot be classified as hearing impaired. Student was early diagnosed as having an Attention Deficit Disorder

(ADD) or possibly Attention Deficit Hyperactivity Disorder (ADHD). These disorders are no longer problematic.

Student's principal learning deficits lie in brain's impaired ability to process what sees and what hears (See e.g., Parents' Exs.41). It is the combination of these two processing deficits which makes the teaching of Student so challenging. If Student's processing deficit had been primarily visual, could be taught by verbal techniques; if processing deficit was primarily audiological, visual techniques could be stressed. But given the duality of processing deficits, most of the experts here involved agree that Student is best taught by concurrent visual and oral techniques, and then slowly and repetitively with minimal outside distractions (See e.g., Tr. 128-129, 833, 1423).

In any event, there is no dispute in this case as to the gravity of Student's processing deficits; and there is no dispute as to Student's eligibility for special educational services under the umbrella of IDEA. The dispute is over how to best educate Student given these processing deficits.

(c)

Student's History at

Parents after relocating in in 1998 enrolled Student in the 6th grade at Elementary School, . Student was found by in August 1998 to have Multiple Disabilities (including processing deficits in auditory and visual memory with achievement deficits in math, reading and writing) (Parents' Ex. 78). Accordingly, Student was found eligible by for special ed. services at . An initial IEP was prepared for by and consented to by Parents (Parents' Ex. 16). It provided for four (4) hours per day of special ed services, primarily in a self-contained setting, together with thirty (30) minutes a week of occupational therapy (Parents' Ex. 16).

Student continued on at , progressing from grade to grade with class until passed through to Middle School in 1998. While did not fall further behind as went from 6th grade class to the higher classes, performance still remained well below then current peer grade levels (See e.g., Parents' Exs. 14 - 16). Parents were unhappy with lack of progress at and Middle School but consented to the pertinent IEP's (See Parents' Exs. 16, 17 and 18). As in the past, Parents remained intensely involved, participating in every IEP meeting, helping Student with homework every night, giving additional tutelage at home; and, in short, doing everything they could to assist educational progress. In addition to the special classes in a self-contained setting, these early IEP's called for numerous other accommodations, such as preferential seating, shortened assignments, assignment notebook, extended time as needed, oral reading of tests, assistance with note taking and consultation (See Parents' Exs. 16 - 20).

In 1999 Student entered High School. The same educational pattern continued at as at and . The IEP continued the regimen of extensive special education in small self-contained classrooms, particularly with regard to

core subjects (See Parents' Exs. 1, 4 - 7). And, as in the past Student, while progressing along with class remained well below the grade levels of peers. As before, Parents consented to the IEP at (Parents' Ex. 6) although they continued to press for co-teaching and more services.

(d)

Student's Psychological History While at

In early , Parents, now deeply concerned by what they considered to be a lack of meaningful progress in their 's education while at and , sent Student to Dr. , a specialist in clinical and neuropsychology, in order to determine the best interventions to assist Student to learn (Parents' Ex. 41, Tr. 606-611). After exhaustive testing and evaluations (which confirmed the earlier findings by), Dr. determined Student to have a Full Scale Cognitive IQ of 68- which is in the Impaired to Borderline range of mental retardation (Parents' Ex. 41) Dr. noted, however, that since the IQ testing was given orally and visually, Student's actual IQ may have been masked (Parents' Ex. 41).

In June Student was evaluated by , Inc. (Parents' Exs. 36-39) and Assessments in August (Parents' Ex. 35) These evaluations confirmed Student's processing deficit problems. In July , Student was evaluated by the Center with regard to auditory processing problems. This evaluation confirmed earlier diagnoses. Further audiological testing was suggested by (Parents' Ex. 21).

Beginning in February and continuing with two further meetings in March, Student was evaluated by 's psychologist, . Mr. has over 20 years of experience with special education students at the high school level. Mr. confirmed Dr. 's evaluations, but determined Student's IQ as 78, which is in the high Borderline range of mental retardation.

Mr. went on to say that:

"Given the above mentioned factors (unwillingness to elaborate initial responses, test anxiety, low frustration tolerance) these scores [i.e., the Woodcock-Johnson] may somewhat underestimate [Student's] true level of functioning and thus should be interpreted with a degree of caution. Nonetheless they are substantially higher than those obtained in the most recent testing (See neuropsychological Examination dated 4/9-4/11/) and it is quite possible that [Student's] true ability may fall in the low average range"

Mr. [redacted] also confirmed that Student was still performing at well below peer grade level in core subjects. And, Student's performance suffered particularly as the subject matter became more complex and the reasoning more abstract.

Dr. [redacted], a licensed clinical psychologist specializing in clinical neurophysiology intervention evaluated Student in the Summer of [redacted]. Dr. [redacted]'s tests, including electroencephalographic studies, positively confirmed Student's auditory and visual processing deficits with concomitant deficits in achievements, such as reading, writing and problem solving (Tr. 760-5). Dr. [redacted]'s studies revealed that once information had been properly processed by Student [redacted] reasoning powers were less impaired (See e.g., Tr. 765 - 766; 768 - 769). Notwithstanding this latter determination, Dr. [redacted]'s testified that as more difficult and more rapid information was given to Student, [redacted] ability to process the same became more limited (Tr. 789-790). Dr. [redacted] suggested the possibility of utilizing neuropsychological techniques, such as [redacted], in order to open new neurological pathways in Student's brain in order to remediate [redacted] processing barriers (Tr. [redacted]).

(e)

The [redacted] - [redacted] IEP Meeting of June 19, [redacted]

After numerous delays due to scheduling problems (Tr. 414) the [redacted] IEP meeting was held at [redacted] on June 19, [redacted] beginning at 2 P.M. For sometime prior to that meeting Parents had been exploring various alternative education techniques, and had come up with the [redacted] technique as a possible route to increase the ability of their [redacted] to receive visual and auditory input. Parents proposed to [redacted] prior to the June 19, meeting that [redacted] pay for part or all of the tuition and transportation expenses for Student at [redacted] in the Summer of [redacted]. They felt that with this outside jump-start, Student could return to [redacted], take Standard of Learning tests (SOL's) and finish last two years there obtaining a standard diploma. And, given the substantial education expenses they had paid for contrasted with their perceived lack of progress by their [redacted] while at [redacted], they felt their request was more than fair (Tr. [redacted]).

Parents also were deeply concerned about what they believed to be a predetermined mindset by [redacted], namely that Student's IQ and processing skills were too low to allow [redacted] to obtain a standard diploma (See e.g., School's Ex. 9) and, therefore, that Student's teaching should be aimed at obtaining a modified standard diploma.^{4/} Parents considered a modified diploma to be virtually worthless. Parents based upon Student's grade of 398 on high school SOL History test (400 being passing)^{5/} and their long term experience with [redacted], believed that Student, with proper assistance, could pass [redacted] other high school SOL's and receive a standard diploma enabling [redacted] to go to college.

Parents also believed that [redacted], not only failed to provide agreed upon accommodations but also had not utilized optimum teaching techniques. Parents, however, had nothing but praise for Mrs. [redacted] who taught their [redacted] history.

Given this background, combined with Parents' long standing frustration with over its refusal to adopt alternate teaching methods to self-contained classes, the issue of payment by of ESY expenses at the Clinic became the flash point of their long simmering dispute. In Parents' view, if would not even make some gesture, albeit small, by way paying for ESY at Clinic, or even a part thereof, then any further dealings with would be a waste of time (Tr. 1050) Accordingly, Colonel prepared and sent to in advance of the June 19, IEP meeting an outline of his proposal for services and the necessity for it. Once at the IEP meeting Parents' primary, if not sole, focus was a favorable resolution of the issue of payment for services (See e.g., Tr. 1767) Parents' anxiety was heightened by the fact that they did not receive the proposed IEP (which contained IEP's for both the † school year and the ESY) until they arrived at the meeting.^{7/}

, on the other hand, had a totally different perception: It believed the primary purpose of the June 19, IEP meeting was to focus on the † school year - and to a lesser extent upon ESY for the summer of . Relying in part on Parents consistent consent to prior IEP's and believing its educational techniques to be effective and proven, Hayfield passed out the initial IEP to the assembled IEP Committee as a working draft, intending the entire IEP Committee, including Parents, to discuss it, make changes and arrive at an IEP agreeable to all. In keeping with this concept, the initial draft consisted of some pages prepared early that morning, and where goals remained the same, xerox copies of the IEP. Pagination was modified by striking out inappropriate page numbers and inserting sequential page numbers for the working draft.

As a result of the misconceptions by each of the parties as to the primary purpose of the meeting, the June 19, IEP meeting rapidly degenerated. The parties disagree as to much of its content, and particularly whether IEP goals and objectives were discussed. Colonel , after advising the IEP Committee that he must leave by 4 P.M. (which dismayed the School's team who believed they had a full afternoon for discussion) insisted upon making his presentation for ESY services at the first priority. while listening, nevertheless kept trying to return the focus of the meeting to the school year. Finally, in desperation, Colonel : demanded that either agree or disagree with assisting with the funding for Clinic. refused to so commit, pointing out that it believed that its proposed ESY was more appropriate, Colonel : then out of time, left, stating that would hear from his attorneys.

attempted to complete the IEP while Mrs. was still present (Tr. 1765). At this time various school team members wrote their comments, objectives and goals for Student on the IEP pages pertinent to their responsibilities. The Committee members insist that the principal portions of the IEP and the ESY IEP were raised before Mrs. left (Tr. 1762-1765). Mrs. , on the other hand, denies such occurred (Tr. 1813-4).

^{7/} There is no legal requirement for advance distribution of the proposed IEP. Indeed the pertinent regulations require the IEP to be prepared at the meeting.

The team asked Mrs. to stay briefly until they finished writing their comments - this to allow her to receive a completed IEP before she left (Tr. 1768). Mrs. suggested instead that the IEP be mailed to her. Mrs. then signed the IEP, noting that Parents "DO NOT AGREE". A few days later the IEP was mailed to Parents (Tr. 1768). Parents by letter dated July 3, requested that send to them a detailed description of 's proposed ESY program. This was done on July 9, (School's Ex. 19)^{2/}. Parents, by now totally disillusioned with , advised that henceforth Student would be privately educated and that they would be seeking reimbursement.

(d)

Programs

Turning first to the respective the ESY programs, the ESY program offered by for Student was "Reinforcing Foundations". It is an intensive Special Education program, taught by an experienced Special Ed teacher, designed to support high school students. The class size is small - less than 10; and here was 4 not including Student. It runs for 116 hours per month from July 7 to August 7, (School's Ex. 126). The Reinforcing Teacher works with each student based on his or her specific needs as ascertained by prior to the ESY. Further, Student's ESY would be augmented by a Special Education resource teacher and a Speech Clinician (School's Ex. 126).

The ESY program includes "Rewards", a specialized reading program designed to teach students a flexible strategy for decoding multi-syllable words, to accurately read for content and to increase reading comprehension and written expression (School's Ex. 126). Its purpose is to not only help Student to retain earlier taught matter but also to assist him to utilize it in his forthcoming school year. Similar intensive study would be provided in math (School's Ex. 126).

In the opinions of Mrs. and Mrs. , both fully certified and experienced special teachers familiar with Student's needs, the Reinforcing Program was well matched to Student's needs. And, in keeping with Parents' desires, it would assist Student in passing SOL's.

The clinic program espoused by Parents is not an academic program nor is it aimed at retaining earlier taught material. Rather, it is a sensory processing improvement program administered by a technician one-on-one in a clinic. It is designed to upgrade sensory decoding deficiencies and to improve cognitive functioning (See e.g., Parents' Ex. 25) It does so by applying Socratic questioning to simulative sensory information retrieval in order to develop conscious visualization and verbalization (Parents' Ex. 25). According to the founders of the program, once the basic imaging skills are learned so that they become automatic, the student can then take directions, solve problems and perform educational tasks at a previously unobtainable level (Parents' Ex. 25). In short, it is a sensory remediation program, albeit not the only available mode of such remediation (Tr.).

is aware of the _____ program. _____ believes _____ is too remote from Student's academic courses and school setting to be of real benefit at this time (Tr. 1740-1741). _____ believes its ESY program will be far more beneficial.

(e)

Proposed _____ IEP

The IEP proposed by _____ on June 19, _____ for the _____ school year recognizes Student's processing weaknesses and resultant limited achievements, which currently are well below _____ peer's grade levels in English, Math, Reading, Written Expression and Communication. The IEP objectives are clear; namely to increase Student's achievements in these academic areas. Specific goals are enumerated. In keeping with prior years, extensive special Ed teaching in self-contained classes by special Ed teachers is proposed. Indeed, more special Ed services are proposed than in prior years. And, various accommodations are set forth, such as preferential seating when in a general class, note taking help, tests given orally, small class size, monitoring and feedback, reduced homework and availability of mechanical aids such as calculators and keyboarding (these mechanical aids apparently were not given in prior years (See School's Ex. 32). Close support from teachers and/or "buddies" was also recommended.

The proposed _____ IEP (and ESY) while listing the specific goals and objectives in the various courses, does not go into great detail as to how these goals are to be achieved other than by way of special ed self-contained classes. However, the testimony from Student's teachers reveals that Student was (and will be) given information orally and visually simultaneously, with the constant help of highly trained special ed teachers. Student, when entered _____, was assigned a special ed resource teacher, Mr. _____, who closely monitored _____ progress and worked with _____ at _____ until the present. In the _____ year another resource teacher will be assigned.

It is the uniform opinion of Student's teachers, both special ed and general, as well as the special ed coordinator at _____ (Mr. _____) and the _____'s _____ resource specialist (Mr. _____, who is certified in special education that the proposed IEP for _____ is appropriate and will provide Student with substantial educational benefit. _____'s testimony is likewise consistent in declaring that Student has received educational benefit in the past at _____. A review of test scores, grades and samples of school work confirms these opinions, although _____ progress in some courses was not as great as in others. While Student progressed academically, _____ still remains well below peer grade level. Thus, the need for special education services continues.

(f)

Student's Attitude at _____

Student's attitude at _____ has been exemplary. _____ is highly regarded by _____ teachers for _____ politeness, attentiveness and desire to learn. A _____ of 17 (who briefly appeared at these hearings) _____ is obviously well brought up. _____ is also athletic, playing on the _____ team formed with _____ school mates (albeit not a school sanctioned sport).

(g)

_____ Academy

Finally, with regard to _____ Academy, it proposes to teach Student in a small (10 or less) class composed of learning impaired students by teachers trained in the subjects being taught (Tr. 864). Extensive additional assistance by way of _____ clinicians, certified speech and occupational specialists, and one-on-one teaching if needed, is planned. While the Academy usually restricts its students to those who have at least an IQ of 100, it believes Student is an exception (Parents' Ex. 99); and that _____ processing deficits mask a higher latent IQ. _____ is confident that it can provide a quality education for Student. While it cannot guarantee that Student can get into college, it believes such is an attainable goal for certain colleges. Unlike Virginia Public Schools, no SOL tests are required by _____; thus if Student passes _____'s courses he will obtain its regular high school diploma. The _____ does not have IEP's; rather it has its own outlines and programs. These were not put into evidence so no comparison between the Academy's guidelines and _____ IEP's can be made.

B.

LAW

(a)

Application of the Law
Governing Law

Were the undersigned free to interpret IDEA as he saw fit or substitute his views on education for those of local school experts, the result in this case might be different. However, Virginia Hearing Officers have no such broad discretion; they must follow the construction given to IDEA by the decisions of the United States Supreme Court, the decisions of the Fourth Circuit and the decisions of the Federal District Courts in Virginia.

IDEA was enacted "...to ensure that all children with disabilities have available to them a free appropriate public education designed to meet their unique needs and prepare them for employment and independent living" IDEA, 20 U.S.C. 1400 (d)(1)(A).

The seminal case under IDEA involving reimbursement of tuition and related expenses from public schools for parental placement of a student with disabilities in private school is Hendrick Hudson District School Bd. vs. Rowley, 458 U.S. 176 (1982). Rowley first posits the following dual inquiry: (1) Did the school comply with the procedural safeguards required by IDEA, and (2) is the IEP prepared for the disabled student reasonably calculated to provide him or her with opportunity to receive a free "appropriate" public education (at pp 206-7).

The standard to be followed when determining whether the IEP prepared for a handicapped student is reasonably calculated to provide him or her with FAPE was also laid down in Rowley. The Court in Rowley, after exhaustively reviewing the language and legislative history of IDEA, specifically rejected a definition of "appropriate" as equating to "best possible" education or one "equal to that offered to non-handicapped students." Rowley, instead required only that the IEP be "reasonably calculated to provide the handicapped student with "an educational benefit" (Rowley, pp. 203) (defined as "some educational benefit by the Fourth Circuit in MM v. School District of Greenville, 303 F.3d 523 (4 Cir. 2002). In short, only a "basic floor" need be provided. Hartmann v. Loudoun County School Bd., 118 F. 3d 996 at 1001, (4 Cir. 1997), cert den. 118 S. Ct. 888 (1988); Prince William County School Bd. V. Hallums, _____ F. Supp. _____ (Civil Action No. 02-1005-A, D.C. Va. Aug. 12, 2003); Lewis v. School Board of Loudoun County, 808 F. Supp. 523, 526 (D.C. Va 1992).

As held in Bales v. Clark, 523 F. Supp. 1366 (D.C. Va 1981):

"... Parents have no right under the law to write a prescription for an ideal education and to have that prescription filled at public expense" (at p. 1370).

In the same vein, the needs of the disabled child must be balanced against the realities of limited public monies and the need to educate the general student body. Barnett v. Fairfax County School Bd., 927 F. 2d 146 (4 Cir. 1991).

Further, when it comes to determining what educational program is most appropriate in order to educate the handicapped child, deference must be given to that chosen by the local public school educators. MM v. School District of Greenville, supra, Hartmann v. Loudoun County School Bd., supra (at pp. 1000-1). Likewise, choices as to which educational methodology to employ are left to the discretion of the local school officials. Rowley, supra (at pp. 206, 207-8). Accord: Barnett v. Fairfax County School Bd., supra, wherein the Fourth Circuit noted at page 146:

"... while a [public] school must offer a program which provides educational benefits, the choice of the particular educational methodology is left to the school system."

See also Tatro v. Texas, 703 F 3d 823, at 830 (5 Circ. 1983) which holds that a public school's proposed IEP is presumptively correct.

Applicable case law governing the disposition of this case places upon the Parents the burden of proving not only that the proposed education of their child at private school (and its IEP) will provide their child with FAPE, but also that the school's proposed IEP is not reasonably calculated to provide their child with "FAPE", namely "some educational opportunity." Bales v. Clark, 523 F. Supp. 1366 (D.C. Va 1981), Alexander K. v. Virginia Board of Educators, 30 IDELR 967 (D.C. Va 1999). Further, neither the public school nor the reviewing judicial body is required to assess whether the private school's proposed education will be better than that proposed by the public school Lewis v. Loudoun County School Board, *supra* (at p. 526).

The teachings of the aforesaid cases are clear - the burden which Parents must carry in order to obtain reimbursement for the private schooling expenses of their child is formidable indeed: It is only when the local school officials are proven to have selected an educational methodology without a reasonable basis, that a hearing officer is permitted to substitute views or the parent's proposals for the educational route chosen by the local school.

The burden placed upon a parent seeking reimbursement for the costs of placing their child in a private school because of an alleged procedural violation by the local school is equally imposing. Only serious substantive procedural violations by the school can form the basis for a denial of FAPE. Board of Education v. Dienalt, 843 F 2d 813 (4th Cir. 1988), Spielberg v. Henrico County Public Schools, 853 F 2d 256 (4 Cir 1988), Doyle V. Arlington County School Board, 806 F. Supp. 1253 (D.C. Va. 1992), *aff'd* 39 F 3 d 1176 (4 Cir 1994). Further, the procedural violations, if proved, must either result in a clear deprivation of educational benefit for the handicapped student, or deny the parents a meaningful opportunity to participate in the IEP process (including access to due process proceedings). MM v. School District of Greenville, *supra*; Burke County Board of Education v. Denton, 895 F. 2d 973 (4 Cir 1990); Doyle v. Arlington County School Bd, *supra*, at p. 1260; *see also*: Prince William Cy School Bd v. Hallums, et al, (D.C. Va E.D. Civil Action No. 02-1005-A, August 12, 2003).

IDEA also requires that the handicapped child be educated with the opportunity to interact with non-handicapped students to the maximum extent practicable (called "mainstreaming" or Least Restrictive Environment - "LRE"). Burlington School Committee v. Massachusetts Bd. of Education, 471 U.S. 359, at 369 (1985), Hartmann, *supra*, Doyle v. Arlington School Bd., 806 F. Supp. 1253 (D.C. Va. 1992), *aff'd*, 39 F.3d 1176 (4 Cir. 1994). Public schools, with their diverse student body, are preferred. Burlington, *supra*; as are public schools closest to the student's home. 34 C.F.R. Section 300.550(b)(1), 300.552 (b)(3), Rowley, *supra*, at 202.

Mainstreaming, however, is not an inflexible mandate particularly when placing the handicapped child in a general classroom or other open setting would interfere with the provision to him of educational opportunity. In this event, it must give way to the education of the child 20 U.S.C. 1412(5)(B), Rowley, supra, at p. 181 fn. 4; Hartmann, supra, at p. 1005.

(b)

The June 19, _____ IEP Proposed By _____ Is
Reasonably Calculated To Provide Student With FAPE

The IEP of June 19, _____ for Student covers both the _____ (11th grade) school year and the _____ ESY (summer school). It was objected to by Parents. Nevertheless, it together with Student's history at _____ provide the factual basis for determining whether it is reasonably calculated to provide Student with "some educational benefit" at _____ (i.e., FAPE) for the _____ school year.

Parents assert that _____ did not recognize Student's true abilities and therefore taught him at a lower level than is appropriate. They rely upon their knowledge of their _____'s ability and _____ near passing grades in certain SOL's taken by _____. They say that if _____ would address Student's processing deficits more directly and educate _____ via team taught classes, _____ could pass all of _____ high school SOL's and receive a standard diploma. If _____ failed at this _____ could fall back upon a modified diploma. Faced with _____'s refusal to adopt their approach, Parents sent Student to _____

_____ countered by pointing to the psychological evaluations revealing Student's academic ability to be limited, _____ actual test scores, the hands on experience of their skilled teachers with Student over the last two years, and the fact that _____ had made educational progress during that period. Accordingly, _____ asserts that it has been teaching Student up to _____ ability by way of proven special education techniques.

An appropriate IEP under IDEA must contain statements concerning the disabled child's level of functioning, measurable annual goals, the educational services to be provided and objective criteria and procedures for measuring the child's progress. MM v. School District of Greenville County, supra. The proposed _____ IEP satisfies these requirements (See e.g., Hearing Officer (HO), Ex. 1, pp 5, 6, 8, 11, 16). More specifically, current levels of performance are identified: short term objectives and long term goals are clearly and measurably stated, as are the modes of teaching (i.e. general education or special education and the amount of hours in special education, namely 116 hours per month). Progress reports are called for, and various classroom accommodations and modifications (such as preferential seating, reduced paper tasks, extended time, oral response, read exams, additional breaks, reduced language level reading and vision consultation are set forth (HO, Ex. 1, p. 20). Indeed, the technical aspects of the _____ IEP for Student are similar in form to the _____ IEP to which Parents consented. Therefore under MM, the IEP passes muster as to form.

The substance of the IEP proposed by likewise is supported by the preponderance of evidence herein. As earlier noted, is adamant that Student "... needs special education support to make progress in the general education curriculum" (HO Ex. 1, p. 27). Given the uniform opinions by both the School's psychologist and Parents' psychologists that Student struggles as the subject matter becomes more difficult and abstract; and given the uniform assessment by all of the experts herein that Student's dual processing disorders mandate an intensive, repetitive and simplified delivery of information, both orally and visually (See e.g., Tr. 423, Parents' Ex. 41) special education for the Student is a must. Further, all, including Parent's vision experts, agree that a small class environment is also desirable. These constraints are totally consistent with 's proposed methodology of self-contained teaching for Student's core subjects.^{8/} Therefore, even if the case law compelling deference to be given to the choice of educational methodologies selected by the local educators is ignored, the evidence herein fully supports 's proposed method of teaching Student as per its proposed IEP.

Parents, while agreeing with the necessity for special education urge that Student be educated by co-teaching in a general classroom. Parents concede that it is unrealistic to expect to downsize its general classes in order to best accommodate Student. Cf. Barnett v. Fairfax County School Bd., *supra*. Accordingly, the choice is between co-teaching Student in a general class or educating in a small self-contained class by way of special ed teachers. It is almost self-evident that given the size of a general high school class (25-30) combined with the confusion caused by a general education teacher, teaching the majority of the class at peer level and peer speed, while a special ed teacher assists Student at lower grade level and at a lower pace, distraction is bound to occur. This, necessarily will impede Student's ability to stay on task. Thus, 's special education experts, Ms. , Mr. , Ms. and Ms. , all of whom are familiar with Student, opposed co-teaching of Student (See e.g. Tr. 1424-6, 1509, 1529-31, 1539, 1749-50). Again deference must be given to these opinions, particularly when they are consistent with the views of Parents' experts who likewise espouse a small non-distractive learning environment. Indeed, the private school selected by Parents does not envision co-teaching Student. Instead it opts for small classes.

Parents attempt to blunt 's proposed plan of teaching Student by arguing that 's methodology of teaching Student in a self-contained setting has not provided their with any real educational advancement, and therefore a continuation of that policy is not "appropriate". They support their thesis by comparing results of various tests given by Dr. in 2001 with the results of similar tests given by Mr. in 2003. These comparisons while revealing limited progress in some areas, also reveal substantial educational progress in other areas such as English composition skills, Math and reading comprehension (Tr. 1420-1424, cf. Parents' Ex. 41 with School's Ex. 59; See also testimony of Dr. at Tr. 656-657). Indeed, Dr. conceded that Student had made some educational progress at (Tr. 711-712). Student also passed from grade to grade, albeit still remaining two to four years behind his peers in tested ability in various of core subjects. In essence, Parents are arguing for a best education standard. As before discussed, this is not the test - so Parents' argument must fail.

^{8/} In deference to Parents' wishes, team teaching is proposed in English.

Parents misconceive [redacted]'s position as to Student's potential. It, just as Parents' experts, doubts whether, given Student's processing deficits, he can succeed at higher educational levels. Thus, [redacted] looked at the alternative of a modified diploma. It did not, however, preclude the goal of a standard diploma (Tr. 1428).

Parents and their experts (Dr. [redacted] and Dr. [redacted]) urge adoption of techniques in order to remediate Student's processing deficits. However, such techniques are more in the nature of clinical remediation than educationally driven. Nor is [redacted] the only method of addressing processing deficits. [redacted]'s special education experts, who are utilizing other techniques to bypass Student's processing deficits, believe that their proposed methodology is more appropriate educationally than [redacted]. Again, deference must be given to their choice of an educational methodology.

Parents' dissatisfaction with [redacted] was so entrenched that they removed Student from [redacted] and [redacted] when [redacted] refused to pay for ESY [redacted] services. For the [redacted] school year, they selected [redacted] Academy, a small private school consisting of students with mild to moderate learning disabilities. Its classes are small (Tr. 855-56), very flexible (Tr. 870) and provision is made for supplemental accommodations, including speech and occupational therapy (Tr. 864-67). More importantly to Parents, Student will continue [redacted] therapy while at [redacted] (Tr. 907). [redacted] also has other advantages. First, Student need not take any SOL's in order to obtain its degree; Secondly, [redacted]'s student body more closely resembles Student, thus there will be no pull-outs or loss of esteem by comparison with [redacted] classmates.

Based upon the testimony of Parents' experts and the flexible program offered by [redacted] in a small class setting, it appears that the combination of [redacted] and [redacted] may be a program which is reasonably calculated to provide Student with educational progress, possibly superior to that offered by [redacted].

The issue in this case, however, is not whether the setting and curriculum offered by [redacted] when combined with [redacted] intervention will produce a better education than that offered by [redacted]. Lewis v. Loudoun County School Bd., supra. Rather, the determinative issue herein is whether the [redacted] IEP proposed by [redacted] is "reasonably calculated to provide Student with an educational benefit". Rowley, supra, MM, supra. Regardless of whether [redacted] has or has not been providing the best education possible for Student, the record herein is clear that [redacted] has been providing Student with an educational benefit (FAPE). By a like token, [redacted]'s proposed [redacted] IEP is reasonably calculated to provide Student with an educational benefit (FAPE). That is all that is required. Accordingly, Parents' request for reimbursement of the expenses of schooling Student at [redacted] must be denied. Rowley, supra, Barnett, supra, MM, supra.

(c)

The ESY Is Appropriate

Parents also seek reimbursement for the expenses of sending their to the Washington, D.C. clinic for the extended school year (ESY). The test for determining whether ESY services are "appropriate", thus reimbursable, was laid down in MM v. School District of Greenville CY, supra. MM involved a parental request for reimbursement for ESY remedial services (there LOVAS). The Fourth Circuit denied the parents reimbursement holding:

"ESY services are only necessary to 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" (303 F. 2d at 538)

Additional ESY goals aimed at securing educational achievements on as yet unmastered subjects, while laudable, are not necessary in order to achieve FAPE.

A review of the IEP prepared by for ESY and the letter from to Parents explaining in detail the ESY proposed by (School's Ex. 125) reveal not only a technically appropriate ESY IEP but also one reasonably designed to prevent any regression by Student (See HO, Ex. 1, School's Ex. 125). Under 's proposed ESY IEP, Student will obtain five weeks of intensive special education (4 hours per day, 5 days a week) instruction particularly in core subjects. The classes will target both earlier taught and new matter (School's Ex. 125). These will be supplied in a class of 4, by special education experts with extensive support by speech therapists and others, if needed (See School's Ex. 125). The ESY proposed by Parents, on the other hand, is not an educational program. It does not address maintenance of earlier taught information. It is a remedial processing clinical intervention. It thus fails the test set forth in MM, supra. Parents' claim for reimbursement for ESY services at must therefore be denied.

(e)

There Are No Procedural Defects Here Which Entitle Parents to Reimbursement For the Costs Of Private Placement of Student

There is no question that Parents had notice of and attended the June , IEP committee meeting. Parents were also fully informed as to their procedural rights, including right to a due process hearing. In point of fact, Mrs. objected to that IEP, and a due process hearing was instituted within weeks of the collapse of that meeting. Thus, if Parents are to prevail upon this issue they must prove that the June , meeting and the resultant IEP were so flawed that they resulted in a loss of educational opportunity to Student. MM, supra, Hall v. Vance County Bd. of Education, supra. No such proof exists here.

Parents urge that the June , meeting was fatally flawed - indeed a "fraud" - because (1) the IEP copy mailed to them shortly after the June , meeting collapsed was substantially different from the initial draft given to them at the inception of the meeting; (2) that both the initial draft and mailed copy of the meeting contained some pages which were xerox copies of pages in the IEP for the preceding year; (3) that the mailed IEP revealed that many goals, objectives and comments had been handwritten on the initial draft after the IEP meeting had begun, and possibly after Mrs. had left; (4) that page numbers on the mailed draft had been changed from the initial draft; and (5) that the mailed draft contained some essential comments, long term goals and short term objectives which were not discussed at the meeting. From these facts Parents infer that the June , draft IEP was merely a sham, created after the fact to buttress 's position. This inference, however, ignores the reality.

does not deny that the draft mailed to Parents differed substantially from the initial draft. It asserts that the difference between the two was a result of the meeting - with the team listening to Parents and writing, in their own hand, during the meeting, their respective comments, objectives and goals. It says that xerox copies of earlier IEPs were used in the initial draft where the overall goals were the same, and then were modified at the meeting by the handwritten comments, goals and objectives. In short, the initial draft handed to Parents at the beginning of the meeting was merely a starting point, and the purpose of the meeting was to develop the IEP. This was done - and, at Mrs. 's request the IEP was mailed to her.

8 VAC 20-80-62 B.4 mandates that: "Each local educational agency is responsible for initiating and conducting meetings to develop, review and revise the IEP of a child with a disability". (emphasis supplied) This is precisely what occurred. If the local school was required to start the meeting with the final product, the entire purpose of an IEP meeting would be negated.

Further, if indeed, several of comments, goals and objectives handwritten on the copy of the IEP mailed to Parents, were not discussed before Parents left, such was due more to Parents conduct than that of the School's. It will be recalled that Parents' primary objective at the June , meeting was to secure reimbursement for ESY services at . When that effort failed, Parents lost interest; and Col. left shortly thereafter, advising the team that he was through with them and that they would hear from his lawyer. Mrs. stayed on for about forty minutes after Col. left. When she started to leave, she was asked by to remain a few minutes more so that the teachers could finish their comments and give her a completed copy of the IEP. She refused, asked for the IEP, wrote in the applicable box that Parents "DO NOT AGREE", signed her name and left, requesting that the completed copy of the IEP be mailed to her. 's team then finished their comments and mailed the completed draft to Parents.

Further, advised Mrs. before she left the meeting that they would be happy to reconvene the meeting to address her concerns. Similarly, a few days later when Mrs. mailed to Parents the earlier requested specifics on the ESY - IEP, Mrs. again offered to reconvene the IEP meeting to address Parents' concerns. Parents did

not accept these offers. And, at pre-trial, as well as trial, when Parents were again asked if they wanted any modifications in the June , IEP, they refused, saying that they no longer trusted , and were irrevocably ending their relationship with (Tr. 1282, 1242).

IDEA requires that an IEP be in place for a special ed student before school year begins 20 U.S.C. 1414(d)(2)(A). Here 's proposed IEP was completed by it prior to the inception of the school year. Thus, technically, IDEA's timeline was met. Parents maintain that the proposed June , IEP was either incomplete or completed after they left the IEP meeting and therefore was fatally defective.

MM, supra, is dispositive of Parents' argument. In MM the parents there requested that the local school pay for an ESY remediation program, there the LOVAS program. When the local school refused to pay for ESY LOVAS services, MM's parents, just as Parents here, lost all further interest in that IEP and did not continue on with the IEP process. At the due process hearing, just as here, MM's parents claimed that the IEP was never completed, which, according to them, constituted a fatal procedural error entitling them to reimbursement of all private school costs. The Fourth Circuit - whose rulings control in their proceedings - rejected this argument as follows:

"... the court [in Spielberg v. Henrico County Pub. Sch. 853 F2d, 256, 259 (4 Cir. 1988)] properly concluded it would be improper to hold [the] School District liable for the procedural violation of failing to have the IEP completed and signed, when that failure was the result of [the parents'] lack of cooperation.

It is significant that there is no evidence that parents would have accepted any FAPE offered by the District that did not include reimbursement for the LOVAS program. As we have noted, the District is not obligated by IDEA to provide a disabled child with an optimum education; it is only obliged to provide FAPE. Rowley, 458 US at 192. In these circumstances, MM suffered no prejudice from the District's failure to agree to her parents' demands. Because this failure did not result in any lost educational opportunity for MM, the proposed 1996-1997 IEP did not contravene the IDEA." MM, supra, at p. 534-535; accord SS, supra.

Assuming, arguendo, that Student's IEP was either incomplete or completed in Parents' absence, the cause for this alleged procedural defect was Parents' refusal to continue on with the IEP process. Therefore, under MM, supra, cannot be held liable for this alleged procedural defect.

Parents argue also that Mrs. 's initials were inserted by at two places in the IEP at or shortly after the June , meeting. Thus, according to Parents, the entire IEP is fatally defective.

categorically denies this allegation. Other than Mrs. [redacted]'s assertions, there is no proof in this record of such a forgery. No motive exists by [redacted] to engage in such conduct. The insertions relate to matters as to which Parents had complete knowledge (i.e., the ESY and SOL/graduation requirements); no dramatic differences are observed in the initials from those Mrs. [redacted] admits were hers; and Parents, in any event, did not consent to the IEP. Thus, Parents have failed to carry their burden of proof for this claim. Further, these insertions in no way adversely impacted Student's proposed education. See: Di Buo v. Bd. of Ed. of Worcester Cy, 309 F. 3d. 184 (4 Circ. 2002) (holding FAPE must be denied by the alleged procedural errors). Accordingly, as a matter of law this claim of substantial procedural error also fails. MM, supra, Burke County Bd. of Education v. Denton, supra, Doyle v. Arlington County School Bd., supra.

(d)

Parents Are Not Entitled To Reimbursement For
Miscellaneous Costs Incurred By Them

Parents, without citing any legal authority or factual basis, request [redacted] to reimburse them for the costs of: (1) medical (ocular) treatment of Student by Drs. [redacted] and [redacted]; (2) audiological testing by the [redacted] Center; (3) costs of their expert witnesses; and (4) outside tutor and outside therapy costs.

The undersigned has no authority to award attorneys fees and "related costs". Such may be awarded only by a court, and then only if the Parents are the prevailing party. See: Va. Reg. Section 20-80-76N; 20-80-155; 34 CFR Section 300.513(c). Parents did not prevail here. Further, there is nothing in this record to establish that any of the above costs are a "related service" required to be supplied by the [redacted]'s pursuant to IDEA. Irving Independent School Dist. v. Tatro, 468 U.S. 883, 894 (1984). And, to the extent the claim is based upon alleged procedural violations, such are barred by MM, supra. Accordingly, reimbursement for the above is denied.

V.

CONCLUSION

Parents are not entitled to reimbursement for the costs of the ESY placement, nor are Parents entitled to be reimbursed for the costs of education of Student at [redacted] nor are they entitled to be reimbursed for any other costs incurred by them in connection with this proceeding. The June [redacted], [redacted] - [redacted] IEP proposed by [redacted] is hereby confirmed as supplying FAPE. The June [redacted], [redacted] ESY is hereby confirmed.

VI.

FINDINGS OF FACT

1. Student is a _____, well mannered _____ of 17 entering _____ junior year of high school.
2. Student was diagnosed in 1995 as Learning Disabled and entitled to special educational services.
3. Student was born with "convergence and vertical strabismus", an ocular disorder which prevents _____ eyes from working in parallel.
 - a. Student underwent two surgeries, and has been in rehabilitation treatment for this problem for the past two years.
 - b. While the surgeries and treatment have ameliorated this problem. Student still does not have good binocular vision and _____ eyes tire quickly which limits _____ ability to stay on visual task.
4. Notwithstanding Student's strabismus, _____ has 20/20 vision in his right eye, 20/50 in _____ left eye, and 20/20 overall vision acuity.
 - a. Student, therefore, does not meet the criteria for a student with visual impairment.
5. Student was earlier born with, or early in _____ childhood developed, severe visual and audiological processing disorders which impair _____ brain's ability to process what _____ sees and what _____ hears.
 - a. If Student's processing deficits were primarily visual, _____ could be taught by verbal techniques; if _____ processing deficits were primarily audiological, visual techniques could be stressed. The combination of the two deficits, however, makes the teaching of Student problematic.
 - b. Given the duality of the aforesaid processing deficits, Student is best taught by skilled special ed teachers utilizing concurrent visual and audiological techniques, and then slowly and repetitively in a small class environment with minimal distractions.
6. Student entered the _____ School System in _____ at _____ Elementary School in the Sixth Grade.
 - a. Student was evaluated and found by _____ to have Multiple Disabilities (including auditory and visual processing deficits with achievement deficits in math, reading and writing).

b. As a result of said evaluation and findings, Student was found eligible for special education services.

7. While at , Student was educated in basic academic ("core") subjects (i.e., English, Reading, Writing, Math and Science) by way of small self-contained classes taught by special ed teachers.

a. Parents consented to each of the IEP's prepared by for Student, which called for education by way of small self-contained classes taught by special ed teachers.

b. Student made substantial educational progress at .

8. Student passed on to Middle School, where, as at , Parents consented to Student's IEP's which called for Student being primarily educated by way of self-contained classes taught by special ed teachers.

9. In Student entered High School as a special ed student.

a. As at and , Student was educated in core subjects by way of self-contained classes taught by special ed teachers utilizing concurrent visual and audiological techniques.

10. Student, while progressing from grade to grade along with general education peers, remained well below their grade levels in academic achievements.

11. In early 2001, Parents, deeply concerned with what they considered to be poor educational progress by their while at and sent Student to Dr. , a highly regarded psychologist.

12. Dr. 's testing and evaluations confirmed the existence of Student's severe auditory and visual processing deficits.

a. Dr. determined Student to have a Full Scale Cognitive IQ of 68 (which is in the Impaired to Borderline range of mental impairment).

b. Dr. noted, however, that Student's actual mental functioning might have been masked by the aforesaid processing deficits since the tests had been given orally and visually.

c. Dr. noted that Student would probably encounter substantial difficulties as progressed to higher educational levels.

13. Evaluations by , Inc. in June, 2001 and Assessments in August, 2002 and Bell in 2003 reconfirmed Student's deficits.

14. In _____, an appropriate IEP was prepared for Student by _____, for _____ year, as to which Parents consented.
- a. The _____ IEP proposed to educate Student in _____ core subjects primarily by way of self-contained classes taught by special ed teachers.
 - b. Student was so educated in _____ school year.
15. Student made substantial educational progress in _____ school year at _____.
16. In February and March, _____, Student was evaluated by _____'s school psychologist, Mr. _____, which reconfirmed his eligibility for special education services as Multiple Disabled.
- a. Mr. _____ confirmed Dr. _____'s earlier _____ evaluation, but his tests placed Student's Full Scale Cognitive IQ at 78 (high end of Borderline Retardation).
 - b. Mr. _____, like Dr. _____, believed that Student's actual cognitive functioning might be slightly higher - say in the Low Average Range.
 - c. Mr. _____, like Dr. _____, believed that Student would encounter difficulties as he progressed to more advanced studies - this because Student's deficits became more problematic as the subject matter becomes more complex and/or abstract.
17. Dr. _____, a psychologist specializing in bio-feedback, who, at Parents' request, evaluated Student in preparation for the instant hearing also confirmed the evaluations and findings by Dr. _____ and Mr. _____.
18. Given the aforesaid processing deficits, Student is best educated by way of concurrent visual and audiological techniques, given by special ed teachers slowly and repetitively in a small class setting, such as a self-contained class.
19. On June 19, _____, an IEP meeting was convened at 2 P.M. in order to develop an IEP for Student for the (i) summer ESY; and (ii) the _____ junior school year.
- a. Parents, who attended this meeting, had due notice thereof.
20. The draft IEP handed out at the inception of that meeting was an initial working draft.
- a. Modifications, additions and changes were made upon said draft by the _____ team during said meeting in order to address the goal of developing an appropriate IEP for Student.

21. Parents' primary, if not sole purpose, at said IEP meeting was to obtain a commitment by _____ to pay for part or all of summer training of Student at the Washington, D.C.

a. _____ is a clinic staffed by trained technicians, who, one-on-one administer a series of techniques developed by Dr. _____ and Dr. _____ to ameliorate processing deficits.

b. There are various other techniques utilized to help bypass processing disorders, many of which are utilized by _____ (_____).

22. The major portion of the June 10, _____ IEP meeting was devoted to Parents' presentation of justification for their request that _____ reimburse them for part or all of the costs of _____ for their _____ in the summer of _____.

a. The _____ team kept trying to return the focus of the meeting to Student's _____ school year and the goals, objectives and matters relating thereto, and to a lesser extent, to its proposed _____ ESY program.

b. When _____ refused to pay for any _____ services, Col. _____, who was the most agitated, left, advising _____ that it would hear from attorneys.

23. Mrs. _____ stayed on for another thirty to forty minutes, and then, shortly before 5 P.M. she left.

a. During this time many of the comments and modifications to the initial draft IEP were made by _____'s team.

b. The _____ team requested that Mrs. _____ stay until they had finished their comments and could give her the completed IEP.

c. Mrs. _____ refused to stay, asked for the IEP, initialed it, wrote in the appropriate box that "PARENTS DO NOT AGREE" and, as she left, asked _____ to mail to her the completed IEP, which _____ promptly did.

d. Parents also requested that _____ send to them a full explanation of the proposed _____ ESY services for Student - which _____ (Mrs. _____) promptly did.

24. The IEP proposed by _____ for Student for _____ school is reasonably calculated to provide _____ with substantial educational benefit in the least restrictive environment.

a. The goals, objectives, services to be provided, method of teaching, means of tracking Student's progress on measurable terms, and similar matters were clearly set forth.

b. While the IEP calls for Student's core subjects to be taught in self-contained classes it also allows student to interact with the general student body in other areas.

25. The ESY IEP proposed by for Student for the summer was reasonably designed to prevent any substantial regression by Student in earlier taught matter.

a. The ESY IEP also was reasonably calculated to provide Student with substantial educational benefit.

26. Shortly after being advised that would not pay for service and shortly after receiving the IEP and letter explanation of ESY Services proposed by for Student, Parents unilaterally withdrew Student from indicating they were through with .

a. Parents consistently refused repeated offers by as well as an offer by the undersigned, to reconvene the June 19, IEP meeting in order to address their concerns and desires.

27. Parents enrolled Student in Academy, a small private school whose student body is composed of learning disabled students.

a. does not prepare IEP's for its students nor are they required to pass state SOL tests.

28. Parents now seek reimbursement of the costs of the Academy tuition and all tests and evaluations incurred by them in connection with the instant hearing.

VII.

CONCLUSIONS OF LAW

1. IDEA was enacted to ensure that all children have available to them a free appropriate public education designed to meet their needs and prepare them for employment and independent living. IDEA, 20 U.S. c. 1400 (d)(1)(A).

2. Parents, when requesting reimbursement from a public school of the costs of privately educating their child, a special ed student, have the burden of proof. Bales v. Clark, supra.

3. In order to obtain reimbursement of the costs of private schooling of their Parents must prove, by a preponderance of the evidence that either: (a) the school did not substantially comply with the procedural safeguards required by IDEA; or (b) that the IEP prepared by the School for Student was not reasonably calculated to supply him with an education benefit. Hendrick Hudson District School Bd. v. Rowley, supra, MM v. School District of Greenville, supra; Hartmann v. Loudoun County School Bd., supra.

4. An "educational benefit" is not synonymous with a "best education" or even one comparable to that offered to general education students or offered by private schools - rather the test is much lower, namely whether the IEP is reasonably calculated to provide the handicapped student with "an educational benefit" or "some educational benefit - a "basic floor." Rowley, supra, MM, supra, Hartmann, supra, Bales v. Clark, supra, Prince William Cnty Schools Bd. v. Hallums, ___ F. Supp ___ (___ D.C. Va Aug. 12, 2002).

5. ESY Summer Services are required under IDEA only where the failure to provide such would likely result in a substantial loss by the learning disabled student of educational material earlier taught in the regular school year. MM, supra.

6. When determining which educational program and what teaching methodologies are appropriate, deference must be given to the choices made by the local public school educators. MM, supra, Hartmann, supra, Barnett v. Fairfax County School Bd., supra.

7. IDEA requires that a learning handicapped child be educated with non-handicapped children to the maximum possible (i.e., mainstreaming) consistent with the provisions of an educational benefit. Burlington School Committee v. Massachusetts Bd. of Education, supra; Hartmann, supra, Doyle, supra.

a. Where a conflict exists between educational benefit and mainstreaming, mainstreaming must give way. Hartmann, supra.

8. In order for there to be procedural defects which compel a public school to pay the expenses of privately educating a learning disabled child, such defects must not only be serious and substantive, but also must have either: (i) deprived the parents of any opportunity to participate in the IEP process; or (ii) result in a clear deprivation of educational benefit for the handicapped student. MM, supra, Burke County Bd. of Education v. Denton, supra, Doyle, supra, Hallums, supra.

9. The IEP proposed by _____ for Student for _____ junior year at _____ High School is reasonably calculated to provide _____ with a substantial educational benefit and thus supplies _____ with FAPE. Accordingly, Parents are not entitled to recover any costs of privately schooling Student.

10. The IEP prepared by _____ for Student for _____ school year at _____ will provide _____ with FAPE in the least restrictive environment. Rowley, supra. It is hereby confirmed.

11. The ESY Summer program proposed by _____ for Student in the summer of _____ is designed and reasonably calculated to prevent any regression by _____ if earlier taught matter. It is hereby confirmed. The _____ ESY services proposed by Parents do not address this requirement. Parents, therefore, are not entitled to recover any costs related to _____ services supplied to Student. MM, supra.

12. There were no serious substantive procedural defects here which denied Parents an opportunity to participate in the IEP process or which amount to a denial of FAPE - and therefore, Parents are not entitled to any reimbursement based thereon. MM, supra.

13. If, indeed, the _____ IEP was not fully completed during the time when Parents were at the June 19, _____ IEP meeting or modified after Parents left such was due to Parents' conduct - not the School's. Therefore, Parents are not entitled to any recovery upon this theory. MM, supra.

14. Parents did not prevail here. Accordingly, they are not entitled to be reimbursed for any of the costs related to the instant proceeding, including the costs of the various tests and evaluations of Student undertaken by their request.

15. The decision on the merits herein moots _____'s claims of procedural faults by Parents.

VIII.

RIGHT OF APPEAL

Any party aggrieved by this decision has the right to file an appeal thereof in either a Commonwealth of Virginia Circuit Court or a United States District Court in Virginia, regardless of the amount in controversy, if any, said appeal to be filed within one (1) year from the date of issuance of this decision. Cf. 8 Vac. 20-80-76-0.

Date:

Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of _____ a copy of this decision was either mailed, first-class, postage prepaid or personally delivered to:

1. _____, Esquire

Attorney to _____ Schools
2. _____, Esquire

Attorney for Parents
3. _____ and Mrs. _____

Parents
4. _____, Coordinator
Public Schools
5. Virginia Department of Education
Due Process and Complaints
P.O. Box 2120
Richmond, Virginia 23218-2120

Hearing Officer

