

16/40



VIRGINIA:

DUE PROCESS HEARING

Complainants

:
:
:
:

v.

PUBLIC SCHOOLS

:
:
:
:

Respondent

:

DECISION OF THE HEARING OFFICER

Procedural Status

is a year old child residing in , Virginia. In
of Public Schools (PS) denied 's parents' request for
private placement at in . By letter dated ,
counsel for 's parents, the Complainants in this case, seeking reimbursement for
the school and private placement for the school year, filed a
request for a due process hearing. On , an independent Hearing Officer was
appointed from the Hearing Officer list maintained by the Supreme Court of Virginia.
, 's , had previously written to ,
Superintendent of Public Schools on , concerning possible
tuition reimbursement for the school years and and a possible due
process hearing. The complainants and their counsel subsequently asserted that this letter

was an official request for a due process hearing.

A prehearing conference was held on . It was agreed that the issue of the timeliness of the appointment of a Hearing Officer would be deferred, without prejudice, to the evidentiary hearing. It was agreed that the due process hearing, which was estimated to last 3 days, would commence on , and that the Hearing Officer's decision would be rendered on or before .

The parties also agreed that

1. The parties had no objection to appointment of this Hearing Officer;
2. The parties desired to have the hearing closed;
3. The parties understood the availability of mediation and settlement and elected to proceed with the hearing;
4. The complainants provided PS with authorizations to obtain records from the private placement which was located in ;
5. New student evaluations were done and a new IEP was prepared prior to the scheduled hearing date.
6. The complainants would go first in the presentation of evidence.

The Complainants further submitted Statements of Issues

The parties then presented testimony on , and . The hearing resumed and concluded on Monday . The complainants submitted their Proposed Findings of Facts and Conclusion of Law on . Public Schools submitted its Proposed Findings of Facts and Conclusion of Law on . Complainant then submitted its Response on . Counsel for the parties, by way of emails dated and , requested an extension of time in the proceedings to permit a fully developed record which delay

both parties agreed was in the best interest of the child. This agreement called for the Hearing Officer to submit his decision on or before _____.

The complainants presented testimony from the following witnesses

1. _____, Ph. D., A psychologist from _____ ;
2. _____ age _____ of complainants;
3. _____, Ph. D., a special education consultant from _____ ,

Virginia;

4. _____, M.A., _____'s teacher at _____ School in _____ ,
_____ ;

5. _____, assistant director of the _____ School;

6. _____, complainant and _____ of

7. _____, complainant and _____ of _____ ;

The defendant _____ Public Schools presented testimony from the following witnesses;

1. _____, M.A., _____ Resource Specialist in special education with _____ PS;

2. _____, Ph. D., school psychologist with _____ PS;

3. _____, Ph. D., Specialist Contract Services _____ PS;

4. _____, M.A., _____'s _____ special education teacher at _____ School;

5. _____, B.A., Special Education teacher at _____ School;

6. , former Resource Specialist in special education and psychologist with PS; and

7. , Resource Specialist in special education with PS;

The complainant submitted 104 exhibits and PS submitted 84 exhibits all of which were admitted as part of the record in this matter. Also included in the record is the correspondence and emails exchanged by counsel and the Hearing Officer.

FINDINGS OF FACTS

was born . has a twin who is not disabled. , however, suffered prenatal complications which caused neurological damage. As a result, has deficits in attention, cognitive functioning, language, adaptive behavior, social/emotional development, and fine and gross motor skills. (PS Ex. 20) functions significantly below age-level expectations, and needs a program which includes significant structure, individualization, and modifications. (id.) On account of these deficits, was initially found eligible for special education in the spring of , when he was years old, as a student with Developmental Delays and Speech/Language Impairment. (PS Ex. 2) In reevaluations taking place in and again in (PS Exs. 3, 20), was subsequently identified as a student with “Multiple Disabilities”. The constituent disabilities comprising the “Multiple Disabilities” finding were “Speech/Language Impairment” and “Other Health

Impairment” in ; and “Mental Retardation” and “Other Health Impairment” in .
began placement in the preschool special education program at
in the fall of . continued in that program for the
three ensuing years, through . The program is a special
education class, located within a regular neighborhood public school. (
, Tr. 977) The class is small. During 's last year at
(), there were eight special education students and three nondisabled students.
(id., Tr. 966-67) The class is staffed by a special education teacher and an aide.
attended the class for a half-day, from 9:00 am to noon. (id, Tr. 968)

The class was considered by PS as a “self-contained” class in
that students receive their academic instruction in the special education setting. There
was, however, some movement of students in and out of the room. Students in 's
class moved in and out to receive some part of their related services in a room separate
from the classroom. (id., Tr. 975) Students in the preschool program
which attended were not limited to a single category of disability. Rather, they
included students with a variety of disabilities, such as speech/language delays, autism,
mild mental retardation, and others. (, Tr. 969) They ranged in age from
to years old. (id.) Consequently, in 's class at ,
students were not all working on the same activity at the same time. Students in 's
class were sometimes grouped with students from either, or both, of the other two special

education classes. was not restricted to interacting with the same classroom group of students throughout the day and the week. also interacted not only with the nondisabled students in class, but, at least indirectly, with other nondisabled students in the school.

made educational progress in the program at . Progress on IEP goals is reflected both in the regular progress annotations which are made to the IEP (PS Ex. 21), as well as the progress reports which the teachers reviewed quarterly with . (PS Exs. 67-72, 85) The Parents' witness, , as well as self, agreed that had received educational benefit and made educational progress during the most recent academic year.

In preparation for 's movement to parents made inquiries of the PS staff as to available programs. An IEP meeting to establish 's program in was convened on , which was continued to . At the meeting, school staff, the Parents, and their consultant discussed 's progress and IEP goals. The school system members of the IEP team felt, based upon the progress which had made in preschool, that could benefit from a special education program in local school, . They proposed that spend half the day in a small special education class, with the other half of the day in a regular class, supported by a special education teacher or an aide. Related services of speech/language therapy and occupational therapy would also be provided.

Because the Parents were not in agreement, another IEP meeting was scheduled, and took place on . At the meeting, the parents made known their concerns. In light of those concerns, PS staff made an additional suggestion of a special education class at . Though the class at was, for staffing ratio reasons, designated as an autism class, it also served other special education students in a small, intensive setting. Students in the class participated for a portion of the day with nondisabled students. (Hill, Tr. 685 et seq.)

That IEP and its placement was rejected by the parents through a letter from dated . However, the parents prior to the IEP meeting had already made a decision to reject the IEP as is evidenced by 's sharing a draft of the letter which proposed to send to PS with on and to secure approval of the phrasing of the letter. (PS Ex, 6, 7)

In addition, and unknown to the school system, the Parents during the of had applied for 's admission to School. was accepted to on , before the IEP process for the school year had begun. (PS Ex. 76) On , wrote to , "enthusiastically accepting" admission, and paying a deposit of \$3,393.00. (PS Ex. 77)

In light of 's letter, and in a further attempt to address the Parents' concerns, the school system scheduled another IEP meeting with the Parents. That meeting took place on . At this meeting, PS staff proposed a fully self-

contained IEP: one which provided that all of [redacted]'s school day and week, 30 hours, would be spent in a special education setting (PS Ex. 24, at page ff), and, while [redacted]'s teacher might identify areas where [redacted] could be included with support in a general education setting, that would not actually occur until and unless the Parents were in agreement. ([redacted], Tr. 708-10)

The school system members of the IEP team determined that the educational placement within which to implement this IEP should be the [redacted] Non-categorical program. It was PS staff's position that this would be the best placement for [redacted] to provide [redacted] educational benefit.

PS asserted that the [redacted] Non-categorical program is an intensive program for students with multiple disabilities. [redacted] has small, structured "self-contained" classes of no more than 8 or 9 students, taught by experienced special education teachers, and aided by one or more instructional assistants. Like [redacted], [redacted] is a sort of "school within a school", since it is located within part of a small, regular public [redacted] school.

[redacted]'s scheduled class at [redacted] for the [redacted] school year would have had only six students including [redacted]. ([redacted], Tr. 1002-03) Three of those students would have been [redacted]'s classmates from [redacted] last year at [redacted]. ([redacted], Tr. 710-11)

Students in the Non-categorical program had a number of different disabilities,

such as other health impairment, mild mental retardation, autism spectrum disorders, and multiple disabilities. (, Tr. 721) With one exception, all the students would have been in a two-year range, encompassing . For , when was of age, the ages of the other students in the Non-categorical class would be ; for school year, during which would be -grade age, the other students in the class would be repeating (i.e. -grade age) to grade. (, Tr. 721) PS asserted that the students in Non-categorical class at formed an appropriate instructional grouping, since “they are cognitively and developmentally, and academically very similar.” (, Tr. 722) Their needs are similar enough that accordingly to , they would form a “cohesive learning group.” (id., Tr. 730) employed a variety of instructional methods, “so they could be taught together.” (id., Tr. 723)

PS also asserted that the class was structured both to reduce distractions, and to establish a predictable routine for the students. The one student in the class, two years older than the others, is one whom has worked with for four years, and who had a special and productive relationship with . (, Tr. 721) The therapists at had their own space within which to work outside the classroom where needed. (id., Tr. 719)

One of the features of the Non-categorical program was its location as part of a regular school. PS asserted that for students, such as ,

who would be within a self-contained special education class, being associated with a regular school would be very beneficial. The availability of nondisabled students also allowed the Non-categorical class to pursue various kinds of "reverse inclusion" or "reverse mainstreaming" opportunities, where a handful of nondisabled students work with the disabled students. is located very near the Parents' home, and the school which would otherwise attend. itself is a regular public school, serving grades . It has no school or school students.

At the time of the , IEP, did not sign in agreement or disagreement. Instead, took the IEP with to review with and with . (, Tr. 604) About five weeks later, however, the school system received from the Parents a letter rejecting the IEP.

On , Superintendent wrote again reasserting the appropriateness of the , IEP, advising that PS assumed no financial responsibility for the parents unilateral placement and advising the parents of their right to appeal the proposed IEP through a due process hearing.

proceeded to attend for the school year. is a private school in . It has about 230 students, all of whom are disabled. Most of the students were older than , in many cases significantly so. Less than 50 of the students in the regular program there are of

(or " ") school age. The majority of students at are of school or school age. (, Tr. 451-54) Some are even older, as the school serves students through 21 years old. These students, however, are in the same building as is . For students, the typical stay is between four and five years. (, Tr. 358) PS uses , but only for much older students in need of vocational training. (id., Tr. 930)

's teacher at , , and others, testified that had made progress at . The next communications from the parents to PS occurred on , and on , when sent to one of PS's special education staff copies of 's most recent progress reports at . (Parents' Ex. 72 & 74)

On , wrote to Superintendent a lengthy review of 's year at and demanded funding for both the and school years.

After receiving the Parents' request for school system funding and placement at , the school system secured parents' consent and conducted updated educational, psychological, occupational therapy and speech/language evaluations of , as well as a new social history update. After receiving these evaluations, an eligibility committee was convened on . (PS Ex. 20) was again found eligible for special education as a student with Multiple Disabilities.

Immediately thereafter, the school system and the Parents (accompanied by) convened an IEP meeting. The team again reviewed 's level of educational functioning. In addition to the school system evaluations, the committee had available for its review the private evaluations provided by the Parents, as well as the over 50-page IEP which had been prepared by . The school system had invited 's teacher from to both the reevaluation IEP meeting and the IEP meeting, but was on vacation and unable to attend.

In addition to the foregoing materials, the IEP team had a chance to hear from both and about School. There was no objection at the meeting that there was insufficient information to proceed with the IEP. After considering all this information, PS staff on the IEP team again concluded that the Non-categorical program at would provide an appropriate and least restrictive placement for .

The Parents again rejected the school system's offer of placement. The parents had previously agreed to reenroll in and had participated in an IEP meeting for the school year in . (Parents' Ex. 70) On , counsel for the parents requested a due process hearing.

CONCLUSIONS OF LAW

Issue I - Was the appointment of a Hearing Officer Timely?

Complainants asserted from the outset that the letter of to

, Superintendent of Schools, on , constituted a formal request for a Due Process Hearing requiring the appointment of a Hearing Officer. In addition, it was their contention that if that letter did not constitute a formal request then counsel's letter dated , to Superintendent constituted a formal request for a hearing. 's original letter included the comment

“If you and PS are unwilling to consider reimbursement and prospective tuition for School, then this letter is a request for a special education due process hearing.”
(underlining added)

There is nothing in the record to suggest that either the Superintendent or PS was unwilling to consider reimbursement. The superintendent in response to on , stated

“In order to consider your requests for funding, particularly since the last evaluation and IEP occurred more than a year ago, it is important that PS update its evaluations and prepare a new IEP”

That comment can hardly be said to reflect an unwillingness to fund private placement. In addition, counsel's letter of , which clearly crossed in the mail with the Superintendent's letter of , also included conditional language as follows:

“In the alternate, if Public Schools has elected to neither respond nor provide reimbursement nor offer an IEP for this summer and next fall, by this letter we want to be sure that the request for a due process hearing is placed on the docket for appropriate action.(underlining added)

Since the comments in both letters were conditional, they did not constitute an

unqualified request for a due process hearing. Counsel's letter dated _____, was properly construed by PS as an unequivocal request for a due process hearing and the PS made the timely appointment of a Hearing Officer on _____.

Issue II - Which Party Had the Burden of Proof?

The parties are at issue as to which party bears the burden of proof in the present matter. PS asserts (PS p. 18) that the burden of proof rests with parents relying on Hartmann v. Loudoun County School Board, 118 F. 3d 996, 1000-01 (4th Cir. 1997) cert. denied, 118 S. Ct. 888 (1998) asserting in its Proposed Statement of Fact and Conclusions of Law concerning the Hartman case.

“There the court affirmed the school system's proposed IEP and placement, emphasizing:

Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.
118 F.3d at 1001.

The complainants take the contrary position citing Board of Education of the County of Kanawha v. Michael M., 96 F. Supp 2nd 600, (S.D. WV 2000) and Brian S. v. Vance, 86 F. Supp. 2d 538 (D. Md 2000). These cases thoughtfully attempt to balance the important role of the judgment of local educators with the obligations imposed regarding the student upon the local district under IDEA. While it has been noted that the decision in Brian S. v. Vance has been vacated, see Schaffer v. Vance, 2001 WL 22920 (4th Cir.

2001), the rationale applied by that court appears persuasive and the distinctions made by the Court in that case appear to be applicable in the present case. There the court stated

“Deferring case citations for a moment, it may be useful to begin by considering the different settings in which a challenge to an IEP may arise:

1) there is the initial IEP, proposed by the school authorities the first time it is sought for a child, with which the parents do not agree and as to which they seek an administrative due process hearing;

2) there is the existing IEP, at one time agreed to by everyone, which either the parents or the school district seek to change against the wishes of the other, whereupon the matter goes to an administrative due process hearing; and

3) there is the IEP that has been passed upon by an independent ALJ, which a party seeks to challenge in a court proceeding.

The cases do not ordinarily make these distinctions, but in fact there appears to be reason to do so.

Which setting is applicable to the present case? The record reflects that first came within the purview of the PS special education process in of . (PS Ex 1) On , the Eligibility Committee determined that at age years months was eligible for special education services with primary area of disability being Developmentally Delayed and an additional area of disability being Speech/Language Impairment.. (PS Ex 2) As a result of these evaluations the record reflects that IEP's were prepared and consented to by 's parents on (PS Ex 21) and . (PS Ex 22) The controversy between the

parties arises from the attempt to develop an IEP for the fall of _____ which began with an IEP meeting on _____ . (PS Ex 23)

In light of the above it appears to the Hearing Officer that the second category cited by the court in Brian S. v. Vance applies in the current case. There the Court in the Vance case stated

“Moving back to the next scenario, where an existing IEP is sought to be changed, if for no other reason than that it seems "fair []," *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir. 1983), it is not unreasonable to conclude that the burden of persuasion as to the change should be borne by the party seeking the change. Numerous cases so hold. See, e.g., *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995); *Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Independent Sch. Dist. No. 4 of Bixby, Tulsa County, Oklahoma*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights*, 790 F.2d at 1158; *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983); *Tatro*, 703 F.2d at 830.⁷

2. These authorities are in accord with the observation made by Professor Wigmore that the burden of proof is frequently placed "upon the party to whose case the fact is essential," 9 Wigmore on Evidence, § 2486 at 288. (italics omitted) In the context of an IDEA case, this argues for the proposition that the party seeking a change in the IEP should have to explain why the change is appropriate.

If this were _____ and a dispute arose between the parents and the PS _____ involving services to be provided at _____ then it would seem appropriate to place the burden on the parents. However, in the instant case, since _____ was starting into a new and more formal academic program, i.e. _____, and since _____ was going

into it at a new school, it appears equitable that the overall burden of proof should rest with PS. Due deference to the educational expertise of the school staff as is required by the Hartmann case can be applied individually to the credibility of testimony of each witness.

Issue III - Did IEP of _____

Provide _____ with a Free Appropriate Public Education?

The complainants make much of the process and comments made by various PS staff members that began in early _____ as they began to examine the programs being offered by PS as they would apply to _____. It is likewise apparent from their testimony that based upon their meeting with _____ and as well as their reliance on the statement contained in the Special Education Eligibility Form dated _____

, i.e.

“ _____’s needs will only be met with intense instruction and a small group setting”

that they believed that nothing less than a small class in a totally self contained setting would be best for _____. It is equally apparent that PS took a much more expansive view of the kind of program that would provide benefit to _____. While the phrase “negotiations” is more frequently used in a business context, it is clear that it had its application to what was going on between PS and _____’s parents. Indeed, it would seem that such “negotiations” is precisely what was intended from the extensive

provisions for parental involvement under IDEA, i.e. to give the parent an opportunity to present their viewpoints as to their child's education. In the present case, from the parents perspective, it appears that they were successful in persuading PS staff to modify their original proposal. Thus the proposed , and , IEP's read as follows:

"The school staff felt they could address the goals drafted in 's IEP program at ['s home school] that consisted of special education support throughout 's day. would participate in a ½ day general education program with special education support in the room. The other part of the day, would be in a small group, with instruction from special education staff.

Subsequently, at the IEP meeting on , the PS proposal was modified to provide

"On a program at [where had been enrolled for the previous three years] was also offered as an option for . This program would be a classroom based upon a special education model with some inclusion in ."

The , IEP draft went on to state

"Parents concerns: Any option presented included some time in the general education environment which they feel is not supported by the eligibility statement, or the independent psychologist or 's pediatrician."

However, the record reflects that well prior to this time 's parents began to

consider a private placement at _____ in _____, based upon the suggestion of _____'s application to _____ was submitted on _____, (PS Ex 75) and was accepted by _____ on _____. (PS Ex 76) _____ by letter dated _____, paid the first month's tuition of \$3,393.00 stating that _____'s parents "enthusiastically accept" the admission of _____ to _____. (PS 77)

On _____, _____ wrote a lengthy letter to Superintendent _____ setting forth the parents perspective of the events that had gone on since the beginning of the year, asserting that the program being offered by PS did not meet _____'s individual needs and finally advising that they had enrolled _____ in _____ and would be requesting transportation and funding for _____ attendance at _____.

In response to this letter _____ wrote _____ that in light of _____ concerns PS would reconvene the IEP team to review the proposed IEP and to consider _____ request for private school placement. The new IEP meeting was scheduled for _____.

The IEP team met as scheduled on _____, and the proposed IEP reflected changes suggested by PS staff in response to _____'s parents concerns.

" _____ the IEP team discussed placement at _____ in _____ the noncategorical program. A representative from contract services was present to discuss the parent request for placement at _____. The school staff felt that _____'s needs could be met through a program at _____. This

program was developed in response to
's request to have a self contained program. School staff
felt that would benefit from interaction with typically
developing peers."

In terms of "delivery of service options" the , proposed IEP provided
that would receive services for special education in a special education setting on
a regular basis and services for special education in general education on a regularly
scheduled basis. The , IEP was modified to provide special education in a
special education setting on a regular basis and special education in a general education
setting on an intermittent basis. (Underlining added)

By letter dated , 's parents did not accept the proposed
IEP and enrolled in in the fall of .

Much of the proposed Findings of Fact and Conclusions of Law of 's
parents concerned itself with the variety of proposals made prior to , and the
colloquy between the parents and PS staff. However, the Hearing Officer believes that
the issue before is solely whether the services to be provided to pursuant to
the , IEP would have provided with a free appropriate public education.

An IEP, by definition, is supposed to be an individualized document. A review of
both the , and the , IEPs indicated that both were clearly
individualized and geared to 's specific needs. Thus, special activities in the area
of: Communication/Oral Language, Counting Skills, Self-Help Skills, Play Skills/Social

Skills, Project Initiation, Language, Fine Motor and Gross Motor were set forth in considerable detail as PS staff attempted to improve 's present level of performance to achieve annual goal.

The primary thrust of 's parents' challenge to the appropriateness of the , IEP arises from their assertion that 's classroom environment would not be in best interests. Thus the following comments from counsel

“The special education program offered on was not a self contained class, but a collection of children of different ages and different disabilities who are physically placed in the same room studying different curriculum. The program is not a homogenous self-contained classroom.

At the same time testified

“ So that idea of being a classroom, it wasn't a classroom. Because a classroom meant to me that, one, that you are with the same group of kids all day. These kids came and went. They said that some kids would be in there more or less than others. But other kids came in and out for services.”

The alleged deficits in 's environment it is asserted through the parent's witnesses would include (a) the large physical size of the room, (b) the differing ages of 's classmates, (c) that some of classmates would leave the room to participate in regular education classes, (d) that classmates would have varying disabilities, (e) that would be in contact with regular education students both in classroom and in the hallways, (f) that these activities would overwhelm emotionally, (g) that

would "... just freeze and be unable to avail self of the educational atmosphere..", (h) that " would be so worried about what was going to happen next."

The PS response dwelt upon a variety of factors which included the following:

a. 's participation at the prior two years had many of the elements objected to by the parents, i.e. it was located in a regular school, the students were not limited to a single classification of disability, the students participated in differing activities, that the students interacted with other nondisabled students. Indeed in previous two years at class included nondisabled peers. All parties had agreed that had made progress during those years at

. Counsel for PS cited test results indicating improvement by .

b. The class at was in fact a small class as it would only contain six students three of which has been prior classmates at .

c. While PS conceded the ages of students that would be in 's class differed they believed that the students still formed a "cohesive learning group"

d. The staff was experienced and would be able to provide one on one support to .

e. It was also noted that the necessary related services such as speech/language and occupational therapy would be available at .

f. The contact with nondisabled peers would be strictly limited and regulated and

done with parental input. PS asserted that on most occasions, contact with nondisabled peers would be achieved on a "reverse inclusion" basis, i.e., the nondisabled students would come into the special education classroom.

g. Since there would be some contact with nondisabled peers, participation by at would have education undertaken in the least restrictive environment.

Comparing the two positions, it is important to recognize what PS obligations were in the matter. Both counsel cite Board of Education v. Rowley, 458 U.S. 176, (1982) as setting out the guiding principles. There the Supreme Court stated that an "appropriate" educational program is one which is *reasonably calculated to offer a child some educational benefit*. See Rowley, 458 U.S. at 203. While the Court in the Kanawha case noted that the definition of what is an appropriate education as contained in the statute and the Rowley case is a somewhat nebulous concept, it appears to this Hearing Officer that the more important element of the Rowley decision as applied to this set of facts concerns the level of services and support that a school district must provide to a student. The level clearly is not such as to provide the student with the best possible education but rather only those services "*reasonably calculated to offer a child some educational benefit.*" (underlining added) By way of comparison and using the familiar preponderance of the evidence standard, this means that the services provided have only to tip the scale to establish that the student will receive some benefit from what is being provided. Conversely, there must

be some evidence which demonstrates that the program proposed by the local school system doesn't provide at least some educational benefit.

There can be no question that PS was not ignoring . While the school system did not acquiesce in the parents demand for what amounted to a special self contained school for they clearly offered a program geared to meeting 's needs. To this Hearing Officer while it may not have been the best - the ideal - program for - the small sized classes would have been able to satisfy the eligibility committee's comment that " 's needs will only be met with intense instruction and a small group setting". In addition because the services would be provided in a setting where there could be some - though minimal - interaction with nondisabled peers the instruction would meet IDEA's requirement that services be provided in the least restrictive environment. In light of the above, I find that the IEP of , did provide a free appropriate public education to

Issue IV - Did IEP of

Provide with a Free Appropriate Public Education?

The necessity for an IEP for the school year came about because of 's parents' request for reimbursement and the initiation of a request for due process hearing. The parents previously had participated in an IEP meeting at in of to develop an IEP for the school year at that school. Following 's , letter and after appropriate notice, PS took steps in the

short time prior to the commencement of the due process hearing on _____, to conduct updated educational, psychological, occupational therapy and speech/language evaluations of _____. After receiving these evaluations, the eligibility committee again found that _____ was eligible for special education services. An IEP meeting was then immediately convened with the parents and _____. The committee had before it the new evaluations, the private evaluations provided by _____'s parents, and the records from _____'s teacher at _____ was invited to the IEP meeting but was on vacation and unable to attend.

Individualized goals were established for _____ in the following areas: Reading (Word Recognition), Reading (Comprehension), Math (numeration and addition), Math (time), Written Language, Social Emotional, Social Emotional (Attention), Social Emotional (Play Skills), Communication, Adaptive Skills, Fine and Gross Motor, Mobility and Fine Motor. (PS Ex 26) In addition, the IEP provided for additional consultations in Adaptive Physical Education and Integrative Technology.

This IEP differed from the _____, IEP in that it provided that all special education services would be provided in a special education setting on a regularly scheduled basis. The services would again be provided at _____.

The same rationale is presented by _____'s parents with respect to the inappropriateness of the _____ IEP as were presented for the previous year's IEP. While testimony with regard to _____'s performance during the year at _____ was

presented by [redacted] teacher and by the assistant director which showed progress on [redacted] part in that environment, such testimony does not form a basis from which to judge the

[redacted] program. None of the witnesses presented by [redacted]'s parents had seen the [redacted] program in action.

From the testimony presented by [redacted] PS witnesses, [redacted], in the upcoming year, [redacted] would receive the same level of services as would have been provided the previous year with the exception that the contact with the regular education environment would be even more restricted. There was no evidence presented which would show that [redacted] would not have received the "some educational benefit" called for in Rowley. Accordingly, I find that the IEP of [redacted], did provide a free appropriate public education to [redacted]

Issue V - Did The Failure to include [redacted]'s [redacted] Teacher in the IEP Deliberations deprive [redacted] of FAPE?

The evidence establishes that [redacted]'s teacher at [redacted], whom the school system could not compel to attend, was not available for the IEP meeting in [redacted], and that the IEP team had sufficient information about both [redacted] and [redacted] performance at [redacted] School from a variety of sources. In this situation, the lack of personal attendance of the teacher clearly is not the basis for a finding that the school system has not provided an appropriate education. The same situation was presented in Jennings v. Fairfax County School Board, 35 IDELR 158 (E.D. Va. 2001), affirmed 2002 WL 1544711

(4th Cir. July 16, 2002) and the same argument was rejected by the Court.

CONCLUSION

Accordingly, it is the finding of the Hearing Officer:

- a. there being no contrary assertion by _____'s parents, that all the requirements of notice to _____'s parents have been satisfied;
- b. that _____ has a disability;
- c. that _____ needs special education and related services;
- d. that _____ Public Schools, by virtue of its IEPs dated _____, and _____, has offered to provide _____ a free appropriate public education;
- e. that the claim of the parents of _____ for reimbursement for the costs associated with _____'s attendance at _____ School during the _____ school year is denied;
- f. that the request of the parents of _____ for a private placement of _____ at _____ School for the _____ at the expense of _____ Public Schools is denied.

Dated:

Hearing Officer

APPEAL NOTICE

The parties are hereby notified pursuant to 8 VAC 20-80-76 O that a decision by the Hearing Officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party. The appeal may be filed in either a state circuit court or a federal district court within one year of the issuance of the decision without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under Section 1415 of the Individuals with Disabilities Education Act (20 USC Sec 1400 et seq) without regard to the amount in controversy.