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VIRGINIA:

[REDACTED] PUBLIC SCHOOL EXCEPTIONAL EDUCATION
DUE PROCESS HEARING

IN RE: [REDACTED]
By [REDACTED], [REDACTED]

Pursuant to an appointment by letter dated [REDACTED], from [REDACTED], Director of Exceptional Education, [REDACTED] Public Schools from the approved hearing officers' list in the Office of the Executive Secretary of the Virginia Supreme Court; and pursuant to Virginia Code Sections 22.1 – 213 et seq., 9 – 6.14:14-1 et seq. And 34 CFR part 300, et seq., an impartial due process hearing was held before the undersigned Hearing Officer on the day of [REDACTED], at the [REDACTED], [REDACTED]

[REDACTED] At the end of the evidentiary hearing, by joint motion of the parties, the statutory and regulatory time limits were waived in the best interest of the child to allow the parties and the Hearing Officer an opportunity to review the new evaluations agreed to by the parties, which extension ultimately went to [REDACTED] for the Hearing Officer to render the final decision.

The undersigned Hearing Officer is required, or was requested, ultimately to determine by a preponderance of the evidence and applicable laws, rules and regulation, the following:

1. Whether or not the requirement notices to the parents were satisfied; and
2. Whether or not the child is disabled; and
3. Whether or not the child needs special education and related services; and
4. (a) Whether or not the [REDACTED] Public Schools are supplying a free appropriate public education (FAPE).

- (b) Whether or not the child may be returned to regular education upon request from the parent.
5. Any other questions or issues of law or fact presented during the due process hearing bearing upon the issues reviewed therein.

BACKGROUND:

██████████, ██████████ of ██████████ ("the child"), requested a due process hearing, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. ("IDEA") and the regulation therein seeking (1) the termination of the special education services that the child has received since ██████████, and (2) that ██████████ be returned to a regular education classroom setting. ██████████ Public Schools ("LEA") argues that the child's recent academic performance and serious behavioral problems, as well as the results of a recently completed reevaluation of the child, support the LEA's position that the regular education environment is not the proper one to insure educational progress nor is it the least restrictive environment that is appropriate for ██████████. In order to justify assigning the child to a regular education setting the LEA argues that they would have to ignore the results of ██████████ recent reevaluation which discloses ██████████ low level of academic functioning and the severity of ██████████ behavioral problems. The LEA further argues that the child continues to be a child with a disability and as such, the LEA must meet its obligation to provide ██████████ with a free appropriate public education ("FAPE").

FINDS OF FACTS:

1. The child, a ██████████ child, is currently a rising ██████████ grader who currently attends ██████████ School.

2. [REDACTED] has a long and extensive history of severe behavior problems and poor academic achievement.
3. [REDACTED] was first identified as a child with a disability in [REDACTED] while in the [REDACTED] grade.
4. [REDACTED] was determined eligible for special education in the area of [REDACTED] [REDACTED]). (LEA Exh. 13).
5. In [REDACTED] first Individualized Education Program ("IEP"), [REDACTED] was reported as functioning at a pre-readiness level for kindergarten.
6. [REDACTED] also displayed aggressive, defiant and impulsive behavior and received many out of school suspensions (LEA Exh. 15).
7. [REDACTED] was assigned to a self-contained special education classroom with [REDACTED] permission for [REDACTED] placement.
8. The child remained in a self-contained special education classroom for the next three school years.
9. The child has shown some improvement, however, [REDACTED] serious academic and behavioral problems have persisted.
10. By letter dated [REDACTED], [REDACTED] requested that [REDACTED] child be taken out of the [REDACTED] program. (LEA Exh. 23).
11. [REDACTED] alleges that when [REDACTED] gave [REDACTED] permission for [REDACTED] to enter the program, [REDACTED] was not aware that it was special education and that, if [REDACTED] had known, [REDACTED] would not have given [REDACTED] consent. [REDACTED] also claims that [REDACTED] was told that it was only a three-year program and now that the program has "expired", [REDACTED] wants the child returned to a regular classroom. (Tr.p.5)
12. The Eligibility Committee met to review the child's progress and on [REDACTED], the team recommended that the child be evaluated to determine the appropriate

educational placement but [REDACTED] refused to consent to the evaluation (LEA Exh. 24).

13. When the parties could not come to a resolution regarding the child's educational placement, [REDACTED], by letter dated [REDACTED], initiated this due process proceeding and this Hearing Officer was appointed.
14. During the course of the due process hearing, [REDACTED] granted the LEA permission to reevaluate the child (Tr., p. 87).
15. The LEA completed an educational assessment, a classroom observation, a social history, and a psychological evaluation prior to [REDACTED].
16. Subsequent to the hearing, but prior to the decision, the Hearing officer received copies of the evaluation and the Eligibility Committee's findings and recommendations.

DISCUSSION

This Hearing Officer has reviewed, both pre- and post-hearing the exhibits presented by the LEA and has carefully reviewed the transcripts, the educational assessment and family background, the Psychologist's report, the Eligibility Committee's Minutes as well as the Eligibility Determination, all subsequent to the hearing. All of these factors and the transcripts were helpful to the Hearing Officer to make the required determinations in this case. The documents referred to above that were supplied post-hearing were made available to this Hearing Officer by the LEA pursuant to agreement between the parties at the due process hearing (Tr., p. 87).

The applicable law in this case is The Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. § 1412 *et seq* and related federal and state regulation and it requires loc

educational agencies to provide disabled students with a free appropriate public education ("FAPE") in the least restrictive environment. The student's education must be tailored to meet the unique needs of a disabled child by means of an individualized education program ("IEP"), which must contain the elements described in Section 1414(d)(1)(A) of IDEA and must be reasonable calculated to enable the student to receive educational benefits. The seminal case on IDEA and its predecessor was Board of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). Further, the LEA must ensure that, to the maximum extent appropriate, children with disabilities in public schools are educated with children who are non-disabled. In addition, special schooling or other removal of children with disabilities from the regular educational environment may occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. See 20 U.S.C. § 1412 (a)(5); 34 Code of Federal Regulation ("C.F.R.") § 300.550.

FAPE is defined in IDEA as special education and related services that: (a) have been provided at public expense, under public supervision and direction, and without charge; and (b) meet the standards of the State educational agency; and (c) include an appropriate preschool, elementary, or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program required. 20 U.S.C. § 1401 (8) (1997). A child with a disability includes a child with a serious disturbance, specific learning disabilities and speech or language impediments. 20 U.S.C. §1401(3)(A). Each state must insure that its obligation to identify, locate and evaluate all children with disabilities is met. 34 C.F.R. § 300.300(a)(2); 8 VAC 20-80-50.

In Board of Educ. V. Rowley supra, the Supreme Court determined that the statutory definition of FAPE, in addition to requiring "specially designed instruction" requires the provision of such support services as may be required to assist a handicapped child to benefit from special education. The Court in Rowley concluded that the basic floor of opportunity provided by IDEA consists of access to specialized instruction and related services, which are individually designed to provide educational benefit to the disabled child. "Insofar as a State is required to provide a handicapped child with a 'free appropriate public education', we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP". Rowley supra at 203-04. A school division has met its obligation under the Act only when it has offered a free appropriate public education to every child with a disability.

Having reviewed the applicable law and regulations, the Hearing Officer now looks at the reports and evidence of the child's abilities, analysis of progress and school records to determine how the facts in this record support, or not, the requirements of the law.

The child was evaluated by [REDACTED], PhD., LEA School Psychologist, as part of [REDACTED] initial evaluation for special education services on [REDACTED], [REDACTED] (LEA Exh. 10; Tr., p. 18) and again as part of [REDACTED] recent reevaluation; the Psychological Evaluation of the child dated [REDACTED] [REDACTED]. In [REDACTED] [REDACTED] testing revealed that the child scored in the low average range on the intelligence and that [REDACTED] was approximately a year delayed in [REDACTED] fine motor eye/hand coordination. The child behavior test showed that [REDACTED] scored low in the areas of adaptive

functioning. The results showed anxious and depressed behavior, social problems, thought problems, attention problems, aggressive behavior and delinquent behavior. (Tr., p. 24.)

The [REDACTED] Psychological Evaluation continues to display severe academic problems. The child scored in the Well Below Average Range on the intelligence test at the first percentile for [REDACTED] age. On the educational test, the child scored a 66, which is at the first percentile and is extremely low compared to the age-based norm. This score places [REDACTED] at the late first grade level. [REDACTED] math score is at the second percentile, or at early second grade level. [REDACTED] reading and spelling scores are both at the mid-first grade level.

[REDACTED] measured the child's emotional and social adjustment using a social skills rating system, which relayed a score for the child at the ninety-seventh percentile for [REDACTED]. Given all of the other relevant information [REDACTED] opined that, in [REDACTED] view, the child was either selecting what [REDACTED] believed to be the socially desirable answers or that [REDACTED] is not capable or reliable self-evaluation. [REDACTED] ultimately concluded that the child appears to be making limited progress in school, and continues to need substantial support.

[REDACTED], the child's classroom teacher for the past two school years, reported that in the [REDACTED] school year, the child was on the honor roll for the first nine weeks, but [REDACTED] grades slowly slacked off to B's and C's and then to C's, D's and F's. (Tr.p. 37) The child was also absent from school 39 days during that school year. During the [REDACTED] school year, the child earned B's and C's and had numerous absences (21 absences the first semester and as of the date of the hearing 23 days the second semester). (Tr. p. 56) All of the child's grades were based upon [REDACTED] IEP goals and objectives, which means that [REDACTED] grades are based on curriculum

that is modified to meet [redacted] academic needs and certain accommodations. (Tr. p 38) The child's reading skills are so poor that [redacted] reads [redacted] tests to [redacted] [redacted] has problems with basic phonics, word blends, long and short vowels, and reading comprehension. (Tr.pp. 39; 43) [redacted] [redacted] stated that the child guesses at words. Using informal testing in the classroom, [redacted] [redacted] estimated that the child was functioning on the first to second grade level, with math as a relative strength on the third grade level.. (Tr. pp. 40-41) While [redacted] [redacted] informal testing showed improvement in the child's performance, [redacted] [redacted] is still functioning significantly below grade level, even when the tests were read to [redacted] (Tr. pp. 39-42)

[redacted] [redacted] expressed concern regarding the possibility of the child entering a [redacted] grade classroom when [redacted] [redacted] is functioning on a first grade level. [redacted] [redacted] stated that the child needs the supports offered by special education in order to be successful. (Tr. p. 68) [redacted] [redacted] believes that the child will experience frustration that will result in more behavioral problems. (Tr. p. 69) In short, [redacted] [redacted] does not believe that the child will be successful without special education and the special attention and accommodations that come with this placement.

[redacted] [redacted] completed an Educational Assessment of the child on [redacted] [redacted] as part of [redacted] [redacted] reevaluation. [redacted] [redacted] indicated that the child is functioning well below [redacted] [redacted] current grade level, and that [redacted] [redacted] behavior results from frustrations and attempts at task avoidance. [redacted] [redacted] needs assistance with oral reading and comprehension questions.

Additionally, another witness, [redacted] [redacted], Coordinator of Exceptional Education, stated that although the child was in the [redacted] [redacted] grade, [redacted] [redacted] is performing well below grade level. If [redacted] [redacted] were to be placed in a regular education setting where [redacted] [redacted] would be expected

to perform at grade level work, [REDACTED] would become highly frustrated. (Tr. p. 86) Also, the Eligibility Committee identified [REDACTED] as a child with [REDACTED]. While some academic progress has been made and the child's grades are satisfactory (based on IEP goals and objectives), there is consensus among the professionals on the committee that the child functions several grade levels below [REDACTED] actual grade and therefore continues to require the assistance and services provided in the special education program, in order to progress educationally.

Behaviorally, the child has had problems within the school regimen but has improved over time in the special education setting. The child is identified as [REDACTED] [REDACTED]. In the self-contained classroom to which [REDACTED] has been assigned, there are eight students. The students including the child are mainstreamed for physical education, art, music, the library and lunch. (Tr. pp. 15, 35) [REDACTED] was also mainstreamed for a period of time for math, but this was discontinued due to [REDACTED] poor school attendance. (Tr. p. 45) [REDACTED] teacher, [REDACTED] uses various types of behavioral modifications to address behavioral problems of the child and the other students, such as daily behavioral sheets, checklists contracts and a point system. (Tr. p. 80) [REDACTED] testified that although the child has shown improvement over the two years [REDACTED] has been assigned to [REDACTED] classroom (Tr. pp. 57-58), [REDACTED] still has serious concerns about [REDACTED] behavior. [REDACTED] has had to physically restrain the child at least once this year (Tr. p. 62) and the child also walked into another classroom and smacked another student in the head. (Tr. pp. 63-64) [REDACTED] also tends to bully and intimidate other students. (Tr. p. 60) A classroom observation of the child, recently completed as part of [REDACTED] reevaluation, confirms that the child still uses threats and intimidation to control other students and continues to engage in this behavior despite repeated correction. [See Report of Classroom Observation dated [REDACTED]]

In another incident, [REDACTED] Principal of [REDACTED] reported that at the end of the [REDACTED] school year, [REDACTED] came inside the school and said that the child was outside and that [REDACTED] could not get [REDACTED] to come inside the building. [REDACTED] said that [REDACTED] had to come outside to get [REDACTED] and if [REDACTED] could not get [REDACTED] to come in to call the police or security. [REDACTED] then left, leaving [REDACTED] to control the child's behavior. [REDACTED] walked down the street and disappeared. [REDACTED] was forced to call the police and LEA security. They found the child approximately an hour later and returned [REDACTED] to the school. (Tr. pp. 10-12)

Despite the overall concerns regarding the child, [REDACTED] believes that [REDACTED] relative improvement indicates that [REDACTED] is benefiting from the special education program and the services and supports it offers. [REDACTED] believes that the child has "come a long way", but foresees that [REDACTED] will face problems if [REDACTED] returns to a regular education program because of the potential for frustration. "[REDACTED] not getting the accommodations; [REDACTED] thrown in with a group where [REDACTED] becomes not just a student but more of a group, where the last two years [REDACTED] has been a student receiving specific help. You're talking about eight – teacher/student ratio is one to eight versus one to, on average twenty, you know, give or take. I think [REDACTED] frustration level would rise, and we'd start to see a lot of the same referring behaviors. And that's what I would be afraid of, because we would lose where we've made so much headway, so much progress. I'm afraid we might lose that." (Tr. pp. 59-60) [REDACTED] also believes that although the child, like many special education students, would like to be out of a self-contained classroom; [REDACTED] does not understand that the accommodations that are made for [REDACTED] both academically and behaviorally, in such a setting. (Tr. p. 66)

██████████, Coordinator of Exceptional Education, also stated that although the child has made some progress in the area of behavior, ██████ has done so because ██████ is in a structured classroom with a small teacher to student ratio and where specific behavior strategies are implemented to address ██████ behavioral difficulties. These benefits that the child receives in a special education setting are not available to ██████ in a regular education setting. (Tr. pp. 85-86)

The ██████ ██████, has requested termination of the child's eligibility for special education and related services and has asserted that the parent has the right to remove ██████ from special education. IDEA and its related regulations, including Virginia's, does not allow the parent a veto over its mandates for FAPE when children are determined to be disabled and in need of special services. The IDEA and regulations, state and federal, require a team of professionals, along with the parent, to determine if a child is no longer in need of special services. (See 34 CFR § 300.534 and 8 VAC 20-80-58 (B) (1)) If the team of professionals disagrees with the parent, the LEA must follow the procedures set forth in Virginia's approved regulations (8VAC 20-80-56) to use other measures to insure that parental revocation of consent will NOT result in the withdrawal of FAPE for the child (See 8VAC 20-80-58(B)(3) (my emphasis)).

Upon completing the administration of tests and other evaluation materials, a group of qualified professionals (which can be the IEP team) and the apparent or parents of the child must determine whether the child is, or continues to be, a child with a disability. 8 VAC 20-80-56 (B). The team must examine the evaluation data to determine whether the child has a disability, ██████ present level of performance and educational needs, whether the child needs special education

and related services, and whether any additions or modifications the special education or related services are needed to enable the child to meet measurable annual goals as set out in an IEP.

8 VAC 20-80-54 (D)(b)(4).

The Eligibility Committee unanimously (except for the parent) identified the child as [REDACTED] with a [REDACTED]. The consensus of the professionals was that the child functions well below [REDACTED] actual grade, even with the individual attention, and even with low teacher to pupil ratio in special education. They believe the child's best hope of educational benefits continues to require the assistance and services provided in the special education programs.

Given all of the above and the uncontradicted record of the child's educational and related behavior experience to date, this Hearing Officer finds that to provide FAPE in compliance with IDEA, taking the findings and the record as a whole, the LEA has no choice; the parent has no choice and the Hearing Officer (acting in the best interest of the child to gain meaningful educational gain under the law) has no choice but to grant this child special education and the necessary related services.

CONCLUSIONS OF LAW

The Hearing Officer makes the following Conclusions of Law based upon Findings of Facts and the application of the law as set forth hereinabove.

1. (a) That the requirement of notice to the parents was satisfied; (There is no allegation or evidence that this was not done and the parent participated in all of the proceedings and issues leading to this hearing); and
(b) That the child is handicapped; and
(c) That the child is in need of special education and related services.
2. That the LEA has provided the child with FAPE under IDEA and applicable federal and state regulations and must continue to do so given the entirety of the record of this case and the findings of the Eligibility Committee of the needs of the child in which, given the record, I concur.
3. That the LEA has substantially prevailed herein.
4. That this Hearing Officer has jurisdiction over the parties and the subject matter herein.
5. That the decision made by the Hearing Officer is final and binding on all the parties unless any party aggrieved by the findings and decisions of this due process hearing appeals to a state circuit court or a federal district court within one (1) year of the date of this hearing decision.

ORDER

Therefore, in view of all of the foregoing, it is hereby ORDERED that the [REDACTED] Public Schools, with lawful notice to the parents, shall cause an appropriate IEP meeting to be held to develop an educational program for [REDACTED] for the school year [REDACTED] consistent with the findings of the Eligibility Committee and the information provided by the [REDACTED] evaluation of the child and that the LEA implement that plan consistent with the requirement of IDEA, FAPE and this decision in time for the child to begin the [REDACTED] school year with or without the consent of the parents in order to insure compliance with IDEA, FAPE and the least restrictive environment and to proceed into the new school year without any interruption in the child's education..

The Hearing Officer would also recommend, but does not require (should the IEP Committee determine otherwise) that the IEP Committee review the originally prepared IEP for the year prepared by [REDACTED] (LEA Exh. 28) to determine if additional mainstreaming in any academic areas could be tried for the child in the near future. Such "test" mainstreaming might disclose some areas of educational learning that the child might be able to mainstream to a greater degree in the future.

Respectfully Submitted,

[REDACTED]
Hearing Officer
VSB [REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this due process decision was mailed, postage prepaid, to [REDACTED]; [REDACTED], Counsel for the LEA and [REDACTED] [REDACTED] Esq., Virginia Department of Education, at their address of record.

[REDACTED]