

VIRGINIA:

PUBLIC SCHOOLS
DUE PROCESS HEARING



RE: [REDACTED]
by: [REDACTED] and
[REDACTED] Parents
And next friend.

Plaintiffs.

BACKGROUND

[REDACTED] was appointed as hearing officer in this matter on [REDACTED]. The [REDACTED] by counsel, elected to proceed with mediation on [REDACTED] which was completed on [REDACTED].

The 45 days in which the hearing officer is required to file [REDACTED] opinion expired on [REDACTED]. By agreement of counsel, the due process hearing was set for [REDACTED] and the case was continued to [REDACTED]. This continuance was deemed to be in the best interest of the student. [REDACTED].

Because of time restraints, this opinion is being written before the transcript has been transcribed so there can be no references to page and line numbers.

FACTS

It is conceded by all parties that [REDACTED] ([REDACTED]), age [REDACTED] years, born on [REDACTED] [REDACTED] is an [REDACTED] child who tested mildly-moderately [REDACTED] on the childhood [REDACTED] rating scale ([REDACTED] Exhibits Tab 18). [REDACTED] is a brain disorder that typically affects a person's ability to communicate, form relationships with others, and respond appropriately to the environment. Some people with [REDACTED] are relatively high functioning, with speech and intelligence intact. Some have serious language delays. For some, [REDACTED] makes them seem

closed off and shut down; others seem locked into repetitive behaviors and rigid patterns of thinking.

Although people with [REDACTED] do not have exactly the same symptoms and deficits, they tend to share certain social, communication, motor, and sensory problems that affect their behavior in predictable ways.

At present, there is no cure for [REDACTED]. Nor do children outgrow it. But the capacity to learn and develop new skills is within every child.

[REDACTED] has substantial deficits in language, fine motor and social skills. In addition, [REDACTED] exhibits what are commonly referred to as self-stimulatory behaviors such as hand flapping, teeth grinding and tongue chewing.

[REDACTED] Public Schools ([REDACTED] recognizes [REDACTED] disability and has provided [REDACTED] with services since the fall of [REDACTED] as required by the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1400 et seq.

These services have extended over two years of [REDACTED], [REDACTED] and an extended school year program (ESY) for the summer of [REDACTED] as well as [REDACTED] program for school year [REDACTED].

[REDACTED] ESY program for the summer of [REDACTED] included 16 hours of speech/language therapy and 8 hours of OT. These figures were based on providing [REDACTED] with two speech/language therapy sessions per week and one OT session per week. [REDACTED] IEP for [REDACTED] [REDACTED] included 2 hours of speech/language therapy per week and 2 hours of OT per week. It also included a one-on-one aide for 6 hours per day. This included 3 hours of [REDACTED] half-day [REDACTED] and 3 hours of an extended school day where [REDACTED] received one-on-one tutoring to reinforce the [REDACTED] curriculum.

IEP for the ESY called for only two hours of speech therapy for the entire summer and will receive a total of two and one half (2-1/2) hours of occupational therapy (OT) during the summer. This reduction from the ESY program and the program of two hours OT and two hours speech/language therapy per week brings about this request for a due process hearing.

Even though the speech therapy and OT were all but eliminated from the summer ESY IEP, the county did provide services to would receive special education for four hours per day for four weeks (through): 10 hours per week from though a special education consult for 30 minutes per week for 10 weeks. will receive assistance from an instructional assistant for 12 hours per week from through feels that this summer program would meet current needs and goals.

The question then is would the drastic reduction in the hours for speech therapy and OT during the ESY for give a free appropriate education (FAPE) as required by IDEA? Appropriate as used in FAPE means appropriate for the particular child and the particular disability.

ONE

To determine what is appropriate for we look first at the testimony of M.D. whose *curriculum vitae* consists of seven pages stating that is a neurologist who has extensive experience in diagnosing and treating report on is found at Tab 35. testified that had reviewed approximately 18 previous reports and tests on before writing report of I quote from sections of reports:

"Consultation Concerns: [REDACTED] came to medical attention at around [REDACTED] years of age because of hyperactivity as well as what is reflected in [REDACTED] medical records as a "notable delay in expressive language development". While [REDACTED] used single words early and appropriately, overall language development appears to have been significantly delayed and currently [REDACTED] has significant problems in language pragmatics. That is the ability to initiate or respond to who, why, when, where and how questions. [REDACTED] is, in addition, linguistically preservative."

"Formulation: Based upon this present evaluation as well as review of previous, exhaustive evaluations of [REDACTED], it would appear to me that [REDACTED] has [REDACTED]. I believe that [REDACTED] is a very high-functioning [REDACTED] child. I would prefer not to use the term [REDACTED] to characterize [REDACTED] disability as this condition suggests a social deficit with circumscribed interests in the absence of any significant language disorder and with only the rare association with motor stereotypes. [REDACTED] has often been used euphemistically to characterize high-functioning [REDACTED]. This diagnosis also gives the impression that [REDACTED] disability is mild and will not require an intensive program of intervention. It is my impression that [REDACTED] will require an intensive intervention program and that an extended day as well as an extended year program for [REDACTED] would be appropriate. [REDACTED] should be encouraged to interact with normal children in a structured fashion. [REDACTED] should have, in attendance, an aide who is specially trained to deal with children who have [REDACTED] and who can facilitate social interaction as well as the appropriate evolution of the language capacity which circumvents [REDACTED] present difficulty in language pragmatics and therefore, enhances [REDACTED] ability to engage in a socially pragmatic fashion. Language and social learning are, in my opinion, exponential in the age range up to [REDACTED] or [REDACTED] years. After this point, both types of learning, while they are perceived, are perceived in a much more linear fashion. There, therefore, exists a window of opportunity that we have now which will not be available to us as time goes on. Thus, the necessity for a highly intensive, well structured, well conceived program. [REDACTED] can potentially become a self-sufficient, productive adult who is capable of gainful employment to meet not only [REDACTED] own needs, but also that of other individuals. The intense program presently will help to achieve this long-range goal and, in my professional opinion, is a present imperative."

[REDACTED] testified in person during the hearing on [REDACTED] that the IEP dated [REDACTED]

[REDACTED] (Tab 27) will not provide [REDACTED] with an appropriate education.

Another witness, [REDACTED] Ph.D., whose [REDACTED] consists of 14 pages states that [REDACTED] is with the Department of Psychiatry, [REDACTED] and holds a Master of Education in School Psychology as well as being a consulting editor to [REDACTED] [REDACTED] and other qualifications in the field of [REDACTED] too numerous to mention.

[REDACTED] uses the term [REDACTED] Disorder, which is on the [REDACTED] when referring to [REDACTED]. Children with [REDACTED] Disorder are very like high-functioning children with [REDACTED]. Although they have repetitive behaviors, severe social problems and clumsy movements, their language and intelligence are usually intact. Unlike [REDACTED] the symptoms of [REDACTED] Disorder typically appear later in childhood.

An initial clinical evaluation ([REDACTED] Tab 6) was performed on [REDACTED] by [REDACTED] on [REDACTED] to clarify whether a diagnosis of [REDACTED] was appropriate for [REDACTED] and to clarify the type of educational services [REDACTED] would need.

At age [REDACTED] was evaluated by [REDACTED] at [REDACTED] who offered a diagnosis of [REDACTED] and later [REDACTED] was identified as a child with [REDACTED]

[REDACTED]'s conclusions, in part, were stated in paragraphs C and E of [REDACTED] report:

- C. "Meeting [REDACTED] educational needs will require more than a half-day program in a regular [REDACTED] even with an individual aide. Thus, it is recommended that a supplemental program be designed for the afternoons to provide additional instructional time and to provide speech/language therapy and occupational therapy services without interrupting [REDACTED] experience in the classroom. On the basis of the evaluations that have been completed, at least two hours per week of direct service from both speech/language and OT professionals (four hours total) is an essential component of an appropriate educational program. The remainder of the afternoon program, with an individual instructional aide, should address other areas of deficit that cannot be covered in the regular classroom; for example, [REDACTED] may require some

individual tutoring in academic areas that [redacted] finds challenging. [redacted] certainly requires individual instruction, rehearsal, and reinforcement of social interaction and adaptive behavior skills. This individual instruction will allow [redacted] to learn the skills that can then be practiced in the classroom and playground settings.

- E. Finally, it is likely that [redacted] will require Extended School Year Services for the foreseeable future. Reinforcement of skills mastered and preparation for upcoming material will be essential if [redacted] is to avoid regression during the summer break and to benefit appropriately from the school year program."

The services received by [redacted] in [redacted] were generally consistent with these recommendations.

On [redacted] had another psychological evaluation by [redacted] Ph.D. [redacted] was then [redacted] years one month of age ([redacted] Tab 33). This evaluation was requested by the [redacted] because the EASY services for [redacted] were reduced by [redacted]

[redacted] was given numerous tests and a complete report was prepared. I will re-state the summary and recommendations:

"[redacted] has demonstrated that with the level of individual support and special services [redacted] received last year, [redacted] is able to learn academic skills and to develop socially. [redacted] rebound in vocabulary skills and [redacted] steady progress in Numbers and Letters are a testament to the fact that the level of individual support and special services over the past year were appropriate. There is no reason to believe that anything has changed with respect to [redacted] need for individual support and related services.

Thus, it is strongly recommended that [redacted] receive Extended School Year services through the summer of [redacted], with no diminution in the frequency or duration of related services. [redacted] special education teacher has carefully documented the fact that [redacted] has shown regression during the school year and that, following vacations or absences, [redacted] experiences increased anxiety and behavior problems (e.g., report of [redacted]). Such anxiety and behavior problems are common among children with [redacted] Disorder and they emphasize the importance of sustaining a successful program with a few interruptions as possible.

Reducing the frequency of related services represents a significant change and a threat to the progress that [REDACTED] and [REDACTED] teachers have worked so hard to achieve.

The relative strengths that [REDACTED] demonstrates in the verbal domain, documented in the present evaluation, do not include strengths in pragmatic language. Indeed, pragmatic language continues to be an area of marked weakness for [REDACTED] as evidenced by behavioral observations during this evaluation and by objective testing in the [REDACTED] speech and language evaluation conducted by [REDACTED] PS. This weakness in pragmatic language emphasizes the need for continued intensive speech therapy, both during the school year and during the extended school year. In fact, ESY sessions are often ideal for concentrating on the development of pragmatic language skills because of the possibility of a more relaxed and flexible schedule. Pragmatic language difficulties are chronic and disabling for people with [REDACTED] Disorder and it is this more social, everyday-functional aspect of language that requires the most intensive intervention. Children with [REDACTED] Disorder do not learn pragmatic language by exposure to typical peers or by participation in classroom group activities; they learn these skills by exposure to typical peers or by participation in classroom group activities; they learn these skills by intensive individual instruction and by rehearsal, prompting and reinforcement in individual and small group settings. Now is the time to increase the intensity of intervention with respect to pragmatic language skills because the demands for effective social interaction increase with each new grade level. As [REDACTED] moves through the [REDACTED] grades, children will be increasingly intolerant of weaknesses in this area, and intensive instruction in pragmatic language skills can help to support more typical peer relationships.

Similarly, as [REDACTED] moves through [REDACTED] years, it will be increasingly difficult to overcome the deficits and challenges associated with [REDACTED] Disorder. There is substantial scientific support for the impact and the importance of early intervention. Using the summer months merely to maintain [REDACTED] in the areas of speech/language and sensory/motor functioning, as opposed to using this time to actively foster continued development, will have long term negative consequences for [REDACTED] (a) by limiting [REDACTED] ability to participate in, and benefit from, a regular classroom setting, and (b) by limiting the extent to which [REDACTED] will overcome, or compensate for, the functional limitations of [REDACTED] Disorder. Accordingly, as recommended previously by my report of [REDACTED] at least two hours per week of direct service from both speech/language and occupational therapy professional (four hours total) is a critical

component of an appropriate educational program for [REDACTED] during the summer months and throughout the regular school year."

[REDACTED] M.D., Associate Professor of Psychiatry and Pediatrics [REDACTED]

[REDACTED] on [REDACTED] wrote:

[REDACTED] is a [REDACTED]-old [REDACTED] with an [REDACTED] spectrum disorder. [REDACTED] continues to have significant impairments in speech, language, fine motor and social skills. There is concern that [REDACTED] abilities to make progress in these areas may be diminished as [REDACTED] gets older and that clearly interventions now will provide the best change for [REDACTED] continued progress and success. Accordingly, it is essential that [REDACTED] services be continued over the summer without any reduction in the level and frequency from that [REDACTED] receives during the school year."

[REDACTED] was also seen by [REDACTED] M.Ed., Speech and Language Pathologist, at the [REDACTED] on [REDACTED] who recommended:

"For the summer months and for the regular school year, it is recommended that [REDACTED] be enrolled in a speech therapy program as dictated in last year's IEP. This would include one session on an individual basis and one session of small group interaction. The individual attention is needed to assist [REDACTED] in understanding the rules of social engagement in an intense learning environment. It will assist [REDACTED] in learning how to manage one-on-one social interactions. The small group session would be a nice balance with a closely monitored arena for [REDACTED] to practice the skills learned in [REDACTED] individual sessions as well as learn how to interact in a small group of peers."

[REDACTED] OTR/V, a licensed occupational therapist, owns and operates [REDACTED]. [REDACTED] has worked with [REDACTED] on a private basis, employed by [REDACTED] parents, since [REDACTED]. [REDACTED] had [REDACTED] in two kid-in-motion camps during the summer of [REDACTED] and has worked with and tested [REDACTED] on a private basis. [REDACTED] report of [REDACTED] (F [REDACTED] Tab 36) concluded in part:

[REDACTED] certainly does not have the functional fine motor skills to be successful with the writing demands of [REDACTED] grade. [REDACTED] standardized scores place [REDACTED] in the 1st-2nd percentile or at two-three years below [REDACTED] peers for fine motor skills. [REDACTED]

continues to need specialized training techniques for [redacted] emerging writing skills.... [redacted] needs to continue with the same frequency and intensity of these services so as not to regress and to develop functional skills for the [redacted] grade."

TWO

[redacted] introduced 82 exhibits portraying a complete picture of [redacted] history with [redacted] Public Schools. On [redacted] there was an OT evaluation by [redacted]. The assessment was as follows:

"[redacted] is a youngster who is currently making gains in all areas. With the aid of an instructional assistant, [redacted] follows routines and stays on task. [redacted] has made gains in all fine-motor skills and is working on a level consistent with half of [redacted] classmates. The exception to this is handwriting, thought it, too, has improved. [redacted] writes in boxes as a way to keep [redacted] letters evenly sized and spaced. Sensory issues, tactile and auditory sensitivity, and a need for movement continue to be issues for [redacted]. When [redacted] becomes over stimulated by noise and touch or frustrated with activities, [redacted] requires a quiet place to regroup. [redacted] sensory issues impact [redacted] overall learning process, but [redacted] has made impressive strides in self-regulation."

This assessment was by [redacted] who has 26 years experience in OT and working with [redacted] and has worked with [redacted] since [redacted] preschool studies in [redacted] of [redacted] (School Board-S.B. Tab 53).

In [redacted] [redacted] took the [redacted] Assessment Test (SB Tab 71) scoring 85% in Math, 100% in Science, 80% in Social Studies and 85% in Language Arts. These scores were based on the knowledge of any student [redacted] age regardless of their disability or lack thereof.

[redacted] program through kindergarten, combined with the parents' participation, is having a positive effect on [redacted]. I quote from [redacted] report of [redacted]:

[redacted] has made good, steady progress this year. The fact that some skills are inconsistent for quality is a characteristic of the [redacted] Spectrum. Overall, however, [redacted] has grown tremendously this school year. [redacted] is an engaging child who demonstrates good knowledge

and an interest in [redacted] environment. [redacted] most significant need is behavioral. [redacted] anxiety and the ability to become over stimulated by noise, touch and excessive movement impact all aspects of [redacted] school performance. [redacted] is making gains in managing these stresses with the help of modifications and staff. [redacted] deserves credit for [redacted] progress this year."

A psychological profile done by [redacted] M.Ed. on [redacted] placed [redacted] overall developmental age between 4-1/2 and 5 years of age with a chronological age of 6 years 10 months (SB-T52).

On [redacted] and [redacted] a psychological evaluation was done by [redacted] M.S., School Psychologist. This evaluation was very complete. I would sum up the results with one quote. "[redacted] displays verbal abilities in the below average to average range and these scores can be considered the most accurate estimate of [redacted] cognitive potential."

On [redacted] [redacted] completed a Consideration for Extended School Year (ESY) form. This form has 16 questions and I quote from part of them:

- "Q7. Following periods of vacation or absence, does student show irreparable or permanent loss?
A7. Great difficulty with behavior in class after absence.
- Q8. Following periods of vacation or absence, does student show the ability to recover his/her loss?
A8. Great anxiety produced.
- Q11. What permanent, irreparable or major loss of critical life skills will occur as a result of interruption of this student's education? State specific goals/objectives to be addressed in ESY.
A11. Emerging communication, social, behavioral (sensory) skills, cognitive skills, fine motor skills.
- Q12. What previous interruption in the educational program has caused a permanent, irreparable or major loss in this student's ability to perform? Be specific regarding length of interruption, pre: pos test scores or other objective measures of performance.

- A12. Christmas-Thanksgiving. After illness, [REDACTED] has great difficulty reorienting to the school environment, structure and social settings. [REDACTED] seems to have anxiety, difficulty transitioning and general performance in school setting.
- Q13. What specific evidence do you have that demonstrates the inability of this student to recover or recoup following an interruption in instruction?
- A13. [REDACTED] has done well in the [REDACTED] Class with intense 1:1 support. After absences [REDACTED] may demonstrate anger, difficulty responding to direction, expressing [REDACTED] Classroom teacher 1:1 assistant report loss of social skills as well as performance after absences.
- Q14. What critical life skills are a "breakthrough" point that, without ESY, would negatively affect educational benefit during the regular school year?
- A14. Behavior modification, cognitive skills, communication and social skills that are necessary for success in the school setting are at a "break through" point.
- Q15. If the student does not receive ESY services, will the degree of progress on critical life skills affect the student's ability to benefit from education during the regular school year?
- A15. Without a continuation of behavior modification program, communication, social, [REDACTED] may not have the skills to perform in an academic setting next year.
- Q16. Would interruption of programming for interfering behaviors prevent the student from receiving some benefit from education during the next school year? If yes, how?
- A16. [REDACTED] self-stimulating behaviors and inappropriate behaviors in classroom framework interfere with [REDACTED] educational process."

[REDACTED] PS employed [REDACTED], BS in Psychology, to work with [REDACTED] and [REDACTED] observed [REDACTED] on a daily basis in class and at play. [REDACTED] testimony was that [REDACTED] would get agitated more often in group sessions and behaved better in a 1:1 setting. [REDACTED] provided some information to [REDACTED] in the preparation of the form, Consideration For The ESY, and testified that [REDACTED] agreed with the answers and the information on that form (T-10 and SB-48) as stated above.

THREE

██████████ argues that the Individuals With Disabilities Education Act (IDEA) does not require school officials to provide the optimal educational program. Under the IDEA, "a 'free appropriate education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." These statements of principal are correct but they do not apply to this case. The testimony in this case from ██████████ ██████████ and ██████████ M.Ed., a speech and language pathologist, states that continuing two hours per week of speech/language and two hours of OT per week (the amount of services provided by the ██████████ IEP) is necessary for ██████████ (a) to not regress during the summer and (b) to be successful in the ██████████ grade.

In fact, the sum of the testimony from the four experts is that a continuation of the previous services in OT and language is a minimum requirement not the optimal requirement.

White v. School Board of Henrico County, Record No. 1995-002 (va ct. app. ██████████ 2001) is cited in support of the proposition that "the purpose of extended school year programs is to enable continued progress during the regular school year, not to maximize educational benefits or to function as a year-round program" and "the Virginia Department of Education has determined that ESY programs are to be focused on preventing regression and insuring that the student will make educational progress during the next regular school year".

First, I have to note that the "White" case is distinguishable from the present case on its facts. In the White case, the student is already in the ██████████ grade and ██████████ has a reading disability. There is no window of opportunity that will close in the White case.

██████ case is totally different. The evidence is that ██████ is a very high-functioning ██████ child who will require an intensive program of intervention. ██████ an expert in the field, testified that "language and social learning are, in my opinion, exponential in the age range up to eight or nine years. After this point, both types of learning, while they are perceived, are perceived in a much more linear fashion. There, therefore, exists a window of opportunity that we have now which will not be available to us as time goes on." This is not an issue that one can put off now and revisit down the road because ██████ will be too old and the window will be shut.

██████ concludes that the two main purposes of ESY services are: (1) to prevent the likelihood of "substantial regression" and a "failure to recover those lost skills in a reasonable time following the school break." and (2) to avoid the likelihood that the student will be prevented "from receiving benefit from his/her educational program during the regular school year without these services."

██████ testified that without services this summer ██████ will regress and further testified that the IEP of ██████ will not provide ██████ with an appropriate education. ██████ was tested by ██████ PS and is in the 1 percentile in pragmatic language which is as low as one can get.

██████ (SB-48), on ██████ answered questions to the effect that following vacation or absences ██████ shows great anxiety. After Thanksgiving-Christmas, ██████ has great difficulty reorienting to school environment. After absence ██████ may demonstrate anger, loss of social skills, as well as performance. Without continuation of a behavior modification program, communication and social, ██████ may not have the skills to perform in an academic setting next year.

Clearly, [REDACTED] needs the ESY with the same level of instruction in speech/language and OT that [REDACTED] received in [REDACTED] which is two hours of each, each week (four hours total) as opposed to two hours for the entire summer.

FOUR

As a part of the [REDACTED] request for Due Process Hearing, they wish to amend the ESY as follows:

All goals should be revised so as not to be limited to "maintaining" [REDACTED] skills and to provide for [REDACTED] "mastering" the objectives, or "making reasonable progress" toward the objectives. (In light of the "small but vital window of opportunity" that this [REDACTED]-year-old [REDACTED] child now has, the [REDACTED] believe that "reasonable progress" toward these objectives will require mastery before the next school year begins.)

I agree with the proposition maintaining [REDACTED] skill is not appropriate in light of [REDACTED] disability which leaves [REDACTED] with on a one or two year window of opportunity before [REDACTED] learning pattern changes, according to the doctors who have testified.

Making "reasonable progress" is more appropriate as long as one understands that "reasonable" means reasonable in light of [REDACTED] disability.

"Mastering" the objectives is, in my opinion, too strong of a word and not appropriate in this case.

If the IEP goals/objectives are set too high, the student then is being set up for failure which is not the purpose of the IEP.

There is insufficient evidence in this case for me to order the specific objectives for the ESY/IEP and that will be best worked out between [REDACTED] PS and the parents.

ORDER

The IEP should be amended as follows:

- 1) [REDACTED] should receive two (2) hours of speech/language therapy per week.
- 2) [REDACTED] should receive two (2) hours of occupational therapy per week.
- 3) The goal should be amended from "maintaining" to "making reasonable progress".

Respectfully submitted,

[REDACTED]
Administrative Hearing Officer