04-024

Local Hearing ____x_____ State Level Hearing _____

CASE CLOSURE SUMMARY REPORT

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

_____ PUBLIC SCHOOLS
School Division

_____
Name of Parent

_____
Name of Child

_____
Date of Decision

_____
Counsel Representing LEA

_____
Counsel Representing Parent / Child

_____
Party Initiating Hearing

Split Decision
Prevailing Party

Hearing Officer's Determination of Issues:

* Whether the IEPs developed by Public Schools provide the student with a Free Appropriate Public Education (FAPE) in the least restrictive environment based on the student's individual needs.
Prevailing Party - LEA, with modification to IEP.

* Whether the Public Schools offered the student a full continuum of placement and service options. * Whether the Public Schools predetermined the student's placement.
Prevailing Party - LEA

* Whether the Public Schools failed to provide timely, complete and/or appropriate notice to the parent of the child.
Prevailing Party - LEA

* Whether stay-put services should have been implemented for the child by Public Schools.
Prevailing Party - LEA

* Whether the Public Schools improperly informed the parent that ESY services were unavailable during the school year. (Note: Issue really involved implementation of ESD services.)
Prevailing Party - Parent

Hearing Officer's Orders and Outcome of the Hearing follows:

It is hereby **ORDERED** that the IEP proposed by Public Schools be immediately implemented with the following modification:

Extended School Day services will be added for three times per week before or after school as the parties can agree.

A member from 's IEP Team is hereby **ORDERED** to collaborate with 's former 4th grade teachers from Public Schools to discuss which instructional techniques worked best for , and to discuss these techniques with the IEP Team for implementation, whenever reasonably possible.

It is **ORDERED** that the IEP be used as a "fluid" or working document to be frequently revisited by the IEP Team and for modification or change as 's individual needs are more accurately identified by . In the event the parties are unable to otherwise agree on how often the IEP is to be revisited, it is hereby **ORDERED** that the IEP be revisited not less than every thirty days from the date of this decision through completion of 's 5th grade school year.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached. I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Printed Name of Hearing Officer

Signature

VIRGINIA:

IN THE OF

In the Matter of , a minor,

by mother,

v. *DUE PROCESS HEARING*

PUBLIC SCHOOLS

DECISION OF THE HEARING OFFICER

INTRODUCTORY STATEMENT:

This matter came to be heard on , upon request of for a due process hearing on behalf of , . is an eleven year old, fifth grade student who attends Elementary School, , Virginia. This action is brought against Public Schools (PS) pursuant to the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. §§ 1400 et seq.

alleges that PS failed to provide with an adequate Individualized Education Program (IEP) and an appropriate placement, thereby precluding from receiving a "Free Appropriate Public Education (FAPE)" in the "Least Restrictive Environment (LRE)." also alleges that committed several IDEA procedural violations and that these violations contributed to 's denial of a FAPE.

Initially, this matter was scheduled to be heard on , however, on , counsel for the complainant requested an emergency delay. Believing it to be in the best interest of the child to have counsel for the parent present, the motion for

delay was granted and the matter was rescheduled for . Both parties filed post-hearing briefs and response briefs.

FACTS:

began education with Public Schools, but soon thereafter moved to , Virginia where attended a private kindergarten. In , was retained in Kindergarten for a second year because of "lack of progress." From , was enrolled with the Public Schools from where received first and second grade education. The Public Schools referred for special education evaluation. Due to personal family problems, withdrew consent for evaluation at that time.

In , transferred to the Public School system where completed third and fourth grade education. was tested for special education services and determined eligible for such services on . 's tests revealed that had "a specific learning disability due to defects in language processing and a significant discrepancy between average ability and borderline achievement in reading, math and written expression." (School Board Exhibit 6) The school psychologist also noted that displayed both active and impulsive classroom behaviors. IQ was determined to be in the average range. It was noted that seemed to have difficulty focusing and appeared to be easily distracted. has received no further testing since .

In , and moved to Virginia. In of enrolled as a fifth grade student at

Elementary School. started school at in September of where remains a student.

While enrolled in the Public Schools, was taught using the collaborative method. was provided with special accommodations because of learning disabilities to include having tests read orally. proposed that receive instruction in language arts and math by moving from the regular classroom to a Learning Disabled (LD) resource classroom. has also provided with an Alpha Smart machine designed to assist with writing skills.

objects to 's proposed resource methodology of instruction and maintains that 's LRE dictates that be taught using the collaborative method. alleges that the proposed IEP from has effectively denied a FAPE in the LRE.

Despite objection to the LD resource method of instruction, did sign an interim IEP. The interim IEP provided for resource teaching. contends that was intimidated into signing the interim IEP by the assistant principle at Elementary School, , who threatened to deny special education services to if did not sign.

also alleges several procedural violations by and claims that these procedural violations effectively denied a FAPE. alleges that wrongfully predetermined 's placement; failed to offer a full continuum of the services available in ; committed written notification violations; failed to implement "stay put" services; and failed to provide accurate information regarding Extended School Year Services (ESY).

ISSUES:

The issues in this case are as follows:

* *Whether the Public Schools offered the student a full continuum of placement and service options. Whether the Public Schools predetermined the student's placement.*

* *Whether the Public Schools failed to provide timely, complete and/or appropriate notice to the parent of the child.*

* *Whether stay-put services should have been implemented for the child by Public Schools.*

* *Whether the Public Schools improperly informed the parent that Extended School Year (ESY) services were unavailable during the school year.*

* *Whether the IEP developed by Public Schools provides the student with a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE) based on the student's individual needs.*

DISCUSSION and FINDINGS:

Whether the Public Schools offered the student a full continuum of placement and service options. Whether the Public Schools predetermined the student's placement.

argues that failed to provide a full continuum of placement and service options for because they failed to discuss options with for 's IEP beyond resource and consultative services. also argues that was intimidated into signing an IEP by , the assistant principal at Elementary School, who implied that would not receive special education services if an IEP were not signed.

Further, argues that suggestions for 's IEP were dismissed because had already made up mind as to how was to be educated prior to the IEP meeting. complains that neither , nor any other

member of the IEP team, conducted any meaningful consultation with Schools prior to formulating the IEP and that such communication was critical since had just transferred from . also contends that the IEP meeting was simply a "rubber stamp" of the predetermination made by . contends that these procedural violations of the IDEA resulted in the denial of a FAPE for .

This Hearing Officer is very disturbed to hear that a school official has intimidated a parent regarding the education of their child. Such should never be the case. Further, the allegation of predetermination is also serious since the purpose of the IEP is to provide an *individualized* educational program for the disabled child. Although it is not within my power as a Hearing Officer to issue reprimands to School Board employees who intimidate parents, I would strongly urge to thoroughly investigate these very serious allegations coming from a parent who is obviously concerned about the education of child.

One of the fundamental goals of IDEA's procedural protections is to ensure that parents have a meaningful opportunity to participate in the IEP development. However, it has been held that only those procedural violations that actually interfere with the provision of a FAPE are actionable under IDEA. See *DiBuo v. Bd. of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002).

Although I find the assistant principal's behavior alarming, case law dictates that only procedural violations that result in the loss of an educational opportunity to the student, or that seriously infringe on the parent's opportunity to participate in the IEP process, constitute the denial of a FAPE. See *Burke County Bd.of Educ. V. Denton*, 895 F.2d 973, 982 (4th Cir. 1990). Since a workable IEP has been proposed for by

that will provide with an educational opportunity, and, since did in fact participate in the IEP meeting, I cannot find that the present procedural violations denied a FAPE. However, I do FIND that did not sufficiently coordinate with officials when developing the proposed IEP, nor did inform of all available options available for 's educational benefit.

, who testified for and who works as an Instructional Specialist, clearly testified to other educational settings that were available in . should have been made fully aware of those educational settings available throughout from which might benefit. For example, as 's IEP develops and needs are better identified, it might become necessary for to transfer to a school that more appropriately fits needs, one that offers services that are not available at Elementary. As a parent and an active participant in the development of 's IEP, I FIND that should be made aware of the full spectrum of services available to through the .

Whether the Public Schools failed to provide timely, complete and/or appropriate notice to the parent of the child.

argues that was denied a FAPE because was given inappropriate notice by of proposed changes to 's IEP, and that this constituted a procedural violation of Virginia State Regulations 8 VAC 20-80-70 C. 1 and 2. In this case, I must agree with 's argument that eight days is a reasonable period for notice. However, I am not convinced that notification from was completely proper as it relates to timing and implementation of the IEP. In any case, I FIND that even if a procedural notification violation were found, did not meet

the burden of proof required to constitute a denial of FAPE. I FIND that any procedural violation by regarding notice was not so egregious as to deny a FAPE in the LRE. has not been denied a FAPE because of any procedural notification violation.

Whether stay-put services should have been implemented for the child by Public Schools.

In the case of *Ms. S v. Vashon Island School District*, 337 F.3d 1115 (9th Cir. 2003), the court held that, where possible, the new school district is required to implement the IEP used by the old school district. If the parents and the new school district should disagree on an interim IEP and placement, *Vashon* states that the old IEP should be implemented to the extent possible until a new IEP is developed and implemented. In the present case, an interim IEP has been implemented. Thus, I FIND that this issue has been independently resolved.

Whether the Public Schools improperly informed the parent that Extended School Year (ESY) services were unavailable during the school year.

MM v. School District of Greenville County, 303 F.3d 523 (4th Cir. 2002) provided a formal standard for determining when ESY Services are appropriate under the IDEA: "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *MM* carefully emphasized that, under this standard, "the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school." Fourth Circuit precedent is clear that "ESY Services are only necessary to a FAPE when the benefits a disabled child gains

during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months."

In this case, it appears that the alternative relief sought by (if the collaborative model is not ordered) is individual tutoring two or three times per week, before or after school, focusing on a structured reading program and math facts. This being the case, is seeking an extended school *day* for , not an extended school *year*. Nonetheless, a standard similar to that discussed in *Vashon* can be used to determine whether such relief would be of educational benefit to .

Testimony from witnesses on both sides seem to indicate that has difficulty retaining basic skills and needs constant reinforcement and adult supervision. Such reinforcement could be accomplished through an extended school day. It is clear that could receive educational benefit from the additional reinforcement of basic skills that could be derived from an extended school day. It appears from the testimony that has difficulty retaining information from day to day. Accordingly, it would follow that extended school day services are necessary to 's FAPE since the benefits gains during a regular school day are forgotten, thereby being significantly jeopardized, if is not provided with an educational program for longer than the regular school day. Using the *Vashon* test, I FIND that the educational benefits that gains during a regular school day will be significantly jeopardized if is not provided with an extended day educational program. Such could be the reinforcement needs to retain basic skills. Therefore, the IEP proposed by should be modified to include an extended day program.

Although is under no obligation to provide with *maximum* educational benefit, both IDEA and Virginia law require more than just *minimal* educational benefit to a handicapped child. See *Martin v. School Board of Prince George County*, 3 Va. App. 197 (1986). An offer of extended day services to would give more than just the minimum educational benefit.

"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. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the IDEA, and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." See *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050, 73 L.Ed. 2d 690 (1982). I FIND that is in need of personalized instruction to receive a FAPE in the LRE, and that extended day services would serve as a sufficient support service to permit to benefit educationally from that instruction.

Whether the IEP developed by Public Schools provides the student with a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE) based on the student's individual needs.

The IDEA guarantees each child a FAPE in the least restrictive environment along with related services required to enable a child to benefit from his or her education. This does not necessarily mean that the best possible environment must be provided for the child, nor does it mean that the child must be provided with ALL the related services available to children with conditions that affect their learning. Instead, it means that the schools must provide an environment and related services that a particular child needs in order to benefit from a FAPE. Deciding the best environment and related services for is clearly a dilemma, given school history, documented accommodations, lack of recent testing, and varying witness testimony.

IDEA requires the development and implementation of IEPs that are reasonably calculated to provide an educational benefit to the disabled student. See *Hartmann v. Loudoun County Board of Education*, 118 F 3d 996, 1001 (4th Cir. 1997.) The substance of 's IEP must be reasonably calculated to provide with educational benefit. See *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050, 73 L.Ed. 2d 690 (1982). is under no obligation to provide with the *maximum* educational benefit; however, both IDEA and Virginia law require more than just *minimal* educational benefit to a handicapped child. See *Martin v. School Board of Prince George County*, 3 Va. App. 197 (1986). In the present case, eligibility for special education services is undisputed and has been offered such services by the . Because is so new to , it is difficult to know, as yet, how much educational benefit will receive from the proposed IEP.

However, it is important to note that local educators should be afforded latitude when determining the IEP most appropriate for a disabled child. The IDEA was not

designed to deprive local educators of the right to apply their professional judgment. Instead, it should establish a "basic floor of opportunity" for every handicapped child. *See Rowley*, 458 U.S. at 201. States must provide specialized instruction and related services "sufficient to confer some educational benefit upon the handicapped child," id. at 200, but the Act does not require "the furnishing of every special service necessary to maximize each handicapped child's potential," id. at 199. claims the present IEP denies a FAPE in the LRE because is not being taught using the inclusive collaborative method in a regular classroom setting. As an alternative to the collaborative method of teaching, asks that a full-time aide be placed in classroom for language arts and math plus be available for additional tutoring. position is based upon belief that significantly benefited from use of the collaborative method while a student in .

When considering the testimony of and witnesses from , it is clear that did indeed progress via use of the collaborative teaching method. It is also clear that could have benefited from more discussion with appropriate personnel from when developing proposed IEP. The testimony of witnesses must be given due consideration since was in fact a student in for two years immediately prior to transfer into the school system. However, this testimony is not controlling since is now a student in and case law dictates that local educators should be given deference when educating a disabled child.

Thus, in reaching my findings, I must also consider the testimony of , an for the Office of Special Education Services,

, and of , present teacher. testified that had many basic skill deficits that required "remediation and not accommodation." also testified that proposed IEP for was a "fluid" document that could be changed as the need arose. testified that lacked the basic skills to work on the fifth grade level. The exhibits presented of 's in-school work products reinforce these observations. The accommodation to still have tests read orally prior to leaving is also troubling. Although testimony from witnesses did indicate that was being weaned from this accommodation during the later part of the year, there was no testimony that the accommodation to orally read tests had been eliminated. Further, given age and grade, even the best of in-school work products show a lack of basic skills.

argues that self-esteem would suffer if were required to attend LD resource classes. This argument is rejected because stated that would not be the only student pulled out of the classroom and that other students would also be leaving to go to resource classes. also argues that would suffer more if allowed to remain in a regular classroom without the appropriate basic skills to keep up with the work and peers. In this regard, I agree with argument.

Accordingly, I FIND that with some modifications, the IEP proposed by (the local educators) purports to address individual needs as they are presently known, however, the proposed IEP should be used as a working or "fluid" document that can be changed as individual needs are identified. With additional testing, , while working with , will be able to appropriately adjust 's IEP.

educators who are familiar with 's educational needs should be consulted and their in-put initially considered as adjustments are made to accommodate 's educational needs and requirements. This does not mean, however, that is required to use the collaborative method to teach but that should consider putting into place those teaching methods used by that proved positive to 's education and that can be practicably applied. Accordingly, I FIND that the IEP proposed by provides with a FAPE in the LRE so long as the proposed IEP be used as a working document that is subject to modification and adjustments as individual needs are identified and documented by -- the local educator.

Although I do strongly believe that additional testing would be in best interest, that both and the IEP team would benefit greatly from testing, and that parental consent should be given, I adhere to argument that this issue is not properly before the Hearing Officer since did not file a due process over the issue of testing and the issue was not raised by the parent. Moreover, when the issues in this case were initially identified during the pre-hearing phase, did not raise the issue of testing nor did they ask that I order such testing of . Therefore, I FIND that the issue of testing is not properly before the Hearing Officer.

ORDERS:

It is hereby **ORDERED** that the IEP proposed by Public Schools be immediately implemented with the following modification:

Extended School Day services will be added for three times per week, before or after school as the parties can agree, for the remainder of fifth grade year.

A member from IEP Team is hereby **ORDERED** to collaborate with ; former 4th grade teachers from Public Schools to discuss which instructional techniques worked best for , and to discuss these techniques with the IEP Team for implementation, whenever reasonably possible.

It is **ORDERED** that the IEP be used as a "fluid" or working document to be frequently revisited by the IEP Team and for modification or change as individual needs are more accurately identified by . In the event the parties are unable to otherwise agree on how often the IEP is to be revisited, it is hereby **ORDERED** that the IEP be revisited not less than every thirty days from the date of this decision through completion of 5th grade school year.

RIGHTS OF APPEAL:

This decision shall be final and binding unless appealed by either party. To appeal this decision, a civil action may be filed in either a state circuit court of competent jurisdiction within one year of the issuance of this decision, or in a federal district court of competent jurisdiction.

ENTERED:

Hearing Officer