

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.)



Schools _____
School Division _____

Mr. and Mrs. _____
Name of Parent(s) _____

Name of Child _____

June 11, 2004 _____
Date of Decision or Dismissal _____

Kathleen S. Mehfoud., Esq. _____
Counsel Representing LEA _____

N/A (Pro se) _____
Counsel Representing Parent/Child _____

Parents _____
Party Initiating Hearing _____

Split _____
Prevailing Party _____

Hearing Officer's Determination of Issues(s):

1. Whether LEA violated the Parents' IDEA procedural rights by modifying Child's IEP at the beginning of the 2003-04 school year without prior written notice and by not honoring the Parents' prior request for due process;
2. Whether LEA's modified IEP for Child for the 2003-04 school year failed to provide a FAPE;
3. Whether LEA's proposed IEP for Child for 2004-05 school year was reasonably calculated to provide a FAPE;
4. Whether Child is still a Child with a Disability.


Hearing Officer's Orders and Outcome of Hearing:

Child remains eligible for special education services as a child with a disability (SLD). Child received a FAPE under modified 2003-04 IEP and 2004-04 IEP is reasonably calculated to provide a FAPE. LEA's procedural violation did not constitute a failure to provide a FAPE.

LEA ordered to prepare revised IEP for Child for 2004-05 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 was previously mailed in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Peter B. Vaden _____
Printed Name of Hearing Officer _____

 _____
Signature _____

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION



In Re: _____, Jr.
Due Process Hearing

}
}
}

Findings of Fact
and
Decision

For the Parents and

Counsel for
Public Schools:

Pro se

Kathleen S. Mehfoud, Esq.
Reed Smith LLP
901 East Byrd Street, Suite 1700
Richmond, VA 23219-4068

This matter came to be heard upon the request of _____, the mother of

(“ _____ ”)¹ for an Impartial Due Process Hearing under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia (the “Virginia Regulations”). _____ and _____ (the “Parents”)² assert a number of issues which they allege show that _____ has been denied a Free Appropriate Public Education (“FAPE”) by the _____ Public Schools (“ _____ ”) during the 2003-2004 school year. _____ contends that _____ was provided a FAPE and further that _____ does not currently have a disability which would make him eligible for services under the IDEA.

¹ _____’s mother and some teachers call the child “ _____,” and he is so identified in many exhibits. He prefers to be called “ _____ ” and will be so named in this decision.

² Although only _____’s mother made the formal request for a due process hearing, _____’s father, _____, joined in the request was present for the hearing.

received Ms. 's written request for the due process hearing on April 27, 2004. On April 29, 2004, provided information to the Parents on their procedural rights and safeguards, low cost legal assistance and voluntary mediation. The due process hearing was held before the undersigned hearing officer on June 1, 2004 at 's offices in , Virginia. The Parents decided that the hearing would be closed to the public. was present for parts of the hearing. was represented by , Ed.D., Director of Student Services, and by counsel. The hearing was transcribed by a court reporter. On June 2, 2004, Ms. and counsel for made closing arguments in a telephone conference call. With the consent of both parties, closing arguments were not recorded or transcribed.

ISSUES ALLEGED BY THE PARTIES

The Parents assert some 15 complaints over 's provision of special education services to during the 2003-04 school year and related procedural violations.³ These

³ failed to implement services at the start of the 2003-04 school year; failed to give Parents written notice, prior to changing 's placement for the 2003-04 school year; took from 22 % resource room instruction time to 1 % monitoring, without any testing to validate such change; The Wilson Reading Program wasn't taught, as agreed upon, per manual; does not have an appropriate IEP currently; The resource teacher insisted that Parent sign the IEP at the start of a meeting; Parent has been persuasively forced into signing at different times; failed to initiate Parent's original request for due process on 8/27/03; failed to enter Parent's independent evaluation reports into 's records, to be considered in developing an IEP in an appropriate time frame; Reading goal for was not met; Parent was never informed by the IEP team or LEA that she could sign onto agreeable parts of an IEP and mislead into signing until 4/04; Communication between the teachers and Parent was abruptly stopped without warning by principal; told Parent that hiring an aide for 's regular education classroom was a budget issue not IEP issue; Parent was told by that the bullying that her son receives from school is not an IEP issue and would not agree to developing a Behavioral Intervention Plan, nor gave Parent a refusal on it; initiated development of an IEP during 's stay put placement; did not appropriately follow regulations as

allegations may be broadly grouped as follows: (1) Failure to implement the 2003-04 Individualized Education Program ("IEP") designed for _____ by the Elementary School IEP team; (2) Failure to honor Parents' request for due process in August 2003; (3) Failure to provide a FAPE to _____ during the 2003-04 school year; and (4) Failure to offer a FAPE to _____ under _____'s IEP for the 2004-05 school year.

_____ contends that it has provided a FAPE to _____ under its 2003-04 IEP, that any procedural violations did not deprive _____ of a FAPE and that _____ is no longer entitled to services under IDEA as a result of the May 12, 2004 determination of ineligibility by the Special Education Eligibility Committee. (The same Special Education Eligibility Committee did find _____ eligible for services under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*)

FINDINGS OF FACT

Having carefully considered all testimony and arguments presented at the hearing of this matter, and taking into account the credibility and accuracy of the evidence, I make the following findings of fact by a preponderance of the evidence:

- _____ is a thirteen year old student in the Sixth Grade at _____ Middle School ("_____") in _____, Virginia;
- In March 1998, when _____ was a first grader at _____ Elementary School in _____, the Special Education Eligibility Committee found _____ eligible for IDEA services due to language, auditory processing deficits

_____ outlined in the IDEA; Math teacher at _____ until recently when Parent reported it;

_____ Middle School gave test answers to _____ has inaccurate testing results.

and academic discrepancies in reading and math;

- In September 1998, the Eligibility Committee determined that [redacted] was eligible for Learning Disability (“LD”) services due to Attention Deficit Hyperactivity Disorder (“ADHD”), language and auditory processing deficits, and discrepancies in reading and math;
- In January 2001, the Eligibility Committee again found [redacted] eligible for special education services as a LD student, based upon previously identified language and auditory processing disabilities and discrepancies in reading, math and written language;
- In March 2003, when [redacted] was a fifth grader at [redacted] Elementary School, his IEP Team agreed upon [redacted]’s Individualized Education Program “IEP” for his 2003-04 year at [redacted]. As modified by a May 20, 2003 IEP Addendum (together, the “March 2003 IEP”), this IEP provided, *inter alia*, that [redacted] would receive specialized instruction in language arts and support in content area classes for two periods a day in the LD resource room. All other classes would be taught in the general education classroom. The Parents consented to this IEP;
- The March 2003 IEP included 10 accommodations/modifications: Read tests orally; Allow more time for completion of test items; Allow student to respond orally or on tape; Use audio-visual material while lecturing; Use multi-sensory approaches; Provide lecture guides/study guides; Allow student to turn in computer generated homework; Provide adapted worksheets/test; Provide

- frequent opportunity to review; Calculator;
- When _____ began his Sixth Grade year on August 20, 2003 at _____, his schedule omitted instruction in the LD resource room and all of his classes were scheduled in the general education classroom;
 - The Parents were also concerned that _____ had difficulty understanding his special education case manager at _____, a native of Great Britain, because of her English accent. The Parents asked for a meeting of _____'s IEP Team to replace the case manager.
 - The IEP Team met on August 27, 2003. At the meeting, _____'s members on the IEP Team decided, over the Parents' objection, to place _____ in the general education classroom with the accommodations provided in the March 2003 IEP and one percent monitoring of accommodations. The IEP Team eliminated the service provision for instruction in the LD resource room. The August 27, 2003 IEP Addendum states that the IEP Team felt that _____ should achieve success in the regular classroom with accommodation for writing and reading.
 - On the August 27, 2003 IEP Addendum, Ms. _____ wrote a "Notation" that she consented to the IEP Team's change "until Due Process is complete." _____'s case manager wrote, "Mr. and Mrs. _____ agree that he should be placed in the regular classroom until due process has been completed."
 - _____ sent written notice to the Parents of the August 27, 2003 IEP Team meeting one day before. In that notice, _____ did not disclose that it

- proposed to eliminate all instruction in the LD resource room;
- Although the August 27, 2003 IEP Addendum was sent to the office of _____'s director of special education, Dr. _____, she did not read it and did not understand that the Parents were requesting a due process hearing;
 - Ms. _____ sent a letter to _____ on or around September 15, 2003 stating that at the August 27, 2003 IEP Team meeting that she had written on the IEP [sic] that she wanted Due Process;
 - _____ did not provide a due process hearing following the August 27, 2003 IEP meeting;
 - _____'s IEP Team met again on October 15, 2003 and approved an adjustment for _____ to receive after school instruction in the Wilson Reading Program three times per week for 45 minutes per session. The Parents had requested the Wilson Reading Program and they consented to this modification;
 - In November 2003, _____ convened a meeting of the IEP team to modify the IEP to provide that the _____ resource teacher would teach the Wilson Reading Program to _____ during the school day. The Parents did not consent to this change. On or about November 20, 2003, the Parents terminated the Wilson Reading Program, pending _____'s consent for Ms. _____ to teach the program at home to _____. _____ did not agree to this request and Wilson Reading Program was not resumed;
 - With the accommodations and modifications provided in the March 2003 IEP, _____ has made substantial educational progress in the Sixth Grade at

and has obtained satisfactory grades in all classes;

- [redacted] needed the accommodations contained in the March 2003 IEP in order to perform adequately in the Sixth Grade regular classroom;
- In connection with [redacted]'s 2004 Triennial Eligibility Examination, the Parents arranged for [redacted] to be examined at the [redacted] Children's Rehabilitation Center and Research Institute (" [redacted] ") in [redacted], Virginia. [redacted] made an Audiological Evaluation and a Speech-Language Evaluation in November 2003 and Psychological and Educational Evaluations in the spring of 2004.
[redacted] accepted the [redacted] evaluations in their entirety;
- The [redacted] Audiological Evaluation states that [redacted] has a auditory processing disorder that should negatively impact his ability to listen in a normal classroom with its usual distractions. The [redacted] Audiological evaluator recommended an array of accommodations for [redacted] to assist him in the classroom;
- On the Wechsler Abbreviated Scale of Intelligence administered by [redacted] in March 2004, [redacted] attained a generally low average profile of intellectual performance, with Verbal IQ of 89 (23%), Performance IQ of 93 (32%) and Full Scale IQ 89 (23%);
- [redacted] administered the Woodcock-Johnson III Tests of Achievement (Form A) to [redacted] in April 2004. His performance ranged from low-average scores on reading and spelling scores to average scores in most of the mathematics skills. The [redacted] examiner found that reading persists as an area of relative difficulty for [redacted]. His Broad Reading score was found to be at a 4.1 Grade Equivalent. (I

find unreliable the 5.8 grade equivalency which [redacted] attained on the Gates-MacGinitie Reading Test administered at [redacted] in May 2004. This was purportedly a 2.3 year increase over [redacted]'s score on the same test given only nine months earlier. [redacted]'s experts were unable to reconcile the conflicting data and [redacted]'s language arts teacher opined that Gates-MacGinitie assessment might be "a little high." [redacted]'s Spelling Grade Equivalent on the Woodcock-Johnson was 4.1. His combined Academic Skills Grade Equivalent was 4.6;

- The [redacted] Psychological Evaluation concludes that [redacted]'s testing gives evidence to delayed memory disturbances primarily in the auditory verbal domain, which are undermining learning and creating a learning impairment. [redacted] recommended instructional accommodations that compensate for delayed memory disturbances, especially in the area of auditory verbal memory, while advancing the use of visual learning supports to supplement for any limitation;
- Beginning in March 2004, the IEP Team met repeatedly to design an IEP for [redacted]'s 2004-05 Seventh Grade school year. The proposed March 30, 2004 IEP provided for education in the regular classroom with numerous accommodations and modifications and for support as needed from the resource teacher. The March 30, 2004 IEP included all of the accommodations and modifications from the March 2003 IEP (except for additional time for completion of test items) with the following additions: Provide more time to complete assignments; Require fewer correct responses on tests/worksheet/homework; Use

low level reading materials; Speak clearly and use eye contact; Send home periodic review worksheets; Provide notes in print instead of cursive; Reduce number of problems on worksheets/homework; Teachers/Parents use contact sheet to communicate on IEP issues; Provision for Parents to e-mails teachers and principal; Send home laminated/highlighted rule sheets in math. The Parents did not consent to the March 30, 2004 IEP;

- The Special Education Eligibility Committee met on or about May 12, 2004, after the Parents had requested a due process hearing. The Eligibility Committee found _____ ineligible for special education services under IDEA for the reason that his cognitive ability and academic achievements are commensurate and he does not need special education services to progress academically;
- The Special Education Eligibility Committee found _____ eligible for Section 504 services as a child with a central processing disorder that warrants accommodations/modifications in order to continue to be a academically successful;
- _____ has approved a Section 504 Alternative Education Plan ("AEP") for _____ for the 2004-05 school year which the Eligibility Committee intended would provide accommodations for _____ that are identical to the accommodations in his March 2003 IEP.
- The Parents have not consented to _____'s plan to provide Section 504 services to _____ in place of special education services.

DECISION

The principal issues alleged by the Parents in this due process proceeding are the following:

1. _____ violated the Parents' procedural rights by modifying _____'s IEP at the beginning of the 2003-04 school year without prior written notice and thereafter by not honoring the Parents' request for due process;
2. _____'s modified IEP for _____ for the 2003-04 school year failed to provide a FAPE;
3. _____'s proposed March 30, 2003 IEP for _____ would not provide a FAPE.

_____ responds that that _____ has received a FAPE during his 2003-04 school year at _____; that if there were procedural violations, the violations were legally insignificant because they did not cause _____ to be denied a FAPE; and that, as of the date of the due process hearing, _____ is no longer eligible for special education services as a child with a disability

I. Notice Requirement

I find that the notice requirements to the Parents for this present due process proceeding were satisfied.

II. Burden of Proof

Although the Fourth Circuit Court of Appeals has never decided whether the parents or the local education agency bears the initial burden of proof in a due process hearing, the Fourth Circuit has stated that local educators deserve latitude in determining the individualized education

program most appropriate for a disabled child, *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996, 1001 (4th Cir. 1997), and that a reviewing court should be reluctant to second-guess the judgment of professional educators. *MM v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002). Several other U.S. Circuit Courts of Appeals have held that the party attacking the terms of an IEP should bear the burden of showing why the educational setting established by the IEP is not appropriate. *See, e.g., Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990) *cert. denied*, 111 S. Ct. 1685 (1991); *Alamo Heights Independent Sch. Dist. v. State Bd of Educ.*, 790 F. 2d 1153 (5th Cir. 1986). I conclude that in the spirit of its admonition that local educators deserve latitude in devising IEP's, the Fourth Circuit would endorse the position that the party attacking the terms of an IEP should bear the initial burden of proof.

In this case, the Parents challenge the provisions of _____'s March 2003 IEP (as modified) and of his March 30, 2004 IEP. I find that the burden of proof is on the Parents to establish, by a preponderance of the evidence, that these IEP's and the IEP services and accommodations/modifications were not appropriate. With regard to _____'s contention that _____ is no longer a child with a disability under the IDEA, the LEA must bear the burden of proof because _____, in effect, attacks the March 30, 2004 IEP Team determination that _____ is eligible for special education services.

III. Eligibility for Special Education Services

The Virginia Regulations require that I make a determination of whether _____ has a disability. *See* 8 VAC 20-80-76.J.17.b. A child with a disability means a child determined to have a qualifying impairment, who by reason thereof, needs special education and related services. *See*

8 VAC 20-80-10.

was initially found eligible for special education services in 1998. His most recent IEP's, including 's proposed March 30, 2004 IEP, have affirmed 's eligibility on the basis of the January 2001 determination that was a learning disabled student, based on a language and auditory processing disability and discrepancies in reading, math and written language. On May 12, 2004, after the Parents requested a due process hearing in this case, 's special education eligibility committee met for his Triennial Evaluation and determined that is no longer a child with a disability, "because he does not need special education direct services in order to progress academically." School Board Exhibit ("SB") 46. The correctness of the May 12, 2004 Triennial Evaluation is not formally at issue in the present due process hearing.⁴ However, the Parents' disagreement with the March 30, 2004 IEP would be moot if is no longer a child with a disability.⁵ Therefore, this decision must address this issue.

acknowledges that still has a central auditory processing disorder, which is a Specific Learning Disorder ("SLD") disorder.⁶ Additional required criteria for

⁴ By letter of May 18, 2004, counsel for gave notice that was found ineligible for IDEA services and that would request the hearing officer to determine that does not have a disability under the IDEA.

⁵ It appears to be undisputed that was a child with a disability for purposes of the March 2003 IEP (as modified).

⁶ "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; of mental

determining the existence of a SLD include (1) that the child does not achieve commensurate with the child's age and ability levels in one or more of the areas listed [below] if provided with learning experiences appropriate for the child's age and ability levels; and (2) that the team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas: a. Oral expression; b. Listening comprehension; c. Written expression; d. Basic reading skill; e. Reading comprehension; f. Mathematical calculations; or g. Mathematical reasoning. 8 VAC 20-80-56.G.

_____ apparently bases its determination that _____ no longer has a SLD on the absence of a present significant discrepancy between _____'s cognitive ability and academic achievement. (The 2004 Educational Evaluation made by _____ establishes that _____'s achievement, notably in reading and spelling, is not commensurate with his age level.) To determine whether there is a severe discrepancy between achievement and ability, the LEA is required to draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and ensure that information from all these sources is documented and carefully considered. See 8 VAC 20-80-56.C.1. _____'s determination of no severe discrepancy is based primarily on two sources of information: (1) _____'s satisfactory performance in the Sixth Grade regular classroom and (2) Correlation of _____'s recent educational evaluation with his psychological evaluation. _____ school psychologist _____ opined that _____ did not qualify as having a disability under the IDEA because there

retardation; of emotional disturbance; or of environmental, cultural, or economic disadvantage.
8 VAC 20-80-10

was not a clear-cut sizable discrepancy between [redacted]'s measured intelligence and areas of academic concerns including reading and written language, and because with the IEP accommodations provided for [redacted], he was functioning quite well. Dr. [redacted] opinion was uniformly shared by [redacted]'s other witnesses.

IDEA requires great deference to the views of the school system's experts. *See, e.g., A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004). However, I find that [redacted]'s experts have misconstrued the SLD criteria in the Virginia Regulations. The evidence supports the opinions of [redacted]'s experts that [redacted] has performed well in the Sixth Grade regular classroom and that there is not a sizeable discrepancy between [redacted]'s generally low average scores on the Woodcock-Johnson achievement tests and his measured IQ. The inquiry does not stop there. When [redacted] was administered the Wechsler Individual Achievement Test (WIAT) at [redacted] in July 2000, the examiner reported that the scores indicated that [redacted]'s achievement was very low for Reading Composite (1 Percentile) and in the low/very low range for Mathematics Composite (4 Percentile) and Spelling Subtest (3 Percentile). *See SB 5*. Presumably, as of the July 2000 testing date, there was a severe discrepancy between [redacted]'s WIAT scores and his intellectual ability.

To establish that [redacted] no longer has a SLD on the basis that the formerly severe discrepancy between his achievement and intellectual ability has narrowed, I find that [redacted] must show that [redacted] does not need the correction of special education to sustain the level of his academic achievement. *See 8 VAC 20-80-56.C.7.f* I find that [redacted]'s evidence, including the opinion testimony of its experts, establishes to the contrary that [redacted]'s satisfactory Sixth Grade academic achievement is substantially attributable to the accommodations

he has received under his IEP and that still needs those accommodations to be able to perform adequately. *See, e.g.*, Testimony of , Transcript I, p. 126-127; Testimony of , Transcript I, p. 78; Testimony of , Transcript II, pp. 81, 86; Testimony of , *Id.*, pp. 47, 210.⁷ I find that the same evidence, including specifically the testimony of 's experts, establishes that still needs special education services.⁸

In sum, I find that the evidence adduced at the hearing does not establish that no longer has a SLD as defined in the Virginia Regulations and further that is a child with a disability as defined in IDEA and the Virginia Regulations.

IV. Appropriateness of 's IEP's

In determining whether an IEP is appropriate and whether the school system has fulfilled its obligations to provide a student with FAPE, the proper inquiry is twofold. *See Board of Educ. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). (1) whether has complied with the IDEA's procedural requirements in developing and implementing the IEP and (2) whether 's IEP's for were "reasonably calculated" to enable to receive educational benefits. *See id.* at 206-07; *DeVries By DeBlaay v. Fairfax*

⁷ Later in her testimony Dr. testified that the accommodations provided in his Sixth Grade IEP were not special education services, but were "regular education accommodations." Transcript II, p. 219. To credit this testimony, which is contrary to Dr. ' own earlier testimony and the testimony of 's other witnesses, I would have to find that 's Sixth Grade IEP's and the lists of accommodations and modifications therein were a sham. I do not so find.

⁸ The fact that has offered to provide the same accommodations to in the form of a Section 504 IAP does not relieve of its obligation to provide an IEP, if, as I find, is a child with a disability under IDEA.

County School Bd., 882 F.2d 876, 878 (4th Cir. 1989) The Parents contend that failed to meet IDEA's procedural requirements with respect to the modifications to the March 2003 IEP and that neither the March 2003 IEP (as modified beginning August 27, 2003) nor the March 30, 2004 IEP was reasonably calculated to provide educational benefit to

A. Procedural Requirements

The Parents allege that violated IDEA's procedural requirements with respect to the August 27, 2003 modification to 's 2003-04 IEP by (1) failing to give the Parents prior written notice of the proposed changes and (2) failing to process the Parent's request for a due process hearing made in response to the modification. At the August 27, 2003 IEP meeting requested by the Parents to change 's resource room teacher, the IEP Team decided to eliminate the March 14, 2003 IEP service provision for two periods per day in the LE resource classroom. The Parents objected to the elimination of the resource room service and, by all accounts, indicated their intent to request due process. On the IEP Addendum, SB 15, resource room teacher, Ms. , wrote "Mr. and Mrs. agree that [] should be placed in the regular classroom until due process has been completed." (Emphasis in original.) Ms. wrote on the Addendum that she felt that due to 's resource room services not being set up, she wanted to go to the regular language arts classroom "until Due Process is complete." The IEP Addendum was forwarded to 's office of Student Services; however did not consider the Parents' IEP statement to be a request for a due process hearing and did not appoint a special education hearing officer.

No Requirement for Prior Written Notice

gave the Parents written notice of the August 27, 2003 IEP meeting and both

parents attended. Prior written notice is required for changes in educational placement of a child 8 VAC 20-80-70.C.1.a. However, elimination of even a major component of an IEP is not deemed a change in placement. "Change in placement" means, *inter alia*, "Termination of all special education and related services." 8 VAC 20-80-10. [redacted] did not propose to terminate all special education services to [redacted] with the August 27, 2003 IEP modification. I find that the Virginia Regulations did not require [redacted] to provide prior written notice to the Parents of its proposal to eliminate the resource room instruction service from [redacted]'s IEP, even though as a result, special education services to [redacted] would be sharply reduced.

Failure to Provide Due Process Hearing

Although the Parents did not use the request form prescribed by 8 VAC 20-80-76.C, I find that Ms. [redacted]'s written "Notation" referring to due process on the August 27, 2003 IEP Addendum was a request for a due process hearing under the Virginia Regulations and triggered the obligation of the LEA to appoint a hearing officer and conduct the hearing. *See* 34 CFR § 300.507(c)(4). Ms. [redacted] repeated the request in her September 15, 2003 letter to SB 23. [redacted]'s failure to provide the hearing was a major procedural violation. However, as [redacted] correctly argues, the Fourth Circuit Court of Appeals has held that a procedural violation of the IDEA cannot support a finding that a school district failed to provide a disabled child with a FAPE "when the procedural violation *did not actually interfere* with the provision of a FAPE to that child." *DiBuo v. Bd. of Ed. of Worcester County*, 309 F.3d 184, 190 (4th Cir.2002) (Emphasis in original). As will be explained below, I find that [redacted] did receive a FAPE under [redacted]'s March 2003 IEP, as modified after August 27, 2003. Accordingly I find that [redacted]'s failure to conduct a due process hearing upon Ms. [redacted]'s August 27,

2003 request did not constitute a failure to provide a FAPE to

B. Was modified March 2003 IEP reasonably calculated to provide a FAPE?

The second prong of the *Rowley* inquiry is whether _____'s March 2003 IEP for _____, as modified after August 27, 2003, was "reasonably calculated" to enable _____ to receive educational benefit. *See Rowley*, 458 U.S. at 206-07. FAPE standards are satisfied "when the state provides the disabled child with 'personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.'" *A.B. ex rel. D.B. v. Lawson*, *supra*, 354 F.3d 330, *citing Rowley*, *supra*, 458 U.S. at 203. IDEA "emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP." *Board of Educ. of Montgomery County v. Brett Y*, 155 F.3d 557 (Table, Text in WESTLAW), Unpublished Disposition, 1998 WL 390553 (4th Cir. 1998).

In this case there is no dispute that _____ received educational benefit in the regular classroom under _____'s modified March 2003 IEP. _____ earned satisfactory grades and by all accounts from _____'s witnesses, he made great progress in school. Even Ms. _____ testified that _____ has done "in between good and real good" in Sixth Grade. I find that, with the accommodations provided in his IEP, _____ has undoubtedly benefitted educationally from his Sixth Grade instruction at _____. Therefore, I find that _____'s March 2003 IEP, as subsequently modified, was adequate to provide a FAPE to _____ and that _____ has provided a FAPE to _____ during the 2003-04 school year at _____.

C. March 30, 2004 IEP

_____ 's March 30, 2004 IEP (for the period March 30, 2004 through March 30, 2005) continues all but one of the accommodations contained in the March 2003 IEP. Only the

provision of more time for completion of test items was removed. In addition, the March 30, 2004 IEP includes some 10 additional accommodations. Having found that [redacted] received a FAPE under the modified March 2003 IEP, I likewise find that the March 30, 2004 is reasonably calculated to provide education benefit to [redacted].

The March 30, 2004 IEP does not provide the Wilson Reading Program, which the Parents contend is a service that [redacted] requires to benefit educationally. I find from the evidence that [redacted] does not require the Wilson Reading Program as part of his IEP. The Parents stopped the Wilson Reading Program in November 2003. According to the uncontradicted testimony of [redacted], [redacted]'s language arts teacher, [redacted] has shown great progress in Sixth Grade and he does not need a specialized reading program. The [redacted] educational evaluator reports that [redacted] needs direct instruction in reading and written language skills. I find that the regular Seventh Grade language arts program at [redacted], supplemented by the accommodations contained in [redacted]'s March 12, 2004 IEP (e.g., Use low level reading materials), is likely to provide adequate educational benefit to [redacted] without the Wilson Reading Program.

D. Other issues asserted by the Parents

In her identification of issues for this Due Process Hearing, Mrs. [redacted] included a number of other issues which are not covered in the foregoing discussion. These include, *inter alia*, allegation that the resource teacher insisted that Parent sign the IEP at the start of a meeting; forcing the Parents into signing at different times; failure to enter Parents' independent evaluation reports into [redacted]'s records in an appropriate time frame to be considered in developing an IEP; failure to meet reading goal for [redacted]; failure to inform Parents that they could consent to

the parts of IEP's without consenting to entire program; stopping communication between the teachers and Parents; not acknowledging that hiring an aide for [redacted]'s regular education classroom was an IEP Issue; not acknowledging that "bullying" of [redacted] by other students was an IEP issue; not developing a Behavioral Intervention Plan; development of an IEP during [redacted]'s stay put placement; failure to appropriately follow regulations as outlined in the IDEA; [redacted] math teacher's giving test answers to [redacted]; and use of inaccurate testing results. To the extent these issues are within purview of the hearing officer's jurisdiction and are not addressed in the foregoing parts of this decision, I find that these allegations were not established by the preponderance of the evidence.

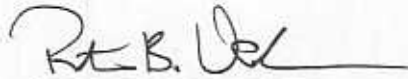
ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. [redacted] Schools shall convene a meeting of [redacted]'s IEP team to prepare a revised Seventh Grade IEP for [redacted] in conformity with this decision. An IEP that includes the services and accommodations/modifications provided in the proposed March 30, 2004 IEP will meet the requirements of this order.
2. The Parents' request for other relief in this due process hearing is denied.
3. [redacted] Schools shall develop an implementation plan within 45 calendar days of the date of this decision which must state how and when this decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing, the hearing officer and the Virginia Department of Education.

Right of Appeal Notice

A decision by the hearing officer in any hearing shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court.



Peter B. Vaden, Hearing Officer
Post Office Box 111
Charlottesville, Virginia 22902
(434) 923-4044

June 11, 2004