04-002

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	Mr. and Mrs. Name of Parents
Name of Student	February 20, 2004 Date of Decision
Kathleen S. Mehfoud, Esquire Counsel Representing LEA	None Counsel Representing Parent/Student
Parents Party Initiating Hearing	Parents Prevailing Party

Hearing Officer's Determination of Issue(s):
The parents contended that the ESY services offered and provided to by the LEA during the Summer of 2002 and the Summer of 2003 were inadequate and denied FAPE. On the eve of the hearing, the parents filed a motion for summary judgment, alleging that the LEA had failed to inform the parents of any free or low-cost legal and other relevant services when the parents initiated the hearing (the "Failure"). The LEA contended that it had so informed the parents and that, in any event, the Failure would not constitute grounds for any relief under the facts and circumstances of this proceeding because, amongst other things, had suffered no loss of educational opportunity.

Hearing Officer's Orders and Outcome of Hearing:
For the reasons provided in the decision, the hearing officer found that the Failure was not merely de minimis or technical but that the nature of the procedural violation by the LEA was sufficiently serious and severe so as to constitute a denial of FAPE to in and of itself. The hearing officer found that the parents were prejudiced by the Failure and that had suffered a loss of educational opportunity. For the reasons provided in the decision, the hearing officer found an award of compensatory education appropriate for and, accordingly, orders ' IEP Team to meet as soon as possible to discuss and determine the amount of services to be provided in each identified area, applying the applicable legal standards for determining the quantum of compensatory education to be provided. The IEP Team shall also consider and decide upon any other possible related services. Of course, any and all instruction and services shall be provided to free of charge and any and all compensatory services shall be provided either during the regular school year or during the Summer of 2004, or during a combination of both, as a supplement to, and not as a replacement of, special education services otherwise required to be provided to under applicable law. Concerning the Failure, the parents have met their burden by showing upon a preponderance of the evidence that the Failure occurred, that the Failure resulted in a denial of FAPE to , that the Failure lead to suffer a loss of an "educational opportunity" and that upon the record and under the particular facts and circumstances of this proceeding, is entitled to an award of compensatory education to compensate him for the denial of FAPE and the loss of "educational opportunity" to which he was subjected.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties to their appeal rights in writing. The written decision from this hearing is attached 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.

John V. Robinson Printed Name of Hearing Officer	John V. Robinson Signature

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

, et als.

Complainants

v.

PUBLIC SCHOOLS

Respondent.

DECISION OF THE HEARING OFFICER

I. Introduction

The parents filed with the Virginia Department of Education (the "VDOE" or the "SEA") a Request for Due Process Hearing dated June 30, 2003 (the "Request"). The parents allege that extended school year ("ESY") services provided to their year old disabled son, , by Public Schools (" " or the "LEA") during the Summer of 2002 and 2003 were inadequate and denied a free appropriate public education ("FAPE"). The hearing officer was appointed to this administrative due process proceeding on July 2, 2003.

An administrative due process hearing was held on October 16 and 17, 2003. On the eve of the hearing, October 15, 2003, Mr. filed a motion for summary judgment, alleging that had failed to inform the parents of any free or low-cost legal and other relevant services when the parents initiated the hearing. The hearing officer decided that summary judgment was not appropriate because of the existence of genuine issues concerning material facts.

Accordingly, the hearing officer requested and the parties held an additional evidentiary hearing on December 17, 2003 concerning solely the procedural violations which the parents assert have been committed by the LEA. The record concerning the parents' asserted procedural violations has now been fully developed and the hearing officer hereby issues his decision on the subject.

II. Findings of Fact

1. and are the parents of

2. was born on and is identified as having autism.

3. was first found eligible for special education and related services on September 3, 1998. Since was 3, he has received special education and related services from the LEA.[1] SB 2.

4. is now and currently attends the LEA's Elementary School where he is in the second grade. SB 50.

5. In the second grade, for the current 2003-04 school year, is classified by the LEA as having a primary disability of autism and a secondary disability of developmental delay. SB 50. The LEA has so classified since June 6, 2001. SB 50.

6. For the Summer of 2002, proposed providing with ESY services three days per week, four hours per day, in a class for children with autism over a four week period and consultation of up to six hours in the home following the conclusion of the autism class services. Additionally, was to receive 90 minutes per week of speech services. SB 19. The parents wanted placed in the STARS program in the summer of 2002, but the special education staff felt that was not developmentally appropriate for the STARS program and would be frustrated by that program. SB 21.

7. later provided more ESY services because of the parental concerns about the amount of services. SB 26. Three to four hours of behavioral consultation between the school and the home were added to the IEP. The LEA provided prior written notice of its determination. SB 28.

8. For the Summer of 2003, proposed providing with services in a program for children with autism for three hours a day, three days a week for four weeks. SB 37. Additionally, speech services were to be provided 60 minutes a week for about four weeks and consultative services by an occupational therapist were provided. SB 37. Prior written notice of this decision was provided to the parents. SB 39.

9. The wanted additional ESY services for their son, , and filed with the VDOE the Request. SB 1.

10. The parents allege that the ESY services provided to by the LEA during the Summers of 2002 and 2003 were inadequate and denied FAPE, as more specifically described by Mr. in his Request. SB 1.

11. A due process hearing was scheduled to be held and was held on October 16 and 17, 2003.

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[1] References to the LEA's exhibits will be designated SB followed by the exhibit number. References to the parents' exhibits will be designated PE followed by the exhibit number. References to exhibits from the hearing officer will be designated HO followed by the exhibit number. The transcripts of the 3 days of hearings will be cited "TR" followed by 1 through 3, depending on the number of the hearing day, and a page number.

12. On October 15, 2003, the eve of the hearing, Mr. filed with the hearing officer a motion for summary judgment. HO 8. In his motion, Mr. alleged that had failed during the due process proceeding to inform the parents of any free or low-cost legal and other relevant services as required by applicable state and federal regulations. In his motion, Mr. alleged that this procedural violation had a major impact on the ability of the parents to defend the rights of and requested an immediate award of the relief which the parents sought for . HO 8.

13. During the hearing, the parties agreed that the issue raised by Mr. in his motion for summary judgment was before the hearing officer. TR 1, p. 10.

14. During the evidentiary hearing held October 15 – 16, 2003, it became readily apparent that genuine issues concerning material facts existed and that summary judgment was not an appropriate option for the hearing officer.

15. After reviewing his file, the hearing officer requested and the parties consented to, an additional evidentiary hearing concerning solely the issues relating to Mr. 's motion for summary judgment. HO 1.

16. This evidentiary hearing was held on December 17, 2003.

17. The have been credible and consistent witnesses throughout this administrative due process proceeding, testifying and answering questions with the utmost candor. Throughout this due process proceeding, the ' demeanor has been open, forthcoming and forthright.

18. Concerning this proceeding, the LEA did not inform the of any free or low-cost legal and other relevant services by October 15, 2003 (the "Failure").

19. Neither Mr. nor Mrs. are attorneys and they have very limited experience concerning administrative due process proceedings.

20. Counsel for the LEA is a skilled attorney, extremely knowledgeable about special education law, with extensive experience concerning administrative due process proceedings and related state and federal court proceedings, and regularly and routinely represents numerous school divisions throughout the Commonwealth of Virginia.

21. The Failure seriously hampered the parents' opportunity to engage competent legal counsel or other representative, to effectively participate in the administrative due process proceeding and to protect ' educational opportunities and rights.

22. The Failure lead to suffer a loss of an educational opportunity.

III. Conclusions of Law and Decision

The parties do not dispute that had a disability, that needed special education and related services and that was entitled to a free appropriate public education pursuant to the Individuals with Disabilities Education Act ("IDEA" or the "Act") 20 U.S.C. §§ 1400 et seq., and Va. Code Ann. § 22.1-213-221 (1950), and the regulations promulgated thereunder. also does not challenge that the IEPs (other than any IEP Addenda concerning ESY services) concerning 2001-2002 and 2002-2003 school years were appropriate.

, however, contends that the ESY services offered and provided to by the LEA during the Summer of 2002 and the Summer of 2003 were inadequate and denied FAPE. During the hearing, it became obvious that the parents were unaware that the legal standard for the provisions of ESY services was established by MM v. School District of Greenville County, 303 F.2d 523 (4th Cir. 2002): "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." Id. at 537-38. The court went on to conclude, "[h]owever, 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. ESY Services are required under the IDEA only when such regression will substantially thwart the goals of 'meaningful progress.'" Id. at 538. In this proceeding, concedes that required some ESY services, but not in the amount requested by his parents. See, also, Dibuo v. Board of Educ., 309 F.3d 184, 190 (4th Cir. 2002).

Inevitably, any analysis of the standard of FAPE must begin with Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). The Rowley Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education. The Rowley analysis provides that is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon 's right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable to receive educational benefit. Rowley, *supra*, 206-7 (1982); Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990); Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987); Gerstmyer v. Howard County Public Schools, 20 IDELR 1327 (1994).

A small violation of IDEA's procedural requirements does not, without evidence of an actual loss of educational opportunity, constitute a failure to provide with a free appropriate public education. Rowley, *supra*; Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985); Tice, *supra*; Doe v. Alabama Department of Education, 915 F.2d 615 (11th Cir. 1990); W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Evans v. School District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988). Technical violations of IDEA procedures that do not deny the student FAPE are considered de minimis. See, e.g., Fairfax County Sch. Bd. v. Doe, Civil Action No. 96-1803-A (April 24, 1997); see also Roland v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990), cert.

denied 499 U.S. 912 (1991); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990); Spielberg v. Henrico County Sch. Bd., 853 F.2d 256, 259 (4th Cir. 1988); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633-635 (4th Cir. 1985); and Board of Educ. v. Brett Y, 155 F.3d 557 (4th Cir. 1998).

The hearing officer finds that the Failure was not merely de minimis or technical but that the nature of the procedural violation by the LEA was sufficiently serious and severe as to constitute a denial of FAPE to in and of itself.

As the Supreme Court has stated:

> [W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

Board of Educ. v. Rowley, 458 U.S. 176, 205-206 (1982).

One of the main themes of the Individuals with Disabilities Education Act Amendments of 1997 (the "IDEA Amendments") appears to be strengthening parental participation in the educational process. The notice provisions and other procedural protections contained in IDEA are designed to make the parents an integral part of the educational process concerning their disabled children. Honig v. Doe, 484 U.S. 305, 311-312 (1988). Courts, including the Fourth Circuit Court of Appeals, have long recognized how important the procedural requirements of IDEA are to protecting the rights of disabled children to a free appropriate public education, "We have previously held that the failure to comply with IDEA's procedural requirements, such as the notice provision, can be a sufficient basis for holding that a government entity has filed to provide a free appropriate public education." Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985).

Upon receipt of the s' request for a due process hearing, the LEA was required by applicable law to "inform the parents of the availability . . . of any free or low-cost legal and other relevant services available in the area. The local educational agency must also provide the parent or parents with a procedural safeguards notice." VAC 20-80-76 (C)(3). See also, VAC 20-80-76 (I)(7) and 34 C.F.R. § 300.507(a)(3).

Pursuant to the mandate of VAC 20-80-76(C)(3), the Office of Due Process and Complaints of the SEA has compiled a list of legal advocacy groups and resources in Virginia titled "Legal Advocacy Groups and Resources for Special Education" (the "VDOE List") and distributed it to school divisions throughout the Commonwealth. The VDOE List is also available on the Internet at www.pen.k12.va.us/VDOE/dueproc. The VDOE List is included within the group of documents designated Hearing Officer Exhibit 13. However, the internet

address shown on the VDOE List within Hearing Officer Exhibit 13 is not current and leads to an inactive internet page.

asserts that it did properly inform the parents of available free or low-cost legal assistance.[2] SB Brief 1. The maintain that until they received the cover letter and documents which constitute Hearing Officer Exhibit 13 (the "Procedural Safeguards Package") they had not received any such information. TR 3, pp. 25-26.

The were credible and consistent witnesses throughout the administrative due process proceeding. From the way events unfolded and because of the testimony on the subject, which the hearing officer finds credible and convincing, the hearing officer is convinced that the did not receive the Procedural Safeguards Package until after October 15, 2003.

It is undisputed that Ms. , secretary to the Special Education Department for , mailed to the at the wrong address, the first package of information, which contained (1) a letter dated July 2, 2003 addressed to the at the wrong address, (2) a letter to the hearing officer dated July 2, 2003, giving the wrong address for the , (3) the VDOE List, (4) A Parent's Guide to Special Education (Revised 2001), published by the VDOE (the "Guide"), (5) a document again produced by the SEA and distributed to all school divisions throughout the Commonwealth titled "Virginia Special Education Procedural Safeguard Requirements under the Individuals with Disabilities Education Act (February 15, 2001)" (the "Procedural Safeguards Notice"). See, Hearing Officer Exhibits 2, 3, 4 and 13.

Ms. alleges that after mailing the first package on July 2, 2003, later that afternoon she realized her mistake and attempted to retrieve the package with the incorrect address, but the mail had already been collected. Ms. alleges that she then immediately went back to her office and prepared another letter for the parents. Ms. then alleges that she placed this letter into a package with the enclosures and mailed this second package.

The parents testified credibly that they first saw this package when they were copied on the LEA's communication, by counsel, to the hearing officer dated October 30, 2003. HO 13. The indignation exhibited by the parents at any hint of a suggestion that the package was supplied to them before this time was genuine and credible.

Furthermore, the hearing officer is troubled by Ms. 's version of events for numerous reasons, including those specified below. The correct address for the was clearly shown on the first page of the Request which was attached to the LEA's letter, also dated July 2, 2003, to the hearing officer. HO 3. A fax sent by the LEA to the hearing officer on July 2, 2003 is incorrectly shown on its face to have been sent on July 2, 2001 [the wrong year]. HO 3.

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[2] References to the Memorandum on behalf of School Board Regarding Low-Cost Legal Assistance will be designated "SB Brief" followed by the page number. Any references to the parents' written statement on this issue will be designated "P Brief" followed by the page number.

Similarly, a "corrected" fax sent by the LEA to the hearing officer on July 3, 2003 is incorrectly shown on its face to have been sent on July 3, 2001 [the wrong year]. HO 5.

While the hearing officer did receive a copy of the letter dated July 2, 2003 to Mr. and Mrs. which was addressed incorrectly, the hearing officer never received from the LEA, until the October 30, 2003 communication, a copy of the letter also dated July 2, 2003 to Mr. and Mrs. which was addressed correctly. The hearing officer is shown as copied on both such letters but apparently the LEA admits that it never sent a copy of the second corrected letter to the hearing officer.

Ms. 's affidavit and testimony at the hearing on October 17, 2003, do not mention the mailing of the Procedural Safeguards Package to the incorrect address in spite of Ms. 's statement that she had an independent recollection of mailing the entire package to the at the correct address. TR 2, p. 235. The hearing officer was the first person to inform the that the Procedural Safeguards Package was sent to the incorrect address and this was only after the first two (2) days of hearings had been completed. After careful examination of the transcripts and evidence on this matter and having had the benefit of observing the and Ms. at the evidentiary hearings, the hearing officer finds that Ms. 's testimony on this issue is inconsistent, unconvincing and is not credible. See, for example, TR 3, p. 12 line 17 to p. 13 line 9.

In addition to raising the issue concerning the VDOE List, the Parents in their written statement assert numerous other procedural violations by the LEA. The hearing officer finds that these other alleged procedural violations either were not timely raised as issues before the hearing officer in this proceeding or are not serious enough to rise to the level necessary so as to constitute a denial of FAPE to . The breach of confidentiality argument was raised too late in this proceeding by the and the LEA has not had an adequate opportunity to respond to it. Accordingly, because of fundamental notions of notice, opportunity to be heard and fairness to the LEA associated with any due process proceeding, the hearing officer is not willing to entertain this issue so late in the proceeding before him.

Mr. 's motion for summary judgment did not complain about the LEA's failure to provide him with a copy of the Procedural Safeguards Notice although provision of this information to the parents by the LEA is also required by the same provisions which require provision of the VDOE List. 34 C.F.R. § 300.507(a)(3); VAC 20-80-76(C)(3); and VAC 20-80-76(I)(7).

At the hearing, the both acknowledged that they were familiar with the Procedural Safeguards Notice and had received it from the LEA on many prior occasions. TR 3, p. 29 (Mrs.) and TR 3, p. 38 (Mr.). Mrs. , who is a teacher with , admitted receiving copies of this document "maybe a hundred" times (TR 3, p. 28) and Mr. admitted that he had received it so many times that "[i]t's almost gotten to the point where its almost background." TR 3, p. 38. Both the admitted to the hearing officer that they had not been prejudiced by the LEA's failure to supply them with the Procedural

Safeguards Notice in this proceeding. Accordingly, based on these admissions and the record, the hearing officer finds that any failure by the LEA to supply the with the Procedural Safeguards Notice was a de minimis, technical procedural violation that did not rise to the level necessary to constitute a denial of FAPE to : no harm, no foul. See, also, Gwinnett County Sch. Sup., 27 IDELR 890 (SEA GA 1998).

Similarly, Mr. 's contention that the LEA's failure to provide him with the notice of the hearing officer's appointment is a serious procedural violation is without merit. The hearing officer himself contacted the shortly after his appointment and in no meaningful way were the materially prejudiced in this proceeding by not receiving such notification letter.

However, the hearing officer finds that the were prejudiced by the Failure. Admittedly, the had received on one prior occasion an earlier publication of the VDOE List and Mr. is aware that the VDOE maintains a website. Indeed, shortly before the October 15, 2003 hearing, in response to someone reminding Mr. to review the state regulations concerning special education, Mr. visited the VDOE website and viewed the regulation which prompted his motion for summary judgment. TR 2, pp. 238-9. However, the rights of the disabled child should not and do not depend on the vigilance of the parents and the arguments made in 's brief in no way diminish or negate the hearing officer's findings that the were materially prejudiced in this administrative due process proceeding and that suffered a loss of educational opportunity because of the Failure.

The concept of education under IDEA is necessarily broad. "Opportune" is defined as suitable or convenient for a particular occurrence or occurring at an appropriate time. Webster's Ninth New Collegiate Dictionary ("Webster's). Chambers Twentieth Century Dictionary ("Chambers) defines "opportune" as "occurring at a fitting time: conveniently presented: timely . . ." "Opportunity" is defined by Chambers as "an occasion offering a possibility" and by Webster's as "1: a favorable juncture of circumstances <the halt provided an ~ for rest and refreshment> 2: a good chance for advancement or progress."

Recently, the Virginia Code Commission issued a report to the VDOE concerning the VDOE's due process hearing system. The report in part highlighted the imbalance in resources available to parents of students with disabilities entering into the hearing process with school divisions. VDOE, Division of Special Education and Student Services, Office of Dispute Resolution and Administrative Services WORK PLAN for the Development and Distribution of a Guide to Alternative Dispute Resolution, August 2003 (the "Work Plan"), page 1.

The Work Plan continues to provide in part:

> During the public comment period, parents, parent attorneys and advocates advised the Commission's Administrative Law Advisory Committee (ALAC) of the unlevel playing field created when parents lack the financial resources for attorneys to represent them against school board attorneys. ALAC also determined that parents need more guidance in understanding the benefits of

mediation and navigating the due process hearing system, especially when the parents act *pro se*.

The tried to find legal counsel to represent them in this proceeding but could not afford the expense. The state and federal regulations which require the LEA to provide the VDOE List to the parents for the benefit of their disabled child are an important procedural attempt to level the playing field by giving the parents an opportunity to safeguard , educational rights through the legally complex due process hearing system by making available to the parents a list of free or low-cost legal and other relevant services.

The record clearly shows that the , proceeding *pro se*, were not on a level playing field throughout this proceeding, facing the LEA's skilled and experienced attorney. By not providing the VDOE List to the , was deprived of the educational opportunity of retaining an experienced and/or skilled attorney or other representative to safeguard his educational rights and to assist him in navigating the due process system, one of his most fundamental and important rights in his special education.

The LEA argues that the parents never requested a continuance of the hearing to obtain counsel. Of course, parents proceeding *pro se* usually are not as familiar with the due process system as are attorneys representing school divisions and, in this proceeding, the parents certainly were not at the same level of skill as the LEA's attorney. In any event, by the time that the parents became aware that the VDOE List was not supplied to them, the parents, without the advice of counsel, had taken, or failed to take certain action concerning the hearing which potentially impacted the presentation of their case. Due process proceedings do not necessarily cure violations of procedural safeguards required by IDEA and related state law. See, Punxsutawney Area Sch. Dist. v. Kanouff, 23 IDELR 73 (1995).

The hearing officer agrees with the LEA that the parents bear the burden of proof in this proceeding. Bales v. Clarke, 523 F.Supp. 1366, 1370 (E.D. Va. 1981); Alexander K v. Virginia Bd. of Educ., 30 IDELR 967 (E.D. Va. 1999); In re Fairfax County Public Schools, 20 IDELR 585, at 586-587 (SEA Va. 1993); Erickson v. Bd. of Educ. of Baltimore County, 162 F.3d 289, 292 (4th Cir. 1998).

In Jaynes v. Newport News School Board, the United States Court of Appeals for the Fourth Circuit held that a School district denied FAPE based solely on procedural violations of IDEA. 13 Fed. Appx. 166 (4th Cir. 2001 unpublished). Counsel for the LEA correctly reminds the hearing officer that Jaynes is an unpublished opinion and, as such, its precedential value is diminished and circumspect. Local Rule 36(c) for the Fourth Circuit.

However, Local Rule 36(c) provides an exception to the general rule as follows:

> If counsel believes, nevertheless, that an unpublished disposition of this Court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.

Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

The hearing officer finds large portions of the Court's reasoning in Jaynes to be compelling, helpful and applicable in the proceeding before him. Indeed, Jaynes also serves as better precedential value in relation to certain material issues in this proceeding than any published opinion. Accordingly, the hearing officer attaches a copy of the Jaynes decision to this decision.

Of course, the hearing officer is well aware of the factual distinctions between Jaynes and this proceeding, but nevertheless finds the reasoning of the Jaynes Court compelling in refuting the substantially similar legal arguments made by the LEA in that proceeding.

The LEA also asserts that the parents are not entitled to the remedy of compensatory education which they seek. SB Brief, p. 15, et seq. Even if the LEA is found to have denied FAPE, this conclusion requires the hearing officer to determine what relief, if any, is appropriate. 20 U.S.C. § 1415(e)(2).

The subject matter of disputes which can be heard by an administrative due process hearing officer in a due process hearing are delineated in 20 U.S.C. § 1415(b)(1)(E). These statutory provisions are mirrored by the relevant provisions of the U.S. Code of Federal Regulations (34 C.F.R. §§ 300.506(a) and 300.504(a)(1) and (a)(2)) and by the Virginia Regulations (§ 3.4(A)(2)). "Each LEA or parent of a child determined to have a disability, shall have the right to initiate a hearing when a disagreement occurs on matters relating to . . . the provision of a free appropriate public education for the child." Virginia Regulations § 3.4(A)(2). Clearly, the parent had a right to challenge the LEA's provision of FAPE to

Under IDEA and its regulations, each party has the right to findings of fact and a decision. 34 C.F.R. 300.509(a)(5). Whether directly or after a hearing officer's decision at the administrative level, each party has the right to bring a civil action in a state or federal court, which has the authority to "grant the relief that the court determines to be appropriate" [34 C.F.R. 300.512(b)(3). Emphasis supplied.] In Burlington Sch. Committee v. Dept. of Educ. of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985), the Court held that under IDEA a court has broad authority to fashion appropriate relief to realize the purposes of IDEA, considering all equitable factors.

Since Burlington, the Office of Special Education Programs ("OSEP") and certain courts have stated that a hearing officer has the same broad authority as a court to grant any such appropriate relief under IDEA.

In Cocares v. Portsmith Sch. Dist., 18 IDELR 461, 462-3 (U.S.D.C. NH 1991), the Court held that given the importance that IDEA places on the protections afforded by the administrative process, the hearing officer's authority to award relief, including compensatory

education, must be coextensive with that of the court. The Court went on to state that to find otherwise "would make 'the heart of the [Act's] administrative machinery, its impartial due process hearing' less than complete." S-1 by and through P-1 v. Spangler, 650 F.Supp. 1427, 1431 (M.D.N.C. 1986, *vacated as moot*, 832 F.2d 294 (4th Cir. 1987), quoting Madecke v. School Bd. of Pinellas County, 762 F.2d 912, 919 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

In Letter to Kohn, 17 EHLR 522 (OSEP 1991), OSEP, with supporting cases, clearly states its position concerning compensatory education for procedural violations of IDEA which result in a denial of FAPE. Part B and its legislative history show the importance attached by Congress to the procedural safeguards as a means of ensuring that FAPE is made available to children with disabilities. OSEP's position is that Part B intends an impartial hearing officer to exercise his authority in a manner which ensures that the right to a due process hearing is a meaningful mechanism for resolving disputes between parents and responsible public agencies concerning issues relating to the provision of FAPE to a child. Id. While Part B does not address the specific remedies an impartial hearing officer may order upon a finding that a child has been denied FAPE, OSEP's position is that, based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he is entitled. Id.

Accordingly, the reasoning is that for exhaustion of the administrative remedy to be meaningful, the party must be able to gain from it any "appropriate relief" which he could obtain once he gets to court.

However, other courts appear to have cast doubt on the issue whether hearing officers or state review officers have at their disposal the full range of judicial remedies. For example, under the so-called Honig injunction, it is to the courts and not hearing officers that school officials must go to obtain injunctive relief to remove a student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or others. Honig v. Doe, 108 S.Ct. 592, 606 (1988). See also, Roher v. District of Columbia, Cir. A. Nos. 89-2425, 89-2503, 1989 W.L. 330800, at *4 n. 7 (D.D.C. 1989) which can also be read to support the position that an administrative hearing officer has no power to issue an injunction, which that note suggests is solely a judicial remedy.

In any event, the hearing officer is confident, for purposes of this proceeding, that compensatory education is a remedy available to the parents provided that they meet the requisite legal standard. In regard to this legal standard, many states condition the right to compensatory education on procedural or substantive violations of IDEA that result in a denial of FAPE. See, for example, Pihl v. Massachusetts Dept. of Educ., 9 F.3d 184, 189-190 (1st Cir. 1993); Murphy v. Timberlane Regional School Dist., 22 F.3d 1186 at 1196 (1st Cir. 1994); Jackson v. Franklin County School Bd., 806 F.2d 623 (5th Cir. 1986); Miener By and Through Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986); Independent School District #284 v. A.C., 258 F.3d 769 (8th Cir. 2001); Parents of Student W. v. Puyallup Sch. Dist. #3, 31 F.3d

1489 (9th Cir. 1994); S.V. v. Sherwood School Dist., 254 F.3d 877 (9th Cir. 2001); Urban by Urban v. Jefferson County School Dist., 89 F.3d 720 (10th Cir. 1996); Erickson v. Albuquerque Public Schools, 199 F.3d 1116 (10th Cir. 1999); Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988); Weiss by Weiss v. School Bd. of Hillsborough County, 141 F.3d 990 (11th Cir. 1998). The Fourth Circuit in addition to analyzing whether procedural violations constituted a failure to provide the disabled child with FAPE also proceeds further to determine whether such failure lead to a loss of an "educational opportunity" for the failure to have legal significance. See, Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990). The hearing officer has found that the Failure resulted in a denial of FAPE to and that the Failure lead to a loss of "educational opportunity" for . Accordingly, the hearing officer finds an award of compensatory education appropriate for .

Compensatory education is an equitable remedy in nature and, accordingly, the hearing officer has analyzed the impact of the equities in this proceeding. Notably, the hearing officer finds that upon the record before him, other than the Failure (and after assessing its potential impact on the record before him), the actions of the LEA have been taken in good faith. Accordingly, the hearing officer instructs ' IEP Team to develop and integrate a compensatory education plan into ' 2003-04 IEP and to include, at a minimum, an award of compensatory education to in each of the following areas: speech, handwriting, computer writing, reading, math and science/history/social studies.

' IEP Team shall meet as soon as possible to discuss and determine the amount of services to be provided in each identified area, applying the applicable legal standards for determining the quantum of compensatory education to be provided. The IEP Team shall also consider and decide upon any other possible related services. Of course, any and all instruction and services shall be provided to free of charge and any and all compensatory services shall be provided either during the regular school year or during the Summer of 2004, or during a combination of both, as a supplement to, and not as a replacement of, special education services otherwise required to be provided to under applicable law.

Concerning the Failure, the parents have met their burden by showing upon a preponderance of the evidence that the Failure occurred, that the Failure resulted in a denial of FAPE to , that the Failure lead to suffer a loss of an "educational opportunity" and that upon the record and under the particular facts and circumstances of this proceeding, is entitled to an award of compensatory education to compensate him for the denial of FAPE and the loss of "educational opportunity" to which he was subjected.

The LEA is reminded of its obligations concerning 8 VAC 20-80-76(I)(16) to develop and submit an implementation plan to the parties, the hearing officer, and the SEA within 45 days of the rendering of this decision.

Right of Appeal. A decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party within one year of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Individuals with Disabilities Act (20 U.S.C. § 1400 et seq.) without regard to the amount in controversy. 8 VAC 20-80-76(O)(1).

ENTER: 2 / 20 / 04

John V. Robinson

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail, via facsimile and e-mail, where possible)

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

STEFAN JAYNES, a minor, by and through his parents, Brian D. Jaynes and Juliana F. Jaynes, and on their own behalf, *Plaintiff-Appellee,* v. NEWPORT NEWS SCHOOL BOARD, *Defendant-Appellant.*	No. 00-2312
STEFAN JAYNES, a minor, by and through his parents, Brian D. Jaynes and Juliana F. Jaynes, and on their own behalf, *Plaintiff-Appellee,* v. NEWPORT NEWS SCHOOL BOARD, *Defendant-Appellant.*	No. 00-2575

Appeals from the United States District Court
for the Eastern District of Virginia, at Newport News.
Henry C. Morgan, Jr., District Judge.
(CA-99-146-4)

Argued: June 7, 2001

Decided: July 10, 2001

Before NIEMEYER and TRAXLER, Circuit Judges, and
Robert R. BEEZER, Senior Circuit Judge of the
United States Court of Appeals for the Ninth Circuit,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Kathleen Shepherd Mehfoud, REED, SMITH, HAZEL & THOMAS, Richmond, Virginia, for Appellant. Peter W.D. Wright, Deltaville, Virginia, for Appellee.

OPINION

PER CURIAM:

This case addresses whether a reimbursement award for educational expenses was proper under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400.[1]

Stefan Jaynes was diagnosed with autism at age two. Following the advice of a pediatric neurologist, Dr. L. Matthew Frank, Brian and Juliana Jaynes (collectively, "Parents") contacted Paces, a program specifically designed for autistic children. Paces informed the Parents that Stefan needed a referral from the local public school system. On October 8, 1993, the Parents requested a referral for special education

[1]IDEA requires states that receive federal funding for the education of the handicapped to provide such children with a free appropriate public education. 28 U.S.C. § 1412(1). A free appropriate public education is provided to a child through the development of an individualized educational program ("IEP"). *Id.* § 1414. IDEA guarantees parents the opportunity to contest any matter relating to the child's IEP, including the right to due process hearings, state-level appeals, civil actions and attorneys's fees. Public schools must also provide particular and timely notification of and procedural instruction regarding such rights. *Id.* § 1415.

services from Newport News Public Schools ("Newport"), which began the assessment process on December 15, 1993. At that time, Mrs. Jaynes signed a "consent to testing" form but was not advised of her parental rights.

On February 18, 1994, Newport school officials held a meeting at which they deemed Stefan eligible for special services and developed an individualized educational program ("February IEP"). The Parents received notice of this meeting but did not attend. Although Newport was aware of Dr. Frank's recommendation that Stefan be enrolled in Paces, the February IEP provided for Stefan's placement into the Program for Educating Exceptional Preschoolers ("PEEP").[2]

Newport neither inquired as to the Parents' absence nor briefed them on the February meeting. Rather, the Parents received a notice of Stefan's IEP eligibility in the mail. Although the Parents eventually signed the IEP, thereby attesting to their receipt of an Advisement of Parental Rights form, both contend that they never received such a form and were never otherwise informed of their right to a due process hearing.

Newport neglected to carry out the February IEP until the end of May 1994, when there were only two weeks left in the school year. During this interim, the Parents repeatedly contacted Newport to request that the February IEP be carried out and that Stefan receive occupational therapy and extended school year services. Newport either ignored or denied their requests. In October 1995, Newport held a second IEP meeting, which Mrs. Jaynes attended. Although Newport had never introduced many of the objectives listed on the February IEP, Newport formulated a new IEP ("October IEP") that, without explanation, reduced the services available to Stefan. Although Mrs. Jaynes signed the October IEP, Newport later altered it without her knowledge.

[2]PEEP is a Newport-owned program designed for children with various disabilities. Paces is a regional public school consortium specifically designed to educate children with autism; because the Paces program is not owned or operated by Newport, Newport would have to pay Stefan's tuition to Paces.

On January 17, 1995, after realizing that Stefan was making no progress in PEEP, the Parents unilaterally removed Stefan from the public school program and placed him in a private Lovaas Applied Behavioral Analysis program ("Lovaas").[3] In late 1996, the Parents learned that they had the right to contest the IEPs in a due process hearing. On January 14, 1997, they requested such a hearing, alleging that Newport committed procedural and substantive violations of IDEA.

The local hearing officer ("LHO") found that Newport failed to notify the Parents of their right to a hearing and, based on that finding, tolled the applicable one year statute of limitations. Because Newport engaged in a pattern and practice of failing to follow the procedures set forth in IDEA, the LHO ordered Newport to indemnify the Parents in the amount of $117,979.78 for educational expenses.

Newport appealed to the state review officer ("SRO"). The SRO affirmed the LHO's decision but reduced the award based on his conclusion that the statute of limitations prevented the Parents from recovering any expenses prior to January 14, 1997, the day the Parents requested a due process hearing.

The Parents sought reinstatement of the full amount in district court. The court held that the only causes of action available to the Parents are those that accrued after July 1, 1995.[4] Finding that Newport's violations of IDEA kept the Parents ignorant of their hearing rights until sometime in 1996, the court allowed the Parents to be reimbursed for educational expenses incurred on or after July 1, 1995. Newport appeals the court's summary judgment in favor of the Parents.

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[3]Applied Behavioral Analysis Therapy, a form of treatment for autistic preschoolers developed by Dr. Ivar Lovaas, consists of breaking down activities into discrete tasks and rewarding the child's accomplishments. *See Bd. of Educ. of the County of Kanawha v. Michael M.*, 95 F. Supp. 2d 600, 602 (S.D. W. Va. 2000).

[4]Effective July 1, 1995, the Virginia statute of limitations for personal injury actions was extended from one year to two years, applicable to causes of action accruing on or after that date. *See* Va. Code § 8.01-248.

We have jurisdiction, 28 U.S.C. § 1291, and we affirm.

I

Newport first contends that the district court misapplied the statute of limitations. We review this legal question de novo. *Singer v. Dungan*, 45 F.3d 823, 827 (4th Cir. 1995).

The appropriate period of limitations for actions brought under IDEA is one year for claims that accrued before July 1, 1995, and two years for claims that accrued on or after that date. *Manning v. Fairfax County Sch. Bd.*, 176 F.3d 235, 239 n.2 (4th Cir. 1999).

The district court held that although claims that accrued prior to July 1, 1995, were barred, any claims arising after that date were actionable because they fell within the two year limitations period. The court then analyzed the Parents' claims to determine whether any accrued after July 1, 1995.

The court determined that the claim alleging failure to give notice of the right to and procedures for requesting a hearing fell within the two year statute of limitations. The court found that the moment the Parents received such notice—sometime in 1996—is the moment that the action accrued. Because any date in 1996 would fall within the two year limitations period, the court concluded that this claim was actionable.

Newport argues that the limitations period on the Parents' due process request started to run on October 10, 1994 (the date of the second IEP meeting) or at the latest, on January 17, 1995 (the date the Parents removed Stefan from the PEEP program). Newport contends that as of these dates, the Parents knew of the events that formed the bases of their claims and that the fact that they did not learn until much later that their injuries were actionable is irrelevant. *See Richards v. Fairfax County Sch. Bd.*, 798 F. Supp. 338, 341 (E.D. Va. 1992), *aff'd*, 7 F.3d 225 (4th Cir. 1993) (holding that IDEA claims accrue when the parents know of the injury or the event that is the basis for their claim, regardless of whether they know that the injury is actionable). Because the Parents did not request a due process hearing within one

year of either of these dates, Newport contends, their claim for reimbursement is barred.

The district court correctly applied the statute of limitations. In general, knowledge that an injury is actionable is irrelevant to the determination of when the injury arose. Here, however, Newport's failure to notify the Parents of their parental rights, in violation of statutory mandates, *is* the alleged injury. The Parents complain that because Newport neglected to inform them of their right to a due process hearing, they were deprived of the opportunity to seek recourse through such a hearing. It follows that the moment they learned they had a right to a hearing was the moment they learned Newport had a duty to inform them of such a right.

II

Newport next challenges the court's application of the standard of review, an issue which we review de novo. *See Myles Lumber Co. v. CNA Financial Corp.*, 233 F.3d 821, 823 (4th Cir. 2000).

Courts reviewing administrative decisions in IDEA cases "are required to make an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings." *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 103 (4th Cir. 1992). Due weight review requires that the court afford factual findings a presumption of prima facie correctness. *Id.* If the reviewing court decides to depart from the administrative findings, it must explain its reasons for doing so. *Id.* After giving the factual findings due weight, the court is free to decide the case based on the preponderance of the evidence. *Id.*; *see also* 20 U.S.C. § 1415(i)(2)(B).

Newport argues that the court should have afforded less deference to the LHO's findings because the LHO adopted many of the Parents' proposed findings of fact and conclusions of law and failed to exercise independent judgment. In particular, Newport attacks the district court's decision to accept the LHO's finding that the Parents did not receive notice of their rights until 1996, contrary to the SRO's finding that the Parents did receive such notice. The district court, however, correctly applied the *Doyle* standard. When findings by the LHO and SRO conflict, due weight is generally given to the LHO's decision,

particularly if, as here, that decision turns on witness credibility. *See Doyle*, 953 F.2d at 105; *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 663 n.* (4th Cir. 1998). The court independently reviewed the evidence underlying the LHO's factual findings and properly determined that those findings were supported by the record.

III

Newport also contends that the district court erred when it determined that reimbursement for Stefan's participation in the Lovaas program was appropriate.

We review de novo a grant of summary judgment. *Gadsby v. Grasmick*, 109 F.3d 940, 949 (4th Cir. 1997). Although we review the district court's legal conclusions de novo, we accept its finding of facts in the absence of clear error. *Mentavlos v. Anderson*, 249 F.3d 301, 307 (4th Cir. 2001).

Reimbursement of special education expenses under IDEA is appropriate when the reviewing court finds that: (1) the public school's placement was not providing the child with a free appropriate public education; and (2) the parents' alternative placement was proper under IDEA. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-70 (1985). In determining whether the public school has provided a free appropriate public education, the court conducts a twofold inquiry: (1) has the State complied with the procedures set forth in IDEA?; and (2) is the IEP reasonably calculated to enable the child to receive educational benefits? *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Weschester County v. Rowley*, 458 U.S. 176, 206-07 (1982). Failure to meet IDEA's procedural requirements is an adequate ground for holding that the public school failed to provide a free appropriate public education. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985) (citing *Rowley*, 458 U.S. at 206 n.27); *accord Bd. of Educ. of the County of Cabell v. Dienelt*, 843 F.2d 813, 815 (4th Cir. 1988).

Because we agree with the district court's finding that Newport repeatedly failed to notify the Parents of their right to a due process hearing, we affirm its holding that these procedural violations constituted failure of Newport to provide Stefan with a free appropriate

public education. For the reasons we give below, Newport's three arguments to the contrary are unavailing.

First, Newport argues that it was entitled to the presumption that it provided the Parental Rights form as early as December 1993. This contention is based on (1) the fact that Newport has a practice of providing this form when a child is brought in to be evaluated and whenever an IEP is developed; and (2) the fact that the Parents signed Stefan's IEPs, both of which included language attesting that they had received the Parental Rights form.

Relying on the findings of the LHO and an independent review of the record, the district court correctly found that the Parents were unaware of their right to a due process hearing until 1996. The record shows that the Parents testified consistently and persuasively at the administrative hearing that they had never seen a Parental Rights form and had never otherwise been informed of their rights. Moreover, at least one Newport administrator admitted that she had never informed the Parents of their rights. Newport does not dispute that when it denied the Parents' requests for extra and extended school year services, and when the Parents notified Newport of their intention to remove Stefan from PEEP, it failed to notify them of their rights. *See Hall*, 774 F.2d at 634-35 (finding failure to notify despite administrator's testimony that she had explained procedural rights to the parents at an IEP meeting when school did not contest that it failed to give notice at similar points in the process). Finally, although the SRO found that the best evidence—the Parents' signatures on the IEPs—demonstrated that they had notice of their rights, the district court's decision to the contrary is based on a preponderance of the evidence and is not clearly erroneous.[5]

Second, Newport devotes much of its attention to its argument that the court erred when it failed to determine whether or not Newport was providing an appropriate education for Stefan. This contention is

[5]Newport asserts that even if it failed to give notice, such failure must lead to a loss of an "educational opportunity" to have legal significance. *See Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990). The LHO found that Stefan had suffered such a loss, and the record supports this finding.

irrelevant because the district court based its decision that Newport was not providing a free appropriate education on *procedural* violations of IDEA, not on *substantive* deficiencies in Stefan's program. A determination of whether the public school's program is "appropriate" is only necessary when the claim is that the IEP was not reasonably calculated to enable the child to receive education benefits. *Cf. Dienelt*, 843 F.2d at 814-15 (affirming award of reimbursement based on district court's determinations that procedural violations constituted a failure to provide the child with a free appropriate public education and that parents' alternative placement was appropriate).

Newport's third argument, that the court erred because it failed to determine that the Parents' placement of Stefan was proper, has some merit. Reimbursement is proper only upon finding both that Newport failed to provide a free appropriate education (here, based on procedural defects) *and* that the Parents' placement was proper under IDEA. *See Burlington*, 471 U.S. at 369-70. Although the district court did not make the second finding, we affirm the reimbursement award because the record supports a determination that Stefan's placement in Lovaas therapy was proper.[6] For example, the LHO concluded, based on extensive briefing, that Lovaas therapy was appropriate and had benefitted Stefan. The SRO noted that according to Dr. Frank's letter, Stefan had improved as a result of Lovaas therapy. Dr. Frank's letter reported that Stefan's "Lovaas training is having a very definite impact on his growth and development" and detailed specific examples. Finally, not only did Stefan's speech/language pathologist testify regarding Stefan's improvements, but Newport's psychologist also reported "qualitative improvement."[7]

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[6]*Cf. Hall*, 774, F.2d 629, 636 n.7 (noting that although district court did not explicitly find parental placement was appropriate, it implicitly so found when it stated that parents proved that the costs they incurred were in connection with providing child with appropriate education).

[7]Newport takes issue with the Parents' failure to present expert testimony on Lovaas at the hearing and contends that PEEP was more appropriate than home-based Lovaas tutoring because it allowed Stefan to interact with other students, as favored by IDEA's "mainstreaming provision," 20 U.S.C. § 1412(5)(B). These arguments are unavailing. First, although there was no live expert testimony, the Parents submitted over 20 exhibits regarding the Lovaas method and elicited testimony from

IV

Finally, Newport argues that it did not waive its right to challenge the specific amount of reimbursement.

In its order granting the Parents' motion for summary judgment, the district court directed that in the event that the parties could not agree upon the amount of damages, the Parents should submit a verified claim for damages to which Newport could reply. Unable to stipulate to the amount of damages, both parties submitted briefs, but neither requested a hearing. In its brief, Newport: (1) argued that expenses for Stefan's Lovaas training should not be reimbursed because such training does not qualify as an educational program under IDEA; and (2) challenged reimbursement for particular expenses not incurred for "special education and related services" under 20 U.S.C. § 1401(a)(18).

The district court reinstated the reimbursement award of the LHO, but reduced the amount by subtracting costs incurred prior to July 1, 1995, as barred by the statute of limitations.[8] The court concluded that because Newport had neglected to challenge the amount of the reimbursement award until after summary judgment was entered against it,[9] Newport had waived such arguments.

Stefan's speech/language pathologist regarding Lovaas in general and its effect on Stefan. Second, although IDEA prefers mainstreaming handicapped students, that provision was meant to prevent schools from segregating handicapped students from the general student population, not to restrict parental options. *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991). Moreover, mainstreaming was not necessarily appropriate in this case due to the particularity of Stefan's disability.

[8]The Parents do not challenge the district court's reduction of the reimbursement amount on appeal.

[9]Both the LHO and SRO concluded that because Newport challenged only the Parents' *entitlement* to the award, and not the *amount* of the award, Newport had waived any such specific objections. The district court relied on those conclusions by the LHO and SRO as well as the fact that Newport did not initially object to the award amount before the district court, but rather had agreed to rest its case on the administrative record.

We hold that the district court did not abuse its discretion in refusing to consider Newport's new arguments. Although IDEA permits the district court to hear new evidence, we have held that such evidence is limited to that which could not have been presented before the administrative agencies. *Springer*, 134 F.3d at 666-67 (upholding district court's refusal to hear testimony when same testimony could have been introduced during local and state proceedings, but, for tactical reasons, was not). In this case, the district court faulted Newport for neglecting to challenge the award amount at any time prior to entry of summary judgment, and Newport offers no excuse for its reticence. The court correctly found that Newport made a tactical decision to forego opportunities to contest the award amount and was estopped from now patching up holes in its administrative case.

The judgment of the district court is hereby affirmed.

AFFIRMED