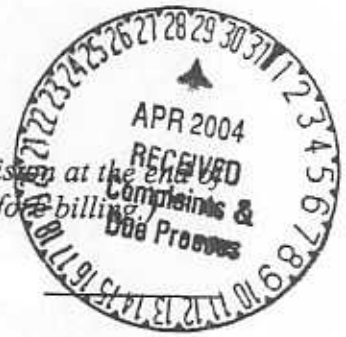
04-056

# 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

March 8, 2004
Date of Decision

Esquire
Counsel Representing LEA

None
Counsel Representing Parent/Student

Parents
Party Initiating Hearing

LEA
Prevailing Party

**Hearing Officer's Determination of Issue(s):**
In this due process hearing, the parents alleged that the LEA denied FAPE by refusing to provide to extended school year services during the December 2003 school break between December 22, 2003 and January 2, 2004. The parents, amongst other things, were seeking an award of compensatory education to remedy the alleged LEA failures. The parents also alleged that the LEA committed various procedural violations concerning the IEP Team meeting which addressed the December 2003 break extended school year services issue.

**Hearing Officer's Orders and Outcome of Hearing:**
For the reasons provided in the decision, the hearing officer finds that the parents have failed to meet their burden of proving upon a preponderance of the evidence that the LEA had denied FAPE by refusing to provide such ESY services. Additionally, even if the burden was on the LEA to prove upon a preponderance of the evidence that it had provided with FAPE concerning its denial of ESY services to in the Winter Break, the LEA has satisfied such burden in this proceeding.

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 December 17, 2003 (the "Request"). The parents allege that Public Schools (' " or the "LEA") denied a free appropriate public education ("FAPE") by refusing to provide to extended school year ("ESY") services during the school winter break between Monday, December 22, 2003 and Friday, January 2, 2004 (the "Winter Break").

The parents, amongst other things, seek an award of compensatory education to remedy the alleged LEA failures. The parents also alleges that the LEA committed various procedural violations concerning the IEP Team meeting which addressed the Winter Break extended school year services issue. The LEA maintains that it acted appropriately in denying ESY services to during the Winter Break, contending that it properly applied the legal standard for ESY services and that it committed no procedural violations concerning this proceeding which rise to the level necessary to constitute a denial of FAPE to .

The hearing officer was appointed to this administrative due process proceeding on December 19, 2003. An administrative due process hearing was held on January 22, 2004 and the hearing officer hereby issues his decision on the subject.

### II. Findings of Fact

1. and are the parents of . Ex. 4.[1]

[1] References to the joint exhibits will be designated Ex. followed by the exhibit number. References to exhibits from the hearing officer will be designated HO followed by the exhibit number. The transcript of the hearing will be cited "TR" followed by the page number.

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

3. 's pediatrician referred her to the Virginia Babies Can't Wait System ("BCW") for evaluation due to concern about her motor skills.[2] Ex. 5.

4. In November 2000 when was months old, the BCW evaluation team found that qualified for Part C services because of significant developmental delays in certain areas. Ex. 5. For example, while 's social emotional development skills were within normal limits for her age, 's self-help score was only 2 months on the Peabody Developmental Motor Scales. Ex. 5. 's receptive language, expressive language and cognitive skills were all determined to be approximately 4 months delayed for her age. Ex. 5.

5. Based on the evaluations on November 16, 2000, the BCW team developed an Individualized Family Service Plan (IFSP). Ex. 5. The IFSP provided various early intervention services to including occupational and physical therapy services for in her home once per week and speech therapy services twice per week. Ex. 5.

6. During the 2000-2001 school year, received speech/language therapy, occupational therapy, and physical therapy services.

7. On June 26, 2001, a physical therapy evaluation determined that was very delayed in gross motor skills and that an occupational therapy evaluation and speech intervention would be appropriate. Ex. 8.

8. In July 2001, following a referral from Hospital, a child study committee recommended various evaluations to determine 's eligibility for special education. Ex. 10. The parents gave permission for the evaluations on July 17, 2001. Ex. 12.

9. A September 28, 2001 Preschool Developmental Evaluation by , M.Ed., an early childhood special education teacher with the LEA, found that was significantly delayed in all developmental domains. Ex. 14. At the time of the evaluation, her chronological age was 24 months, but her age equivalent scores in testing in eight tested domains ranged from 3 months in expressive language to 14 months in personal-social skills. Ex. 14.

10. On September 8, 2001, during a psychological observation of as part of a complete evaluation by the LEA, Mrs. reported that 's Hospital had diagnosed "hypotonia" and had not yet diagnosed autism in . Ex. 15.

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[2] BCW is the program developed by the Commonwealth of Virginia to provide early intervention services to eligible infants and their families pursuant to Part C of the Individuals with Disabilities Education Act ("IDEA" or the "Act"). 20 U.S.C. §§ 1400 et seq., and the Va. Code Ann. §§ 22.1-213-221(1950), and the regulations promulgated thereunder.

11. On October 5, 2001, , M.Ed., CCC-SLP, a speech/language pathologist, evaluated for the LEA and found a severe delay in her communication and comprehension of spoken language. Ex. 16.

12. On October 9, 2001, an eligibility committee of determined that 's global delays indicated a need for special education and related services. Ex. 19. Accordingly, the eligibility committee identified her as eligible for special education and related services under the category of developmentally delayed. Ex. 19.

13. The parents and the LEA developed an IEP for immediately following the eligibility meeting. The IEP called for special education, physical therapy, speech/language therapy, and occupational therapy services for . Ex. 20.

14. The parents signed the LEA's IEP. Ex. 20. At the time of the October 9, 2001 IEP, was two years and one month old. There is no issue in this hearing about the delivery of services under the October 9, 2001 IEP.

15. The parents and the LEA developed an IEP for for the 2002-03 school year on May 21, 2002. The May 21, 2002 IEP provided for special education and related services including 45-60 minutes of special education per week at 's day care setting from May 21, 2002 to June 14, 2002. Ex. 23.

16. The parents gave permission for implementation of the May 21, 2002 IEP, and there is no issue in this hearing about that IEP.

17. During the 2002-03 school year, received special education and related services in self-contained classroom for 3 hours a day, 5 days a week at Elementary School operated by the LEA. From September 2002 until April 2003, was in the PEDD (Preschool Education for Developmentally Delayed Children) class taught by .

18. On March 11, 2003, Dr. , M.D. wrote that suffered from blocked pathways in the brain and autism. Ex. 32. Amongst other things, Dr. recommended placement in a highly structured classroom with aggressive individual and group speech/language therapy and Dr. further stated that it was "medically necessary" that receive ABA (applied behavior analysis) therapy. Ex. 32. ABA therapy is an educational methodology that, amongst other things, consists of intensive, one-to-one repetitive drills conducted by an adult with the subject disabled child, with daily data collection to monitor skill acquisition.

19. On April 10, 2003, the parents and the LEA discussed possible revisions to 's IEP. Ex. 34. The parents requested an increase in 's weekly speech therapy from 60 minutes to 120 minutes and the IEP team agreed to increase 's weekly speech therapy to 90 minutes and to provide additional homebound services. Ex. 34. The parents accepted these changes. Ex. 34.

20. Following the April 10, 2003 IEP meeting, was moved to the Preschool Autism Class taught by , and the LEA provided 10 hours of ABA therapy to at her day care program each week. , M.Ed. provided the ABA services for the LEA. Ex. 39.

21. Beginning in July, 2003, the LEA obtained consultation services from The Autism Program of Virginia (now Commonwealth Autism Service) concerning 's educational program.

22. On June 9, 2003 the parents and the IEP team prepared an IEP to provide extended school year services to during the summer of 2003. The ESY program included educational services at Elementary School and speech and occupational therapy. Ex. 40; Ex. 43. The parents agreed to these services, and there is no dispute about the services provided during the summer of 2003.

23. On August 5, 2003 the parents and the IEP team prepared an IEP for the 2003-04 school year. Both parents attended this IEP meeting. Ex. 45.

24. Under the August 5, 2003 IEP, the LEA agreed to provide 6 hours of special education, 5 days a week. Ex. 45. The LEA also agreed to provide a trained instructional assistant to for the entire school day, speech, physical and occupational therapy, and ongoing consultative services from The Autism Program of Virginia. Ex. 45. The August 5, 2003 IEP did not provide for ESY services during the winter or spring breaks.

25. The parents signed the August 5, 203 IEP on October 10, 2003. Ex. 45.

26. The August 5, 2003 IEP is being implemented at Elementary School. 's teacher is , and the instructional assistant assigned to i is . Ms. and Mrs. have reviewed 's entire file and all the exhibits in this case.

27. has a B.S. and M.S. in education from Longwood College. Ex. 2. She has also received recent training in teaching methods for autistic students. She is endorsed by the Virginia State Department of Education to teach elementary grades NK-8 and special education K-12 in the areas of mental retardation, emotional disabilities, and specific learning disabilities. There is no endorsement in Virginia for autism. Ms. is in her third year of teaching.

28. has a B.A. in English and a M.S. in Rehabilitative Counseling. Ex. 3. She has also received recent training in teaching methods for autistic students. She is licensed as a Certified Rehabilitation Counselor by the Commonwealth of Virginia. Prior to returning to the work force as 's instructional assistant, Mrs. was a rehabilitation counsel for the Virginia Department of Rehabilitative Services from 1994 until 1997. Mrs. is

currently enrolled in her second semester of "Specialized Teaching Methods for Individuals with Autism Spectrum Disorders" at the Virginia Commonwealth University School of Education.

29. Elementary School communicates with the parents about 's program on a daily basis by a written report called Notes and News. *See, e.g.*, Exs. 56, 58, 60. Mrs. also completes a daily data sheet recording 's performance on various tasks related to her IEP objectives. *See, e.g.*, Exs. 55, 57 and 59.

30. There is no dispute in this hearing about the IEP goals and objectives or the implementation of 's educational program at . The only programming issue is whether the LEA was required to provide ESY services to during the Winter Break.

31. On December 10, 2003, the parents requested an IEP meeting to discuss the provision of services to during the Winter Break.

32. The IEP team met with the parents on December 17, 2003. Both parents were present as were Ms. , Mrs. , Mrs. , Mrs. , and Mrs. .

33. During the meeting, members of the IEP team indicated that they did not believe that would significantly regress if she did not receive extended school year services during the Winter Break. They also indicated that they did not believe that exhibited any breakthrough skills that required ESY services. Exs. 51, 52.

34. The IEP team's conclusions were based on data maintained by the school staff, the personal observations of school personnel who worked with , and a December 17, 2003 progress report and related discussions with of The Autism Program of Virginia.

35. The parents did not offer any reports, evaluations or data to justify their request for ESY services during the December 17, 2003 IEP meeting.

36. The parents provided no expert opinion evidence at the hearing to support their contention that 's required ESY services during the Winter Break in order to assure her a free appropriate public education.

37. During the IEP meeting on December 17, 2003, Mrs. left the room to get a copy of the parents' procedural safeguards notice and placed it on the conference room table for the parents when she returned.

38. In any event, Dr. mailed the parents a copy of the procedural safeguards notice the following day. Ex. 54.

39. did not regress during the four-day Thanksgiving Break in November, 2003.

40. The LEA representatives at the IEP meeting on December 17, 2003 acted reasonably and in good faith in determining that would not significantly regress if she did not receive extended school year services during the Winter Break. The LEA representatives reasonably and justifiably based their collaborative and considered opinion on their day-to-day experience teaching and instructing , their academic expertise and their experience with concerning the recently completed Thanksgiving break.

41. The parents did not agree and left the meeting before a written notice stating the reasons for denying the parents' request was written. Ex. 54.

42. Although it was not required by any IEP, Ms. went on her own time during the Winter Break on December 23, 2003 to 's day care program and provided a list of activities to engage during the Winter Break.

43. did not regress significantly during the Winter Break and was able without material difficulty to resume her educational program when she returned to school on January 5, 2004. See, for example, TR. 76-79; 96; 146; 151; 169-170. ran to the school door as soon as her bus arrived at school and has quickly picked up her routine and skills where she left off before the Winter Break. See, for example, TR. 76-79; 96; 146; 151; 169-170.

44. There is no material evidence of any regression in 's behavior or performance at school as a result of the Winter Break. See, for example, TR. 76-79; 96; 146; 151; 169-170.

45. On behalf of , Ms. gave a copy of the audio tape recording of the December 17, 2003 IEP meeting to the parents on January 7, 2004. On behalf of , Ms. sent written notice of the reasons for denying the ESY services request to the parents on January 9, 2004.

46. Dr. is the Director of Exceptional Education for the LEA. She has 21 years of experience in special education, 14 of them as a teacher of disabled children. Ex. 1. She has a master's degree in special education and a doctorate in special education administration. She has published numerous articles and is a member of the adjunct faculty teaching special education at William and Mary and Virginia Commonwealth University. The hearing officer qualified her an as expert in special education.

47. Amongst other things, Dr. has reviewed 's school file and observed 's individualized education program and clearly has established a sufficient foundation in this proceeding upon which to render her expert opinion.

48. Dr. was the only expert witness qualified in this proceeding and the hearing officer finds her expert opinion testimony credible and compelling.

49. The testimony of the fact witnesses testifying on behalf of the LEA was both credible and consistent on the major issues before the hearing officer.

50. The requirements of notice to the parents concerning this proceeding were satisfied.

51. has a disability and needs special education and related services.

52. is receiving FAPE.

## 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 IDEA 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 Addendum concerning ESY services for the Winter Break) concerning 's 2001-2002, 2002-2003 and 2003-2004 school years were appropriate.

The parents, however, contend that the LEA's refusal to provide with ESY services during the Winter Break denied FAPE. The legal standard for the provision 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. 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).

Concerning the issues before the hearing officer in this proceeding, there is no evidence of serious procedural flaws in this proceeding that rise to the level necessary to constitute a denial of FAPE to . 's current IEP was developed in compliance with the procedures set forth in IDEA and under Virginia law, and any technical procedural violations concerning this proceeding clearly do not rise to the level necessary to constitute a failure to provide with FAPE.

While the parents' efforts to provide the best education for are understandable and admirable, the IEP team's decision concerning the non-provision of ESY services during the Winter Break must be analyzed in light of the standards and requirements imposed by law and, more particularly, the legal principles concerning ESY services articulated above.

The law does not require that receive the optimal education available, nor even that the education provided allow to realize her full potential commensurate with the opportunity provided to other children. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, at 198, 102 S.Ct. 3034 (1982); Bales v. Clark, 523 F.Supp. 1366 (E.D.Va. 1981).

In Rowley, *supra*, the Court cautioned judges against imposing their view of preferable education methods upon school districts. Noting that courts lack the wisdom and experience necessary to resolve persistent and difficult questions of educational policy, the Court limited the permissible inquiry to determining whether the specified requirements of the Act were being met. Id. at 206, 102 S.Ct. at 3051.

Subsequent court decisions have also been careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators.

In Hartmann v. Loudoun County, the court stated:

> Although section 1415(e)(2) provides district courts with authority to grant 'appropriate' relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section 'is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' (citations omitted)... [t]hese principles reflect the IDEA's

> recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

See also Springer v. Fairfax County, 134 F.3d 659, 663 (4th Cir. 1998) (holding that "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task"); Barnett v. Fairfax County School Board, 927 F.2d 146, 151-52 (4th Cir.), cert. denied, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and Tice v. Botetourt County, supra, at 1207 (once a "procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals" – rather, the court should "defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides").

In a recent decision, the Court cautioned hearing officers not to succumb to the temptation to substitute their judgment for that of local school authorities in IEP matters. Arlington County Sch. Bd. v. Smith, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

IDEA defines FAPE as special education and related services that (i) have been provided at public expense and under public supervision and direction; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary school education in the state involved; and (iv) are provided in conformity with an IEP. 20 U.S.C. § 1401(8).

The hearing officer agrees with the LEA that the parents bear the burden of proof in this proceeding and, accordingly, the parents must prove upon a preponderance of the evidence that the LEA's failure to provide ESY services to during the Winter Break denied a FAPE. 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).

Allocating the burden of proof to the child or parents who are challenging an IEP or the implementation of an IEP, which all parties agree was developed in accordance with IDEA's procedural and substantive requirements, is consistent with the deference both IDEA and the courts exhibit for the considered decisions of local educators concerning educational matters, which are within their professional experience and expertise. Hartmann v. Loudoun County, at 1000-1001; Houston Independent Sch. Dist. V. Bobby R.; Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); Dong v. Bd. of Educ., 31 IDELR 157 (6th Cir. 1999).

For the reasons given herein, the parents have failed to meet their burden. Additionally, even if the burden was on the LEA to prove upon a preponderance of the evidence that it had provided with FAPE concerning its denial of ESY services to in the Winter Break, the LEA has satisfied such burden in this proceeding.

The LEA is reminded of its obligations concerning 8 VAC 20-80-76(I)(16) to develop and submit any 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 Education Act (20 U.S.C. § 1400 et seq.) without regard to the amount in controversy. 8 VAC 20-80-76(O)(1).

ENTER: 3 / 8 / 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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