

VIRGINIA DEPARTMENT OF EDUCATION  
OFFICE OF DUE PROCESS AND COMPLAINTS



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.)*

School Division	<u>Public Schools</u>	Name of Parent(s)	_____
Name of Child	_____	Date of Decision	_____
Counsel Representing LEA	_____ Esq.	Counsel Representing Parent/Child	<u>Pro se (Assisted by)</u> _____
Parents Party Initiating Hearing	_____	School System Prevailing Party	_____

HEARING OFFICER'S DETERMINATION OF ISSUES:

Whether child is receiving FAPE, Whether additional one-on-one instruction required, whether proposed private placement appropriate.

Hearing Officer's Orders and Outcome of Hearing:

LEA's \_\_\_\_\_ IEP met requirements of IDEA and Virginia Regulations without additional one-on-one instruction. Placement at private institution requested by Parents not appropriate under IDEA.

Parents' requests for relief denied.

LEA allowed to implement IEP as written.

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

Printed Name of Hearing Officer \_\_\_\_\_

Signature \_\_\_\_\_

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EDUCATION



In Re: } Findings of Fact  
Due Process Hearing } and  
} Decision

Parents and  
Pro se and advised by:

Counsel for  
Public Schools:

. M.S.Ed.

Esq.

Virginia

Virginia

This matter came to be heard upon the request of \_\_\_\_\_, and

of \_\_\_\_\_, 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" or "Va. Regs."). (the "Parents") allege that \_\_\_\_\_ is not

receiving a free and appropriate public education ("FAPE") in the \_\_\_\_\_ Public

Schools ("\_\_\_\_\_") and seek an order that \_\_\_\_\_ be required to pay for \_\_\_\_\_'s

enrollment at \_\_\_\_\_ in \_\_\_\_\_, Virginia.

Request for the due process hearing was made by the Parents around \_\_\_\_\_.

Notice of the Request for Due Process Hearing and Notice of Hearing were mailed to \_\_\_\_\_ of \_\_\_\_\_, at \_\_\_\_\_ last reported mailing address. No response was received from \_\_\_\_\_ and \_\_\_\_\_ did not participate in the due process hearing proceedings.

The due process hearing was held before the undersigned hearing officer and transcribed by a court reporter on \_\_\_\_\_ at \_\_\_\_\_'s central office in \_\_\_\_\_, Virginia. The Parents appeared in person at the hearing and were assisted by \_\_\_\_\_, M.S.Ed., who owns and operates \_\_\_\_\_, was represented by \_\_\_\_\_, Ed.S., Director, Pupil Personnel Services, and by counsel. The Parents elected not to have the hearing open to the public and not to have \_\_\_\_\_ attend the hearing.

#### FINDINGS OF FACT

\_\_\_\_\_ was born on \_\_\_\_\_ is enrolled in the \_\_\_\_\_ grade at \_\_\_\_\_ School in the \_\_\_\_\_ system. \_\_\_\_\_ resides in \_\_\_\_\_, Virginia with \_\_\_\_\_ and \_\_\_\_\_'s three children. During \_\_\_\_\_ first year of \_\_\_\_\_ the \_\_\_\_\_ schools, \_\_\_\_\_ was identified as developmentally delayed and was found eligible for special education services. Following \_\_\_\_\_ triennial evaluation in the spring of \_\_\_\_\_, \_\_\_\_\_ was reclassified as Educable Mentally Retarded ("EMR"), level 2, with related services of Speech Language.

Since beginning \_\_\_\_\_ grade in \_\_\_\_\_, \_\_\_\_\_ has attended \_\_\_\_\_ School and has been taught, principally, in a self-contained classroom. In March \_\_\_\_\_, \_\_\_\_\_ formally requested \_\_\_\_\_ to provide a full-time one-on-one teacher's aide for \_\_\_\_\_. \_\_\_\_\_ declined to provide the service citing \_\_\_\_\_'s alleged progress under \_\_\_\_\_ then current Individualized Education Program ("IEP"). In \_\_\_\_\_ and again in \_\_\_\_\_, \_\_\_\_\_ requested that a teacher be assigned to teach \_\_\_\_\_ one-on-one, full time. \_\_\_\_\_ refused these requests, again citing \_\_\_\_\_'s alleged progress under \_\_\_\_\_ current

IEP. Over the summer of \_\_\_\_\_, \_\_\_\_\_ enrolled \_\_\_\_\_ for 96 hours in a twice-a-week Extended School Year ("ESY") program at \_\_\_\_\_ where \_\_\_\_\_ was taught one-on-one and, by all accounts, made good progress.

\_\_\_\_\_ is now enrolled in \_\_\_\_\_ grade at \_\_\_\_\_ School. Under \_\_\_\_\_ IEP, for 84 percent of the school day, \_\_\_\_\_ is taught in a self-contained classroom with six other disabled students, including four boys and two girls ranging in level from \_\_\_\_\_ to \_\_\_\_\_ grade. \_\_\_\_\_ goes to the regular \_\_\_\_\_ grade classroom daily for home room and the elective period (physical education, music, and library.) Although \_\_\_\_\_ benefits from interaction with peers in the regular classroom in terms of acquiring social skills, the Parents and

\_\_\_\_\_ 's witnesses agree that \_\_\_\_\_ would not benefit from spending a greater portion of school day in the regular classroom.

Since the beginning of the \_\_\_\_\_ school year, special education teacher \_\_\_\_\_ has taught \_\_\_\_\_ and \_\_\_\_\_ classmates in the self-contained classroom. \_\_\_\_\_ is assisted by \_\_\_\_\_, an experienced special education aide. At the present time, \_\_\_\_\_ receives one-on-one instruction from \_\_\_\_\_ in reading for about 15 minutes each day, and reviewing sight words during part of \_\_\_\_\_ 's 45 minute lunch period. (To encourage \_\_\_\_\_ to eat more, \_\_\_\_\_ is kept in the self-contained classroom for lunch while \_\_\_\_\_ classmates eat lunch with the regular classroom students.) Twice a week, \_\_\_\_\_ and \_\_\_\_\_ teach \_\_\_\_\_ and one other student educational skill games, while their special education classmates attend elective programs with the regular classroom students. For the rest of the self-contained class school day, \_\_\_\_\_ and \_\_\_\_\_ teach the \_\_\_\_\_ and \_\_\_\_\_ classmates in groups based upon the students' respective skill levels.

's IEP has no provision for one-on-one teaching. is to receive Level II Mental Retardation services in the self-contained special education classroom for 82 percent of school week and Level I Speech services, also in the special education classroom, twice a week in 20 minute sessions (2 percent of week). According to printed school schedule, actually receives speech training three days a week in 20 minute sessions.

At an IEP team meeting, the Parents requested to pay for 's placement at in , Virginia. This program would be taught by , who was issued a license on by the Virginia Department of Education to teach up to four students in a studio in home.

also operates , a residential day treatment program for mentally retarded adults. At the present time, only student-client is 's step , a disabled student now in a transitional, community based, training/education program. If attended , would not be taught in the same classroom as step .

denied the Parents' request to pay for 's enrollment at , whereupon the Parents gave notice of their request for the present due process hearing.

#### DECISION

In order to qualify for federal financial assistance under IDEA, a state must demonstrate that it "has in effect a policy that assures all children with disabilities the right to a free and appropriate public education." 20 U.S.C. § 1412(1). The Parents contend that cannot receive FAPE under 's current IEP, because program is not sufficiently

individualized to [redacted] needs. The Parents believe that [redacted] requires much more one-on-one teaching. After their earlier requests that [redacted] assign a full-time one-on-one teacher or aide for [redacted] were refused, and following [redacted]'s success under [redacted] ESY program at [redacted], the Parents now seek an order that [redacted] enroll [redacted] full-time at [redacted].

I. Eligibility for Special Education Services

The Parents and [redacted] agree that [redacted] is a child with a disability as defined by IDEA and the Virginia Regulations. The identification of [redacted]'s disabling condition in [redacted] IEP is Mental Retardation/Speech Language Impaired. I find that this identification of [redacted]'s disability, with which the parents agree, is supported by the record, including [redacted]'s [redacted] Special Education Eligibility Committee Summary.

II. Notice Requirements

The notice requirements to the parents for this due process hearing were satisfied.

III. Adequacy of [redacted] IEP

A. Burden of Proof

In this case, the Parents seek, in effect, to change [redacted]'s placement under the [redacted] IEP from the self-contained classroom at the [redacted] School to [redacted]'s program at [redacted]. The Parents contend that [redacted] cannot receive FAPE without more individualized, one-on-one teaching than [redacted] is providing at [redacted]. Following a prehearing conference on [redacted], the hearing officer ruled that the burden of proof would be upon [redacted] to establish by a preponderance of the evidence that [redacted] was receiving FAPE under [redacted] current IEP. *See, e.g., Board of Educ. of*

*County of Kanawha v. Michael M.*, 95 F.Supp.2d 600, 144 Ed. Law Rep. 187 (S.D.W.Va. 2000).

The burden of proof would shift to the Parents to show that \_\_\_\_\_ would be a proper placement under IDEA. See *Jaynes v. Newport News School Board*, Unpublished, 2001 WL 788643 (4<sup>th</sup> Cir. 2001).

B. Appropriateness of the \_\_\_\_\_ IEP

In determining whether \_\_\_\_\_'s IEP for \_\_\_\_\_ is appropriate and whether the school system has fulfilled its obligations to provide \_\_\_\_\_ 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 is "reasonably calculated" to enable \_\_\_\_\_ to receive educational benefits. See *id.* at 206-07. The failure to meet the procedural requirements of the Act itself is an "adequate groun[d] ... for holding that a school failed to provide ... a FAPE." *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir.1985).

1. Procedural Requirements

The Parents do not contend that \_\_\_\_\_ violated IDEA's procedural requirements. \_\_\_\_\_ (and \_\_\_\_\_) were invited to attend the \_\_\_\_\_ IEP team meeting and the Parents gave the permission for \_\_\_\_\_ to implement the \_\_\_\_\_ IEP for \_\_\_\_\_. The Parents also requested, and were invited to attend, an \_\_\_\_\_ IEP team meeting to review the \_\_\_\_\_ IEP. At the \_\_\_\_\_ meeting, the Parents requested that \_\_\_\_\_ place \_\_\_\_\_ at \_\_\_\_\_. The school system denied this request and provided the Parents with the appropriate notice of their procedural safeguards. The

Parents then filed their request for this due process hearing. I find that [redacted] complied with IDEA's procedural requirements in developing [redacted]'s IEP and in providing the Parents notice of procedural safeguards.

## 2. Substance of IEP

The second prong of the *Rowley* inquiry is whether [redacted]'s IEP was "reasonably calculated" to enable [redacted] to receive educational benefits. *See Rowley*, 458 U.S. at 206-07. The parents believe very strongly that [redacted] would make faster educational progress, particularly in reading, if [redacted] received more one-on-one teaching. The parents have sought more one-on-one teaching for [redacted] since [redacted] school year. After the successful ESY program at [redacted] last summer where [redacted] was taught one-on-one, the Parents, understandably, want [redacted] to receive the same or equivalent services during the school year.

Under IDEA, to provide FAPE, the school division must provide every disabled child with meaningful access to the educational process. "That is, a FAPE must be reasonably calculated to confer some educational benefit on a disabled child. Such an educational benefit must be provided to a disabled child in the least restrictive and appropriate environment, with the child participating, to the extent possible, in the same activities as non-disabled children." *MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 526; 169 Ed. Law Rep. 59 (4th Cir. 2002) (Citations omitted). IDEA does not, however, require a school district to provide a disabled child with the best possible education, and once FAPE is offered, the school district need not offer additional educational services. *Id.*, 303 F.3d at 526-27. IDEA does not require the furnishing of every service necessary to maximize each disabled child's potential. Instead,



school districts are merely required to provide a "basic floor of opportunity to every child with a disability. However, a school district cannot discharge its duty under IDEA by providing a program that provides only *de minimis* or trivial academic advancement." See *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 160 (4<sup>th</sup> Cir. 1991). Applying this well-established standard from *Rowley* and Fourth Circuit precedent, I find that the hearing evidence does establish that under [redacted]'s IEP, [redacted] is receiving FAPE.

Despite the Parents' dissatisfaction with aspects of the education [redacted] receives at [redacted], there is no dispute that [redacted] is receiving educational benefit. The Parents stipulated that [redacted] is making appropriate progress with [redacted] math skills and this was confirmed by [redacted]'s testimony. [redacted] also testified, without contradiction, that [redacted] had progressed with seasons and calendar skills, increased general knowledge, and more vocabulary.

What does concern the Parents about [redacted]'s educational progress is the pace of reading development. [redacted] testified that [redacted]'s reading fluency is better this school year, but that [redacted] has regressed in reading since the ESY instruction ended. [redacted] testified, to the contrary, that [redacted] is still making gradual progress with reading. "I'm going back to the word 'fluency.' When I talk about that, it's that [redacted] not having to stop every other word and sound it out. [redacted]'s being able to recognize the word and being able to read the whole sentence fluently without having to stop and sound out words. Also, you know, decoding, being able to figure out harder words or use context clues by using the words." *Transcript of Hearing*, [redacted], p. 268. One of [redacted]'s experts, [redacted], former Director of Special Education for [redacted] Schools, testified that from [redacted] review of the records and

in-class observation, although [redacted] has remained on the same primer level in reading, [redacted] is progressing within that level with phonetic skill, sight word vocabulary, increased pace, and generally with the skill to read more words. [redacted] concluded that overall, [redacted] was making slow but steady progress, as would be expected for someone with [redacted]'s cognitive delays.

The Parents' reading expert, [redacted], a former special education teacher and a staff member at [redacted], testified that [redacted]'s reading skills are not at the level that [redacted] observed when [redacted] completed the one-on-one ESY program. However, [redacted]'s opinion was based only on examining a half dozen of [redacted]'s papers shown to [redacted] by [redacted]. [redacted] has not observed or tested [redacted] since the end of the ESY program.

The Parents also called [redacted], Psy.D., a clinical psychologist, as an expert witness. Because [redacted] has not tested [redacted] or reviewed [redacted] school work since the beginning of the current school year, the hearing officer held that [redacted] lacked a basis for opining on whether [redacted] had made educational progress under the [redacted] IEP. [redacted] did state findings that, based upon [redacted] testing of [redacted], [redacted] achievement test score was consistent with [redacted] IQ, [redacted] mental capacity and [redacted] cognitive functioning, and [redacted]'s academic analyses were essentially commensurate with [redacted] overall intellectual status.

Taking the evidence as a whole, I find that [redacted] is receiving real, measurable educational benefit under [redacted] IEP at [redacted] School. The Parents' natural concern for [redacted]'s welfare, understandably, motivates them to seek the best available educational services for [redacted], including increased one-on-one reading instruction. However the evidence establishes that [redacted]'s IEP for [redacted] "provide[s] the

child the basic floor of opportunity that access to special education and related services provides." See *MM ex rel. DM v. School Dist. of Greenville County, supra*, 303 F.3d at 532 (internal quotations omitted). This IEP is reasonably calculated to enable [redacted] to receive educational benefits and [redacted] is in fact making educational progress this school year. I find therefore that the [redacted] IEP does provide [redacted] with a free and appropriate public education.

IV. Whether Placement at [redacted] Appropriate

Since I find that [redacted]'s [redacted] IEP satisfies IDEA's substantive requirements, I need not address the sufficiency of [redacted] program. See *Jaynes v. Newport News School Board, supra* (requiring parents who seek reimbursement for private placement to prove both that school division failed to provide a free appropriate education and that the Parents' placement was proper under IDEA). I nevertheless note that [redacted]'s proposed instruction through [redacted] would fail to satisfy one of the primary objectives set forth in the IDEA, namely, to educate disabled children in a classroom along with children who are not disabled, to the maximum extent possible. See 20 U.S.C. § 1412(a)(5)(A); See also *Rowley*, 458 U.S. at 202, 102 S.Ct. 3034 (noting that the statutory language reflects a "mainstreaming preference"). This policy does not mandate placement with non-disabled children when a child is so severely disabled that such placement would not provide an educational benefit, See 20 U.S.C. § 1412(a)(5)(A); however, the evidence establishes that [redacted] does benefit from the limited daily interaction that [redacted] now has with [redacted] regular classroom peers. By contrast, [redacted] is only licensed to teach four disabled students, and, as of now, [redacted] would be the only student. Accordingly I conclude that the [redacted] proposed program for [redacted] would not comply with

IDEA because it does not offer an education in the least restrictive environment.

ORDER

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

1. Public Schools may continue to implement its IEP for in conformity with this decision;
2. The Parents' request for relief in this due process hearing is denied; and
3. Public 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.

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, Hearing Officer