

04-122



VIRGINIA DEPARTMENT OF EDUCATION
 DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
 OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

CASE CLOSURE SUMMARY REPORT

<u>Public Schools</u>	
School Division	Name of Parents
Acting Division Superintendent	Name of Child
<u>John F. Cafferky, Esquire</u> Counsel Representing LEA	<u>Pro Se</u> Counsel Representing Parent/Child
<u>Robert J. Hartsoe</u> Hearing Officer	Party Initiating Hearing

HEARING OFFICER'S DETERMINATION OF ISSUES:

1. **Issue:** Whether the IEP's current ESY placement provides the necessary services regarding the Child's emerging skills?
Determination: Yes.
2. **Issue:** Whether the IEP's current ESY placement's "class-based program" which addresses "classroom behaviors" is required?
Determination: Yes.
3. **Issue:** Whether the IEP's current ESY placement provides the necessary services to address the child's emerging reading skills?
Determination: Yes.
4. **Issue:** Whether the IEP's current ESY placement robs the Child of leisure time to where he is denied FAPE?
Determination: Yes.

HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:

ORDERED: It was ordered that

1. The LEA has provided the child FAPE.
2. The LEA is responsible for submitting an implementation plan to the parties, the hearing officer and the Virginia Department of Education within 45 day from the date of this decision.
3. The LEA was declared the prevailing party on all issues.

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


Hearing Officer

July 7, 2004
Date

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of this pleading was delivered *via* first-class, postage prepaid mail, this 8th day of July, 2004, to:

Mr. and Mrs.

Virginia

John F. Cafferky, Esquire
Blankingship & Keith
4020 University Drive, Suite 300
Fairfax, Virginia 22030

Patrick Andriano, Office of Dispute Resolution and
Administrative Services, VDOE
Virginia Department of Education
P.O. Box 2120
Richmond, Virginia 23218-2120

and hand delivered along with the original file and bill, to:

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES



DECISION

<u>Public Schools</u> School Division	Name of Parents
Acting Division Superintendent	Name of Child
<u>John F. Cafferky, Esquire</u> Counsel Representing LEA	<u>Pro Se</u> Counsel Representing Parent/Child
<u>Robert J. Hartsoe</u> Hearing Officer	Party Initiating Hearing

PROCEDURAL BACKGROUND AND ISSUES DEFINED:

On June 3, 2004, _____ and _____ (“Parents”) requested a Due Process hearing on behalf of their son, _____ (“Child”), challenging the appropriateness of _____ Public Schools’ (“LEA”) IEP, dated May 21, 2004, for the Extended School Year (“ESY”) placement for the Summer of 2004. The Parents alleged that the LEA failed to provide the Child with a free appropriate public education (“FAPE”). On June 15, 2004, the Parties held their Prehearing conference. The procedural issues discussed and decided are memorialized in the Second Prehearing Report, filed herein. The following issues were identified at the Prehearing conference:

1. Whether the IEP’s current ESY placement provides the necessary services regarding the Child’s emerging skills?
2. Whether the IEP’s current ESY placement’s “class-based program” which addresses “classroom behaviors” is required?
3. Whether the IEP’s current ESY placement provides the necessary services to address the Child’s emerging reading skills?

4. Whether the IEP's current ESY placement robs the Child of leisure time to where he is denied FAPE?

In addition, the issue of burden of proof was also identified and, by agreement, to be decided before the Hearing. Any other IEP procedural issues, notifications and deadlines were waived by the Parties. A two-day due process hearing was noticed for July 1, 2004. By agreement, the date for the witness and exhibit list/exhibits exchange was modified to be less than five days before the Hearing, as memorialized in the Third Prehearing Report. By subsequent agreement, the date of the Hearing was rescheduled to July 6, 2004, as memorialized in the Fourth Prehearing Report.

Before the Hearing and on the record, the issue of burden of proof was addressed. The burden of proof was placed on the Parents as the party challenging the IEP. See Bales v. Clarke, 523 F.Supp. 1366, 1370 (E.D.Va. 1981); Hartmann v. Loudoun County School Board, 118 F.3d 996, 1000-01 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 888 (1998); Johnson v. Independent School District No. 4, 921 F.2d 1022, 1026 (10th Cir. 1990), *cert denied* 500 U.S. 905 (1991) *relying on Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986); Arlington County School Board v. Smith, 230 F.Supp.2d 704 (E.D.Va. 2002) and Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *reversed on other grounds* 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984) (where the Court found that the burden of proof was placed on the party "challenging the student's IEP," based on the statutory "presumption" in favor of the education placement; thus, the party "attacking the IEP" has the burden of showing why the IEP was deficient.) As stated below, the overwhelming evidence was that the IEP provided FAPE. As a result, the LEA would have prevailed even if it had the burden of proof.

FINDINGS OF FACT¹

Basically, the factual and expert testimony were not disputed. The Parties stipulated that the Child suffered from a disability to require special education as well as from a disability to require ESY placement. The Parties simply disagreed as to what services should be provided for the Summer of 2004. While the LEA contended the proposed IEP was valid, the Parents mandated that the Child should be placed at the _____ Center and participate in the "Fast ForWord" system, as described in Parents' Exhibit D.

During the Hearing, _____, _____ and _____ were qualified as experts for the LEA. Ms. _____'s expertise was in special education with emphasis on mental retardation and school psychology. (_____ Testimony.) Mrs. _____'s expertise was in speech and language pathology including speech articulation and the pragmatic use of language. (_____ Testimony.) Ms. _____'s expertise was in special education for students with learning disabilities and mental retardation. (_____ Testimony.) These professionals were very credible witnesses. In addition, by the Parents, _____ was qualified as an expert in occupational therapy with emphasis on the "Fast ForWord" system and "tortaminus" system. (Parents' Testimony.) She did not appear, but her letter opinion was received into evidence as Parents' Exhibit D. Further, the Parents did not provide expert testimony regarding the insufficiency of the proposed IEP or the benefits derived from the proposed alternative placement. In fact, the record is void as to whether the Child, with Down Syndrome, would gain any academic benefit from the Parents' proposed alternative placement. (*See, e.g.*, Parent's Exhibit C.)

¹No transcripts were ordered. The proposed IEP required a "transitional" period for one week, starting on the date of the Hearing. As such, time was of the essence by agreement of the Parties, notwithstanding the matter was not legally defined as "expedited."

The Child is a thirteen year-old student with Down Syndrome who has been found eligible for special educational services, most recently, on the criteria of Mental Retardation. (LEA Exhibit 55.) Further, the Child has hypotonia, visual limitations and global developmental delays. (*Id.*) He was born with congenital cataracts and been treated for glaucoma in his right eye. (*Id.*) He wears glasses and contacts. (*Id.*) The Child attended inclusive special education services through the non-categorical program with resource services in math and language arts, and related services for vision, speech and occupational therapy. (Testimony; LEA Exhibits 11 through 14.)

At his previous IEP placements, the Child received some academic/social benefit. (All LEA Expert Testimony.) He was taught by the same teacher, Mrs. , for three years. (Testimony.) Further, he received services from the same speech and language therapist, , during the same time. (Testimony.) The Child made slow, but steady progress. (and Testimony.) The Parents contend that the Child has recently reached a period where “critical emerging skills” in reading must be addressed. (Parents’ Testimony.) According to the Parents, intervention of a different methodology is required to ensure the Child’s progress. (*Id.*) However, no expert testimony was provided on this issue, with the exception of Parents’ Exhibit D, which simply finds that the Child would benefit from, and is eligible for, the “Fast ForWord” system.

In regard to the 2004 ESY, the IEP team met on May 21, 2004, at which time the proposed IEP was published. (LEA Exhibit 17.) The IEP required that the services be rendered at a middle school. (*Id.*) The LEA experts opined that the Child was maturing such that an elementary school placement was no longer appropriate. (and Testimony.)

Further, they opined that the ESY placement would be a "transition" to the Child's Fall placement at a middle school. ([redacted] and [redacted] Testimony.) In the 2003 ESY placement, the LEA satisfied the previous IEP's goal insofar as the Child maintained his academic and social level through the summer months. (*Id.*) The proposed 2004 IEP ESY placement provides for similar services and structure. (*Id.*) According to the LEA's experts, the placement will also succeed. (*Id.*) The LEA experts also identified the need to maintain the Child's interaction with peers and teachers to re-enforce his socialization skills. (*Id.*) These skills, coupled with a structured routine, allow the professionals to address the Child's academic needs. (*Id.*)

ANALYSIS

- A. **The IEP's current ESY placement provides the necessary services regarding the Child's emerging skills. Similarly, the IEP's current ESY placement provides the necessary services to address the Child's emerging reading skills.**

The IEP provides an appropriate educational program insofar as it is reasonably calculated to offer the Child some educational benefit as required by Board of Education v. Rowley, 458 U.S. 197 (1982). This requirement is somewhat narrower than this general requirement regarding ESY services. In MM v. School Dist. Greenville County, 37 IDELR 183 (4th Cir. 2002), the Court held "ESY services are only necessary to FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *See also*, JH by JD and SS v. Henrico County Sch. Bd., 326 F.3rd 560 (4th Cir. 2003).

Insofar as the placement is for ESY, the Parties stipulated that the needs of the Child would be significantly jeopardized if he was not provided an educational program during the

summer months. The only issue is what educational program should be implemented. On this issue, the evidence was undisputed that the proposed IEP would not only maintain the Child's current level of academic/social development, but would provide the necessary services to allow the Child to progress. While the Parents' "Fast ForWord" system may have attributes, there was no evidence to support a conclusion that the Child, with his current diagnosis, would gain any educational benefit. In contrast, the LEA experts testified that the "Fast ForWord" system would be unsuccessful; *e.g.*, the Child cannot "sit still" with a computer for the requisite time. Further, implementation of the system would rob the Child of the other components of the proposed IEP such as, *inter alia*, social interaction, math skills and school structure/routine. These other components far outweigh any advantage which may be gained from the alternative placement.

Finally, the evidence supports the conclusion that the placement is the least restrictive, given the Child's residence, age, and diagnosis. The Parents' proposed alternative placement would remove the Child from the area as well as deny his interacting with peers and teachers. The strength of the Child's progress, his outgoing personality and his progress mandate that he continue with an academic structure that allows him to interact with peers and receive positive re-enforcement from teachers. While the Parents may be dissatisfied with his academic progress, the evidence strongly suggest that the Child has made great strides in the last three years due to the intervention of his teachers.

The Parents' love and devotion for the Child was abundantly clear. However, their arguments that the LEA was attempting to circumvent its obligation to providing FAPE to the Child by placing him in an "one-size-fits-all" ESY placement was not substantiated by the evidence. On the contrary, the witnesses for the LEA were professionals who displayed sincere

commitment to the success of the Child and they provided competent testimony that the proposed IEP was appropriate.

B. The IEP's current ESY placement's "class-based program" which addresses "classroom behaviors" is required?

The Parties defined "class-based program" as an environment where the Child interacted with peers and teachers to re-enforce "classroom behaviors." The term "Classroom behaviors" was defined by the Parties as the protocol required by the teacher; *e.g.*, sitting at the desk, lining up for recess, displaying appropriate behavior for "learning time," *etc.* Mrs. testified that such behaviors were required to ensure that the Child remains focused on academic goals. Further, she opined that such behaviors must be re-enforced during the summer months. Without such behaviors, the Child's academic level would likely decrease. No expert testimony was introduced to support a contrary finding. Accordingly, the proposed IEP's placement is appropriate.

C. The IEP's current ESY placement does not rob the Child of leisure time to where he is denied FAPE?

No expert testimony was introduced to support the proposition that the lack of leisure time would deny the Child FAPE. To the contrary, Mrs. testified that the Child would receive the benefits of leisure time on a daily basis from his free time in the hours after the completion of the IEP's ESY placement.

CONCLUSION

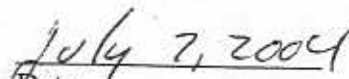
After careful consideration of all the evidence as well as representations and arguments of the Parties, I conclude that the proposed IEP provides the Child with FAPE. The LEA is responsible for submitting an implementation plan to the Parties, the Hearing Officer and the Virginia Department of Education within 45 days from the date of this decision. Given the

circumstances, I strongly believe immediate implementation is required. Based on the above, I find that the LEA is the prevailing party in this matter.

APPEAL RIGHTS

8 VAC 20-80-76 O provides that “[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 in a state circuit court within one year of the issuance of the decision or in a federal court.”


Hearing Officer


Date

cc: Mr. and Mrs.
John F. Cafferky, Esquire
Patrick Andriano, Office of Dispute Resolution and Administrative Services, VDOE
Martin L. Humbertson, Coordinator, Monitoring and Compliance, LEA