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09-018  
VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES  
OFFICE DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

Dispute Resolution &  
Administrative Services

CASE CLOSURE SUMMARY REPORT

PUBLIC SCHOOLS  
School Division

Name of Parent(s)

Name of Child

NOVEMBER 1, 2008

Date of Decision or Dismissal

KATHLEEN MEHFOUD, ESQ.  
Counsel Representing LEA

PARENT PRO SE

Counsel Representing Parent(s)/Child

Party Initiating Hearing

PUBLIC SCHOOLS  
Prevailing Party

HEARING OFFICER DETERMINATION OF THE ISSUE(S):

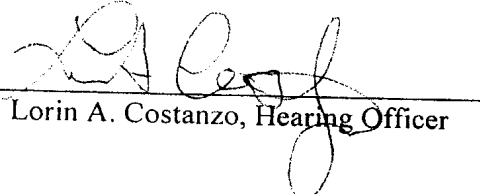
1. The proposed IEP of 8/14/08 is appropriate and provides personalized instruction with sufficient support services to permit the child to receive educational benefit.
2. Parent has not shown that the proposed IEP is not appropriate and Parent has not shown that the proposed program ( School) is appropriate.
3. has not been denied a FAPE by Public Schools.

HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:

The LEA is the prevailing party.

This certifies that I have completed this matter in accordance with the regulations and have advised the parties of their appeal rights in writing. I have advised the LEA in writing of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days of the rendering of a decision or the withdrawal of a hearing request.

November 1, 2008

  
Lorin A. Costanzo, Hearing Officer

- Copies to:
1. Parent
  2. LEA Counsel
  3. SEA

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

DECISION OF HEARING OFFICER

\_\_\_\_\_ PUBLIC SCHOOLS  
School Division

\_\_\_\_\_  
Name of Parent

KATHLEEN MEHFOUD, ESQ  
PATRICK ANDRIANO, ESQ.  
Counsel Representing LEA

\_\_\_\_\_  
Name of Child

PARENT, PRO SE  
Counsel Representing Parent/Child

LORIN A. COSTANZO  
Hearing Officer

\_\_\_\_\_  
Party Initiating Hearing

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PRELIMINARY MATTERS:

1. Hearing: The due process hearing was held October 3, 2008 at 9:00 A.M. at the School Admin. Building, \_\_\_\_\_, VA. The due process hearing was *closed* at the request of Parent.
2. Exchange: The parties timely exchanged (and provided a copy to the hearing officer) a list of witnesses to be called at hearing and a copy of all documents to be admitted at hearing.
3. Motion to Dismiss/Motion in Limine: Prior to the commencement of the hearing, counsel for the School indicated that Parent did not comply with the *subpoena duces tecum* issued to Parent. Parent indicated she timely exchanged documents but did not also provide information in compliance with the *subpoena duces tecum* issued because of some confusion on her part.

The School presented a motion for dismissal and alternatively a *motion in limine*. After conference with the parties, the hearing officer declined to dismiss this cause but afforded the School the option of a continuance to allow for a late compliance with the subpoena duces tecum by Parent. Counsel for the School noted the School preferred a dismissal and noted objection to the denial of the motion to dismiss. Counsel for the School further indicated the School did not desire a continuance in this cause. Parent indicated she wanted to proceed forward.

Upon consideration of the above the hearing officer determined a.) the due process hearing would proceeded forward and b.) the documents exchanged by the parties would be the only documents presented by Parent in this cause.

4. Witness List: Parent indicated she desired to testify at the due process hearing. However, Parent did not list herself as a witness on the list of witnesses required to be exchanged with the other party (and a copy required to be furnished to the hearing officer). Over the objection of counsel for the School, the Parent was allowed to testify at this proceeding.
5. Assist Parent: Parent requested to have Ms. \_\_\_\_\_ assist her at hearing and be a witness for her. The hearing officer determined, prior to hearing, that Ms. \_\_\_\_\_ may assist Parent

and be a witness of Parent, if Parent desires. However, as counsel for the School indicated she desired to separate witnesses, the hearing officer determined that if Parent desires to call Ms. \_\_\_\_\_ as a witness then Ms. \_\_\_\_\_ is to testify as the first witness of the hearing.

6. Present at Hearing: The following were present and/or testified at the hearing:

- A. Parent: \_\_\_\_\_ (Parent and witness)  
Charlotte Morgan (Witness and acted to assist Parent at hearing)  
(Witness)
- B. School: Kathleen Mehfoud, Esq. and Patrick Andriano, Esq. (LEA attorneys)  
(Witness and Party Representative)
- C. Also present at the hearing was Kryisia Nelson, Esq. who did not participate in the proceeding but was the SEA's designated monitor.

7. Transcript and Exhibits:

- A. The transcript of the hearing consists of one volume and is referred to as "Tr. \_\_\_" with the page number inserted at "\_\_\_".
- B. The Exhibits of each party were admitted *en masse* as offered by each party.
  - i. The exhibits of Parent consist of one spiral bound volume. There were no exhibit Tabs, Numbers, Page Numbers, or divisions between documents/pages. For clarity and to expedite matters, the Hearing Officer inserted page numbers in pencil prior to the day of hearing. The page numbers progressed from 1 to 401.
  - ii. The exhibits of the School consist of one three ring binder containing 44 numbered exhibit tabs (with tab number 19 also having an "A" tab).
- C. The Exhibits were designated as follows:
  - i. The Parents' Exhibits are designated as "P. Ex. pg. \_\_\_" with the page number inserted at "\_\_\_".
  - ii. The School's Exhibits are designated as "S. Ex. \_\_\_" with the exhibit number inserted at "\_\_\_".

**ISSUE:**

*Issue:* Whether \_\_\_\_\_ was denied a free appropriate public education?

*Parent's proposed resolution:* Smaller class room size 1 teacher to 6 students or  
remove \_\_\_\_\_ out of his school and place him at \_\_\_\_\_

**BURDEN OF PROOF:**

Parent bears the burden of proof in this cause. Parent raised the claim that her son has been denied a Free Appropriate Public Education ("FAPE"). In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005) the United States Supreme Court held that the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Id.*, 546 U.S. at 62, 126 S.Ct. at 537.

## FINDINGS OF FACT:

01. \_\_\_\_\_ is a \_\_\_\_\_ year old male who was born on 6/4/\_\_\_\_\_ and resides with his Parent,

02. On January 12, 2001, (at age \_\_\_\_\_ years \_\_\_\_\_ months and while in the 4th grade) \_\_\_\_\_ was found to be eligible for special education and related services under the IDEA with identified handicapped condition of Other Health Impaired ("OHI"). Parent signed the Eligibility Committee Summary of Deliberations indicating she supported the findings and recommendations.<sup>2</sup>

03. The January 12, 2001 eligibility committee indicated, in part, that \_\_\_\_\_ was extremely distractible, has a slow work pace, negatively impacted by attention problems, and has reading and math skills on a first grade level. Cognitive (WISC-3) is in the low average to borderline range. ADHD negatively impacts classroom behavior and performance.<sup>3</sup>

04. The chronology of IEPs, IEP Addendums, and eligibility committee meetings concerning \_\_\_\_\_ and \_\_\_\_\_ Public Schools ("LEA" or "School") include the following (*with reference to the School and/or Parent Exhibit containing such document*):

<u>date:</u>	<u>activity.... reference to School and/or Parent Exhibit</u>
01/12/01	INITIAL ELIGIBILITY DETERMINATION ... SB EX. 6; P. EX. PG. 329-331.
01/24/01	IEP ... SB EX. 7; P. EX. PG. 315-327.
05/22/01	IEP ... SB EX. 8; P. EX. PG. 301-312.
06/14/02	IEP ... SB EX. 9; P. EX. PG. 283-298.
05/23/03	IEP ... SB EX. 11; P. EX. PG. 267-280.
11/12/03	ELIGIBILITY COMMITTEE MEETING (TRIENNIAL) ... SB EX. 14; P. EX. PG. 390 ( P. EX. IS 1 PG ONLY, PAGES MISSING/OUT OF SEQUENCE).
11/19/03	IEP ADDENDUM ... SB EX. 15; SB EX. PG. 259.
05/14/04	IEP ... SB EX. 17; P. EX. PG. 239-258.
05/31/05	IEP ... SB EX. 19; P. EX. PG. 209-231.
10/28/05	IEP ADDENDUM ... SB EX. 19A; P. EX. PG. 193 ET SEQ. (PAGES MISSING IN P EXHIBIT /OUT SEQUENCE).
05/30/06	IEP ... SB EX. 20; P. EX. PG. 169-182.
09/26/06	ELIGIBILITY COMMITTEE MEETING (TRIENNIAL) ... SB EX. 22; P. EX. PG. 163-167.
05/17/07	IEP ... SB EX. 23; P. EX. PG. 127-147.
11/27/07	IEP ... SB EX. 24; P. EX. PG. 109-125.
04/30/08	IEP ... SB EX. 27; P. EX. PG. 85-107.
05/28/08	ELIGIBILITY COMMITTED MEETING ... SB EX. 31; P. EX. PG. 73-79.
06/11/08	IEP ... SB EX. 32; P. EX. PG. 1-21 & P. EX. PG. 51-72.
08/14/08	IEP ... SB EX. 34; P. EX. PG. 25-48.

05. The IEPs of 1/24/01, 5/22/01, 6/14/02, and 5/22/03, plus the 11/09/03 IEP addendum, and the IEPs of 5/14/04, and 5/31/05 were signed by Parent indicating that she gave permission for her child to be enrolled in the special education program described in the Plan, that she participated in the development of the Plan, and that she received a copy of the Plan and *Parental Rights in Special Education*.

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<sup>1</sup> SB Ex. 1.

<sup>2</sup> SB Ex. 6

<sup>3</sup> SB Ex. 6.

06. On the IEP addendum of 10/28/05 parent signed giving permission for her child to be enrolled in the special education program described in the Plan, and indicating that she received a copy of the Plan and *Parental Rights in Special Education*.

07. The IEP of 5/31/05 and the IEPs of 5/30/06, 5/17/07, 11/27/07, and 4/30/08 were signed by Parent indicating participation in the development of the IEP and the placement. Parent additionally signed each IEP/IEP addendum indicating that she had read the prior notice of IEP and placement decision, that when notified of the meeting to develop the Plan she was provided a copy of the procedural safeguards, and that she gave permission to implement the IEP and the placement decision. It is noted that on 5/30/06 Parent initialed indicating she had read the prior notice and attachments, if any, before giving permission to implement the IEP and the placement decision. She did sign her name but did not check the box marked "I give" or "I do not give" permission to implement).

08. The IEP of 8/14/08 was signed by Parent indicating her participation in the development of the IEP and placement. Parent signed indicating she was provided a copy of the procedural safeguards that explains rights when she was notified of the meeting to develop the IEP.

09. Parent signed the IEP of 8/14/08 indicating she did not give permission to implement the IEP and the placement decision.<sup>4</sup>

10. On 11/03/03 a Triennial Psychological Evaluation was conducted by Ed.S. [redacted] has a diagnosis of ADHD with medication prescribed. He is functioning within the Borderline range of cognitive ability and has significant weaknesses in attention and concentration.

[redacted] has high physical activity level, and adequate speech and language skills. Verbal reasoning skills are within the Low Average range and nonverbal reasoning skills fall within the Borderline range. [redacted]'s ability to maintain attention and concentration are Borderline.<sup>5</sup>

11. On 9/26/06 a Triennial eligibility meeting was held. [redacted] was found eligible for special education services with the identified disability/disabling condition of OHI. It was further indicated that [redacted] was diagnosed with ADHD and his ability was in the borderline to low average range with full scale IQ in the borderline range. [redacted]'s achievement scores were commensurate with ability with the exception of math which is in the deficient range. His teachers indicated that [redacted] put forth good effort and is achieving well with supports but he is easily distracted and needs frequent reminders to remain on task.<sup>6</sup>

12. On 5/15/08 [redacted] was evaluated by [redacted], Ed.S., NCSP. The Psychological Report indicated as follows for [redacted]:

- a. Full Scale IQ (FSIQ) is extremely low range - (FSIQ = 69; 2nd percentile; 95% confidence interval = 65-75).
- b. Verbal Comprehension Index (VCI) - average range and better than or equal to 32% of his peers ...

<sup>4</sup> SB Ex. 34; P. Ex. pg. 25-48.

<sup>5</sup> SB Ex. 13.

<sup>6</sup> SB Ex. 22.

VCI = 93; 95% confidence interval = 87-100).

- c. Nonverbal Reasoning Ability (measured by the Perceptual Reasoning Index) - extremely low range and better than or equal to 2% of same aged peers (PRI =69; 95%confidence interval = 64-79).
- d. Working Memory Index (WMI) is in extremely low range - (WMI = 59; 95% confidence interval = 55-70.
- e. Visual Motor Integration - classified very low compared to same age peers (score of 63 {1st percentile})
- f. Behavior Functioning - Conner's Teacher Rating Scale (by special education teacher, Ms. ) indicated significant difficulty with maintaining attention, organization, and restlessness.<sup>7</sup>

13. On 5/28/08 an eligibility committee meeting was held at the request of his mother after consulting with medical personnel at the University of Virginia. 's doctor at UVA had conducted an intelligence screening; he noted the results to be suggestive of the presence of a learning disability and not solely attributable to untreated ADHD.

14. Ms. attended the Eligibility Committee Meeting of 5/28/08, was an active participant in same, and signed the *Summary of Essential Deliberations* indicating her agreement with the eligibility decision. This meeting determined continued to be eligible for services as a student with *Other Health Impairment*. He was also determined to be eligible as a student with a *Specific Learning Disability*.<sup>8</sup>

15. On the 5/28/08 Summary of Essential Deliberations Parent, by her signature, indicated she received a copy of the Virginia Special Education/504 Procedural Safeguard Requirements under the Individuals with Disabilities Education Act (Parental Rights in Special Education)/Section 504 and that she understood these rights.<sup>9</sup>

16. is currently in the 12th grade and is classified as *Other Health Impaired* (OHI) and Specific Learning Disability (SLD). He was classified as SLD as of the eligibility committee meeting of 5/28/08. He also has a diagnosis of ADHD.<sup>10</sup>

17. has achieved four of the six SOLs required for attainment of a standard diploma. SOL assessments that remain in order for him to attain a standard diploma are: Algebra 1 (373) and English 11 (reading – 398, writing – 366). He needs 400 or higher on all three to pass. He has yet to pass the 8th grade math SOL required in order to attain a Modified Standard diploma. He has passed the 8th Grade Literacy requirements to attain a Modified Standard Diploma.<sup>11</sup>

18. On 5/12/08 's oral language skills were described as low average, his academic tasks are within the low range and his ability to apply academic skills is very low. His performance is low average in reading and basic reading skills, low in written language and written expression, and very low in mathematics and math calculation skills.<sup>12</sup>

<sup>7</sup> SB Ex. 29; P. Ex. pg. 153-159.

<sup>8</sup> SB Ex. 31.

<sup>9</sup> SB Ex. 31.

<sup>10</sup> SB Ex. 31.

<sup>11</sup> SB Ex. 34; P. Ex. pg. 25-48.

<sup>12</sup> P. Ex. pg. 83-84.; duplicated in P. Ex. pg. 151-152.

19. On 4/30/08 an IEP meeting was held for . This IEP was signed by Parent indicating her consent. The IEP provided, in part:

- a. is a candidate for a standard diploma.
- b. Transition Services were discussed with a functional vocational evaluation and specially designed instruction needed. Referral to Dept. of Rehab Services was provided.
- c. Classroom Accommodations (for all assignments- at assigned school; from 4/25/08 – 4/24/09) include:
  - assistance with directions
  - calculator
  - mark in test booklet on teacher-made tests
  - organizational aids (checklists)
  - preferential seating
  - classroom tests and quizzes administered orally
  - small group setting
  - test administered in locations with minimal distractions.
- d. Accommodations on SOL testing were provided for, including in part, group size, assistance with directions, audiotape version of test items (except for English:Reading), flexible schedule, and calculator (for math).
- e. will receive support services via a Resource class 50 minutes a day, 5 days a week to assist him with classwork and homework.
- f. OHI consult 20 minutes per week.<sup>13</sup>

20. Parent requested a private school placement for at School. This matter was addressed to the Public Schools. An IEP meeting was scheduled and notice was provided Parent. The purpose of the meeting was to address Parent's request, to review and/or revise the current IEP, and develop and/or consider transitional services.<sup>14</sup>

21. On 8/14/08 the IEP committee considered Parent's request that be placed at School for the 2008-2009 school year. Her request for placement at School was not implemented. Parent participated in the development of this IEP and the placement. Parent also signed indicating she did not give permission to implement this IEP and placement decision.<sup>15</sup>

22. Prior notice was provided Parent concerning the denial of Parent's request through the IEP Committee to place at School for the 2008-2009 school year.<sup>16</sup>

23. The IEP committee determined that the plan and level of educational services and supports proposed by the School was appropriate with an adequate opportunity for to meet his goals and objectives. The committee further determined was afforded adequate opportunity to make appropriate progress towards his identified graduation requirements and therefore placement in a more restrictive educational setting was refused.<sup>17</sup>

24. On August 19, 2008 Ms. , parent of , filed a *Request for Due Process Hearing*. Parent contends therein that, " has ADD and Learning Disability he is in a school environment that has an IEP with the learning environment to be the least restrictive. Parent has asked for 3 years to have his IEP adjusted to minimum distractions". She further contends that the "IEP is not meeting 's Special Education needs and classroom size and co taught teaching

<sup>13</sup> SB Ex. 27.

<sup>14</sup> SB Ex. 34; P. Ex. pg. 25-48

<sup>15</sup> SB Ex. 34 & 35; P. Ex. pg. 24-49.

<sup>16</sup> SB Ex. 35.

has left behind." Ms. proposes adjusting the IEP to minimum distractions and a smaller class room size, 1 teacher to 6 students, or removing out of his school and placing him at

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25. was offered the PERT program, prevocational educational, rehabilitation, treatment at rehabilitative center. This is a collaborative program between the Department of Education and the Department for Rehabilitative Services was not able to attend due to Parental consent being denied.<sup>19</sup>

### DISCUSSION AND CONCLUSIONS:

The IDEA provides for a party to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child and which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint.<sup>20</sup>

A "Free Appropriate Public Education" (FAPE) is defined as "special education and related services that:

- A.) have been provided at public expense, under public supervision and direction, and without charge;
- B.) meet the standards of the State Educational Agency;
- C.) include an appropriate preschool, elementary, or secondary school education in the State involved; and,
- D.) are provided in conformity with the individualized educational program required under section 614(d)." 20 U.S.C. 1401(9)

The requirement to provide FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Board of Educ. v. Rowley, 458 U.S. 176 (1982). In Rowley, the Supreme Court provided:

*Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.... We therefore conclude that the basic "floor of opportunity" provided by the act consists of access to specialized instruction and related services which are individually designed to give education benefit to the handicapped child. Rowley, 458 U.S. at 200, 201.*

Rowley provides that the issue is whether the IEP is reasonably calculated to enable the child to receive educational benefit, not whether it will enable the student to maximize his or her potential. *Id.* at 177. Under Rowley the requirements of the IDEA are met if: 1.) The School complies with the

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<sup>17</sup> SB Ex. 35.

<sup>18</sup> SB Ex. 1, Request for Due Process Hearing.

<sup>19</sup> Tr. 82.

<sup>20</sup> 20 U.S.C. § 1415 (b)(6)(A) and 20 U.S.C. § 1415 (b)(6)(B).



IDEA's procedural requirements; and 2.) The IEP is reasonably calculated to enable the child to receive educational benefit.

"Educational benefit" means that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. *Rowley*, 458 U.S. at 200. Furthermore, the benefit conferred by an IEP must be "meaningful" and not merely trivial or *de minimis*. *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3rd Cir. 1988, 109 S.Ct. 838 (1989)). The IDEA does not require that the school system provide the child with the best education possible. The IDEA requires an IEP to provide a *basic floor of opportunity* that access to special education and related services provides. *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990)

Parent contends that FAPE has not been provided to \_\_\_\_\_ and presents a proposed resolution of smaller class room size, 1 teacher to 6 students or that \_\_\_\_\_ be placed at School.

"Least Restrictive Environment" ("LRE") is a consideration in placement decisions by the IEP team. 20 U. S.C. 1412(a)(5)(A) provides that, "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily".

In determining an issue concerning private school placement by Parent or reimbursement for a private school placement by Parent the issue requires determination that the School's IEP is not appropriate and that the Parent's placement is appropriate. *Burlington, MA v. Dept of Education et al.*, 471 U.S. 359, 105 S. Ct., 1996, (1985).

**Proposed IEP:** On August 14, 2008 an IEP meeting was held to review and/or revise the current IEP and consider Parent's request for a placement of \_\_\_\_\_ at \_\_\_\_\_ School. Parent participated in the development of this IEP but she did not give permission to implement this IEP.

The IEP team denied Ms. \_\_\_\_\_'s request that \_\_\_\_\_ be placed at \_\_\_\_\_ School for the 2008-2009 school year and indicated placement at a public day school.<sup>21</sup>

This proposed IEP (8/14/08 IEP) provided:

1. Public day school placement.
2. Transition services.
3. Placement in regular classes and special classes. Resource class 50 minutes a day, 5 days a week. Self contained math class. All other courses with non-disabled peers either co-taught settings (with teacher student ratios no greater than 2 to 20) or in regular education courses (with additional direct support from paraprofessional in areas of content area courses).
4. Self contained math class and instruction in the general education curriculum with his regular education peers.
5. Direct instructional support. Each of \_\_\_\_\_'s core academic classes would be co-taught. \_\_\_\_\_ to receive instruction and support from two teachers, one a special education teacher and the other a regular education teacher who is endorsed in the particular academic subject.
6. Extra support, as needed, from a paraprofessional in classes.

<sup>21</sup> SB Ex. 34 & 35; P. Ex. pg. 24-49.

7. Classroom accommodations included:
  - a. Access to prepared notes to supplement own notes for all classes.
  - b. Audio taping for lecture classes, as determined by sp. ed. teacher in consultation with gen. ed. teacher.
  - c. Assistance with directions, at student request or as determined by sp. ed. teacher in consultation with gen. ed. teacher.
  - d. Calculator, for all assignments.
  - e. Respond verbally/teacher marks answer document for standardized tests, as determined by sp. ed. teacher in consultation with gen. ed. teacher.
  - f. Organizational aids (checklists) as determined by sp. ed. teacher in consultation with gen. ed. teacher.
  - g. Preferential seating away from potential distractions, for all classes.
  - h. Oral classroom tests and quizzes, for all tests or quizzes.
  - i. Small group setting, for all tests, assignments as needed.
  - j. Test administered in locations with minimal distractions, for all tests and quizzes.
  - k. Extended time on classroom tests, written assignments, for all assignments.
  - l. Home/school communications notebook/system, as determined by gen. ed teacher in consultation with sp ed. teacher.
8. SOL testing accommodations/modifications are provided for which include accommodations/modifications providing for group size, assistance with directions, audiotape version of test items (except for English:Reading) and flexible schedule.<sup>22</sup>

The IEP committee found that \_\_\_\_\_ had made significant gains in reading skills demonstrated in his scoring a 396 on his English 11 Reading SOL, this was 2 points from the 400 needed to pass and was a 39 point increase from his prior assessment. It was proposed that \_\_\_\_\_ attend summer remediation in the area of reading in preparation to retake the English 11 Reading SOL. However, Parent decided not to pursue this.

\_\_\_\_\_’s schedule was considered by the IEP team and the IEP team felt this would provide him appropriate levels of direct instructional support with adequate teacher to student ratio in light of this level of inattention and distractibility. The prior written notice indicated current schedule and student teacher ratios as follows:

<i>Course</i>	<i>Type</i>	<i>Ratio</i>
US /Va Gov.	Co-Taught	20/2
Biology II/Ecology	Co-Taught	16/2
Sequential Elective	Regular Ed	
English 12	Co-Taught	13/2
Resource	Self-Contained	13/2
Computer Math	Co-Taught	12/2
Math Enrichment	Self-Contained	3/1

Least Restrictive Environment was considered. As the IEP team determined the plan and level of services and support was appropriate and provided an adequate opportunity for \_\_\_\_\_ to meet goals and objectives and make progress, the more restrictive educational setting of \_\_\_\_\_ Schools was refused.<sup>23</sup>

**Request for Due Process Hearing:** On August 19, 2008 Ms. \_\_\_\_\_ filed a *Request for Due Process Hearing* contending “\_\_\_\_\_ has ADD and Learning Disability he is in a school environment that has a IEP with the learning environment to be the least restrictive. Parent has asked for 3 yrs. to

<sup>22</sup> SB Ex. 34; P. Ex. Pg. 25-48.

<sup>23</sup> SB Ex. 35.

have his IEP adjusted to minimum distractions.” She contends that the IEP is not meeting \_\_\_\_\_’s Special Education needs and classroom size and co-taught teaching has left \_\_\_\_\_ behind. Ms. \_\_\_\_\_ proposes adjusting the IEP to minimum distractions and a smaller class room size, 1 teacher to 6 students, or removing \_\_\_\_\_ out of his school and placing him at \_\_\_\_\_<sup>24</sup>

***Parent’s burden of proof:*** The burden of proof in this cause is a material consideration. Parent has raised the issue of a denial of FAPE and has proposed a smaller class size with minimal distractions or a private school placement at one particular school, \_\_\_\_\_ School. It is her burden to establish that the proposed IEP is not appropriate. On matters relating to reimbursement for a private school placement it is her burden to establish that the both the School’s IEP is not appropriate and that the her placement is appropriate.

Parent presented three witnesses, including herself, in this cause. Parent’s witnesses raised certain concerns with the hearing officer.

*Parent’s First Witness*, Ms. \_\_\_\_\_ was called, given oath/affirmation, but not asked questions and did not testified other than as to her name.

*Parent’s Second Witness*, Ms. \_\_\_\_\_, did testify. She is the “assistant head of school at \_\_\_\_\_ School. Ms. \_\_\_\_\_ has a bachelors of arts degree in English and a master’s degree in special education with teaching certificate endorsements in English, 8 though 12, Special Education, K through 12, and learning disabilities. She has been with \_\_\_\_\_ School nine years in January of 2009.<sup>25</sup>

Her testimony gave rise to a number of questions and concerns that affect the weight to be given her testimony. These questions and concerns include:

- a. Ms. \_\_\_\_\_ was not present at the IEP or eligibility meetings. Moreover, she testified she did not know what \_\_\_\_\_’s disabilities were that were considered.<sup>26</sup>
- b. The basis of information Ms. \_\_\_\_\_ relied on/utilized is in this cause is unclear. Ms. \_\_\_\_\_ stated she had a copy of information provided to her by Parent. It is unclear from the testimony/evidence what was provided to her and/or what she had reviewed.<sup>27</sup>
- c. To Parent’s question, “The IEP that’s presently in place for \_\_\_\_\_, do you feel that the objectives and the goals meet his disability?” Ms. \_\_\_\_\_ opined “no”.<sup>28</sup> She did not provide information concerning the foundation for this opinion. She did she explain why she held this opinion and there was not clarity as to which IEP the question or the answer

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<sup>24</sup> SB Ex. 1, Request for Due Process Hearing.

<sup>25</sup> Tr. 33, 35.

<sup>26</sup> Tr. 38.

<sup>27</sup> Tr. 37, 38.

refer to (the proposed IEP of 8/14/08 which was not signed by Parent or a prior the Parent had signed indicating consent). Concern is expressed with her previously stated lack thereof concerning disability. Also no testimony was sought or offered as the knowledge basis or reasons for formulating this opinion. There was not clarity as to what documents, records, observations, or facts, if any, that were taken into consideration by this witness in making her opine or in her testimony in general.

Parent's Third Witness was Ms. herself. Ms. indicated she feels that the IEP was inappropriate for her child's educational level and the IEPs that have been in place shows no significant grade level as far as improvement. She expressed concern over the fact that her child had more that ADD and that he had a learning disability as well. She expressed concern that this was not found earlier and she felt he was not given a FAPE because the IEP was basically based on ADD.<sup>29</sup>

Parent presented evidence as the Parent of . She presented her concerns, feelings, and perceptions with matters she has dealt with over an extended time. She conveyed her frustrations, experiences, and concerns in dealing with and addressing her son's disabilities and matters that have arisen.

It is noted that Parent was not qualified as an expert witness in educational or education related matters.

After her testimony, Ms. stated, "I would like to ask some questions to the school board." Counsel for the School objected and the objection was granted as it was noted that Parent's list of witness only named two witnesses, and , who would be testifying at hearing.<sup>30</sup>

Ms. did not present any testimony or evidence concerning whether the placement at School was appropriate or not. In fact, there was no testimony concerning a placement at School by any of the witnesses and the only documentary evidence admitted was the "Application for Admission" filled out by Parent and dated 8/5/08.<sup>31</sup>

Certain documents admitted by Parent appear to be or are related to the matter of the appropriateness of the education being offered . However, Parent did not present testimony addressing the vast majority of these documents.

Certain documents were admitted by Parent that raise question as to the relevance and/or materiality of the documents. Among other documents that give the hearing officer concerns, Parent's Exhibits contain documents addressing what appears to be a Manifestation Recommendation Review

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<sup>28</sup> Tr. 40.

<sup>29</sup> Tr. 43.

<sup>30</sup> Tr. 41.

<sup>31</sup> P. Ex. pg 361-365.

and appears to be a suspension.<sup>32</sup> These documents appear to be either incomplete or out of sequence and were not addressed, explained, or referenced by Parent. Parent's Exhibit page 373 seems to indicate that \_\_\_\_\_ may have been suspended from \_\_\_\_\_ School with a recommendation for a 364 day suspension due to consumption of a pill obtained from another student he was told was Lortab but identified as Erthymiacin. Parent's Exhibit Pg. 372 and perhaps page 370 may be related but it is not clear if there are additional pages missing or not from this exhibit. Parent admitted documents of observations in the year 2000 (P. Ex. pg 355-357, 367, 368) which were not addressed and which raise issues of relevancy and/or materiality also.

It is noted that number of documents in Parent's Exhibits were duplicated from School Exhibits or were also presented in School's Exhibits and a number of these documents were addressed by the School's witness in this proceeding.

**School Witness:** The School presented one witness, \_\_\_\_\_, supervisor of student services, \_\_\_\_\_ Public Schools.

Mr. \_\_\_\_\_ has a master's in special education, endorsed K-12, LD/ED, general education endorsement in social sciences in secondary education and administrative master's in education leadership. He has been in teaching or administration for 13 years and worked for Public Schools in his current position for the past three years. This is his fourth year as special education director, which is a capacity of the student services supervisor. Prior to this he was assistant principal and director of special education at \_\_\_\_\_ City Schools, principal at \_\_\_\_\_ School, taught at \_\_\_\_\_ High School for one year in special education, and taught two years at \_\_\_\_\_ Day School.<sup>33</sup>

Mr. \_\_\_\_\_ indicated he was familiar with \_\_\_\_\_. He has reviewed \_\_\_\_\_'s educational records, the evidence exchanged on both sides, attended multiple IEP meetings, including the 8/14/08 IEP meeting, and is familiar with \_\_\_\_\_'s educational testing.<sup>34</sup>

Mr. \_\_\_\_\_ opined, based upon his knowledge and experience and in light of the above review of records, tests, and evidence that \_\_\_\_\_ was making educational progress and the proposed IEP was appropriate. Among other matters, he pointed to evidence of progress in the area of reading in that \_\_\_\_\_ passed the eighth grade level reading assessment in SOL and he demonstrated very good, solid skills on his 11th grade reading assessment, he scored a 398 on this SOL.<sup>35</sup> He indicated \_\_\_\_\_ has shown progress in the area of math. He did complete and pass Algebra 1. He achieved a SOL of 344 in the spring of '07. When he was given remediation and further support in

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<sup>32</sup> P. Ex. pg 370-373.

<sup>33</sup> Tr. 53, 54.

<sup>34</sup> Tr. 55, 56.

<sup>35</sup> Tr. 68.

the summer of 2007 he achieved a 373. Since being in the ninth grade [redacted] has shown progress in that he has progressed grade to grade. He has passed Algebra, English 11, and world history.<sup>36</sup>

Mr. [redacted] did indicate that, last year [redacted] failed biology 2/ecology and computer math. In these two classes he had a content endorsed teacher and a special education endorsed teacher in the classrooms and a ratio no greater than 2 certified teachers to 20 students.<sup>37</sup> Mr. [redacted] noted issues about [redacted]'s efforts and his not completing assignments, not turning in work, and not taking advantage of opportunities offered him. His teachers had noted, and it was reflected on his most current eligibility, a marked disparity in classes where he would or would not be putting forth effort and attempting the curriculum. He indicated though, with supports and accommodations [redacted] was able to complete the courses.<sup>38</sup>

Mr. [redacted] participated in the IEP meeting of 8/14/08. He believed that it is appropriate and felt this because it is built and calculated to address the student's specific needs and weaknesses. The IEP shows [redacted]'s weaknesses in the area of on-task behavior and maintaining appropriate and adequate attention to the task, for which [redacted] is provided accommodations and support.<sup>39</sup> Issues as to classroom schedule, size, and supports were addressed under the proposed IEP of 8/14/08 and would be:

- VA GOVERNMENT - co-taught with a special education and a general ed. teacher.... max ratio 20 students to 2 teachers.
- BIOLOGY 2/ECOLOGY- general education course co-taught course with both a special education and general education teacher .... max ratio 20 students to 2 teachers (current approx 2-16)
- PARENTING 2 - elective... general ed course
- ENGLISH 12 - co-taught general ed. and a special ed teacher.... max ratio 20 students to 2 teachers
- RESOURCE 12 - self contained class, one teacher and two paraprofessionals.... max ratio 14 students to 3 (one teacher and 2 paraprofessionals (last at ration observed at 12 to 3)
- COMPUTER MATH- co-taught general education and special ed teacher ...max ration 20 students to 2 teachers.
- SELF CONTAINED MATH ENRICHMENT - one teacher and one paraprofessional for three students (with Ryan it would be one teacher and one paraprofessional for four students).

Mr. [redacted] also noted that no classes currently are filled at the 20 to 2 maximum ratio, all have less.<sup>40</sup> The self contained math support provided is important to help [redacted] build skills and also help him reach a general curriculum requirement. Mr. [redacted] further discussed areas of deficit, post-secondary transition planning and the goals and objectives provided (which he indicated are appropriate).<sup>41</sup> Accommodations offered in the proposed IEP and Services offered in the proposed IEP were subject of testimony also in explaining his opinion that the IEP proposed is adequate and provides opportunity for educational benefit to [redacted]

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<sup>36</sup> Tr. 72.

<sup>37</sup> Tr. 73

<sup>38</sup> Tr. 74-76.

<sup>39</sup> Tr. 77.

<sup>40</sup> Tr. 99-102.

<sup>41</sup> Tr. pg. 80-82.

**Conclusions:** The hearing officer is charged with making no presumptions in the case and base findings of fact and decisions solely upon the preponderance of the evidence presented at the hearing and applicable state and federal law and regulations. It is Parent, and not the School, who has the burden of proof in this cause and the Parent has failed to satisfy her burden of proof. The evidence is insufficient to establish that \_\_\_\_\_ Public Schools has failed to offer a Free Appropriate Public Education (FAPE).

Parent has not presented evidence, expert or otherwise, concerning her proposed resolution of a smaller class room size of 1 teacher 6 students. Parent has not presented any evidence concerning the appropriateness of her proposed resolution of a placement at \_\_\_\_\_ School. Parent has not presented any evidence of a proposed program at \_\_\_\_\_ School or any where else or of the appropriateness of any proposed program.

Parent has not raised issue concerning the School's compliance with the IDEA's procedural requirements nor presented evidence of non-compliance. Parent's signature is present indicating receipt of a copy of the Virginia Special Education/504 Procedural Safeguard Requirements under the IDEA per exhibits admitted in this cause and as is discussed above. Parent has actively participated in the IEP process and the Eligibility Committee meetings as per the exhibits admitted in this cause and the requirements of Notice have been met.

The exhibits and the testimony of the School Witness furthermore establish that \_\_\_\_\_ was afforded personalized instruction with sufficient support services to permit him to benefit educationally from that instruction. \_\_\_\_\_ Public Schools has an appropriate program for

The evidence in this cause indicates that the proposed IEP of 8/14/08 is reasonably calculated to enable the \_\_\_\_\_ to receive educational benefit and \_\_\_\_\_ Public Schools and is in compliance with IDEA's procedural requirements.

#### **DECISION:**

Upon observing the demeanor of the witnesses, upon testimony of witness, upon evidence admitted, upon reviewing applicable statutes and law, and for the reasons stated above it is the decision of the Hearing Officer that:

1. The proposed IEP of 8/14/08 is appropriate and provides personalized instruction with sufficient support services to permit the child to receive educational benefit.
2. Parent has not shown that the proposed IEP is not appropriate and Parent has not shown that the proposed program (at \_\_\_\_\_ School) is appropriate.
3. \_\_\_\_\_ ***has not*** been denied a free appropriate public education (FAPE) by \_\_\_\_\_ Public Schools.
4. Determination is made as required in the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* as follows:

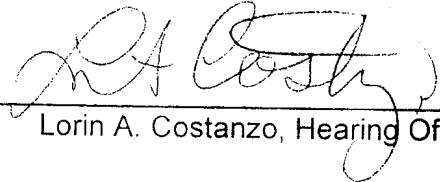
- a. *The requirements of notice to the parent were satisfied;*
- b. *The child has a disability;*
- c. *The child needs special education and related services; and*
- d. *The Public Schools is providing a free appropriate public education.*

**APPEAL AND IMPLEMENTATION:**

Appeal rights: The hearing officer's decision is final and binding unless either party appeals in a federal District Court within 90 calendar days of the date of the decision, or in a state circuit court within one year of the date of the decision.

Implementation Plan: The local educational agency shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision or the withdrawal of a hearing request with the following exception: the appeal or consideration of an appeal of the decision by the local school division and the decision is not an agreement by the hearing officer with the parent or parents of the child that a change in placement is appropriate.

November 1, 2008

  
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Lorin A. Costanzo, Hearing Officer

Copies sent to:

1. Parent
2. School Counsel
3. SEA