

**VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES  
OFFICE OF DUE PROCESS AND COMPLAINTS**

**CLOSE REPORT**

<p style="text-align:center">Public Schools</p> <p><b>School Division</b></p> <p>Dr.</p> <p><b>Division Superintendent</b></p> <p>John F. Cafferky, Esquire Leza Conliffe, Attorney at Law <b>Counsel Representing LEA</b></p> <p>Robert J. Hartsoe, Esquire <b>Hearing Officer</b></p>	<p><b>Name of Parents</b></p> <p><b>Name of Child</b></p> <p>None</p> <p><b>Counsel Representing the Parent/Child</b></p> <p><b>Party Initiating Hearing</b></p>
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**HEARING OFFICER'S DETERMINATION OF ISSUES:**

**Issue:**                    **Whether the Child should receive "one-on-one" services and, if so, how much? [The term "one-on-one" services is defined as the use of a dedicated LEA staff person to effectuate the goals of the March, 2009 IEP.]?**

**Determination:**        **The Parents lacked sufficient persuasive evidence to prevail on this issue. Instead, the overwhelming expert evidence was that the Child did not require one-on-one services to effectuate the March 2009 IEP.**

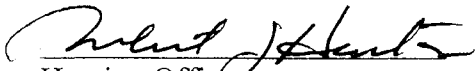
**Issue:**                    **Whether the Child has been sufficiently evaluated to allow the IEP Team which created the March 2009 IEP to ascertain what services are necessary to ensure the Child is provided FAPE?**

**Determination:**        **The Parents presented no evidence on this issue. Instead, the evidence (expert and otherwise) was undisputed that the Child was sufficiently evaluated to allow the IEP Team to ascertain the necessary services to ensure that the March 2009 IEP provided FAPE to the Child.**

**HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:**

**ORDERED** that this matter be dismissed with prejudice.

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 was previously published on August 10, 2009, and I have 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

August 10, 2009  
Date

**CERTIFICATE OF SERVICE**

I certify that on this 10<sup>th</sup> day of August, 2009, a true and accurate copy of this pleading was mailed, *via* first-class, postage prepaid mail, to:

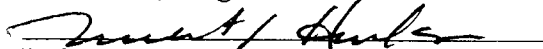
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Received

AUG 12 2009

**VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES  
OFFICE OF DUE PROCESS AND COMPLAINTS**

Dispute Resolution &  
Administrative Services

**DECISION**

<p>Public Schools <b>School Division</b></p> <p>Dr. <b>Division Superintendent</b></p> <p>John F. Cafferky, Esquire Leza Conliffe, Attorney at Law <b>Counsel Representing LEA</b></p> <p>Robert J. Hartsoe, Esquire <b>Hearing Officer</b></p>	<p><b>Name of Parents</b></p> <p><b>Name of Child</b></p> <p>None <b>Counsel Representing the Parent/Child</b></p> <p><b>Party Initiating Hearing</b></p>
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**INTRODUCTION**

This case involved caring Parents and committed professionals. The Parties presented an excellent case in a professional manner. For reasons stated herein, the appeal to each issue is denied. The LEA is identified as the prevailing party.

**PROCEDURAL BACKGROUND:**

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”), this matter came upon the Parents’ and Child’s (collectively “Parents”) appeal from the 2009 IEP, LEA Exhibit 17.

The Parties established two issues *via* the prehearing conferences, pleadings and correspondence. The Parents filed their “Request for Due Process” on May 20, 2009. By letter, dated June 1, 2009, the LEA filed its response. On June 2, 2009, the Parties held their first PreHearing Conference. At that time, they communicated their agreement to continue with mediation. To that end, they submitted a written agreement to continue mediation. As a result, the statutory deadlines were reset. On June 26, 2009, the Parties concluded that mediation was unsuccessful. The decision must be rendered within forty-five days thereof, or August 10, 2009. The Parties agreed that the Child should be placed at the \_\_\_\_\_, starting in September, 2009. (*See* prior Pre-Hearing Reports for details and background.)

The Hearing on the merits was held on July 29, and 30, 2009, at which time the Parties presented evidence and arguments. During the Hearing, the Father was present with an interpreter. In addition, the LEA was present with counsel.<sup>1</sup> With the exception of the matters stated herein, all procedural matters, notices, *etc.*, were satisfied or otherwise not at issue.

**ISSUES DEFINED:**

- I. **Whether the Child should receive “one-on-one” services and, if so, how much? [The term “one-on-one” services is defined as the use of a dedicated LEA staff person to effectuate the goals of the March, 2009 IEP.]**
- II. **Whether the Child has been sufficiently evaluated to allow the IEP Team which created the March 2009 IEP to ascertain what services are necessary to ensure the Child is provided FAPE?**

**FACTUAL FINDINGS:**

The Parties participated in the Hearing in a professional manner. Overall, factual and expert-opinion evidence did not conflict on major issues.<sup>2</sup> The Parties’ Exhibits were admitted at the beginning of trial, without waiving arguments as to what weight the fact finder should place upon each Exhibit. Although the Parents had the burden of proof as the party challenging the sufficiency of the IEP, the LEA introduced evidence first without prejudice. The LEA introduced evidence from four witnesses ; and

s. All were employed by the LEA.

Mr qualified as an expert in special education administration including the creation and implementation of IEPs. Hearing Transcript (“HT”) at 24, 32. He is the principal for the and responsible for overseeing the entire program, evaluating instructional staff, teachers, assistants, attendants, hiring and monitoring the day-to-day operations at the school.<sup>3</sup> HT at 24. The is a special education center school that serves two distinct groups of students, ages five to twenty-one: severely disabled; and, a group a with a bit higher functioning that have some very challenging, aggressive-type behaviors. HT at 26-27. He has observed the Child on a “fairly regular basis” in his academic setting since 2005. HT at 30-31. Mr. had reviewed all the LEA’s Exhibits including the Child’s several IEPs. HT at 31; LEA Exhibit Nos. 8 through 17. While at the , the Child would be placed in a classroom with no more than five students. (HT at 33.) Each classroom would contain a teacher, a public health assistant and a public health attendant. HT at 33. These professionals would

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<sup>1</sup>An evaluator for the Hearing Officer, per mandate of the Virginia Department of Education, was present during a portion of the Hearing.

<sup>2</sup>While no testimonial evidence was introduced as to the Child’s learning, emotional or social limitations, the Parties’ evidence revealed that the Child was extremely low functioning on all level without a specific diagnosis. *See, e.g.*, LEA Exhibit 22-27, HT at 90-124.

<sup>3</sup>By agreement, the Child will be placed at the in the Fall, 2009, semester. Based on the expert evidence, this placement will provide the Child FAPE. See HT at 62, 118.

have a specialization in special education. HT at 64. They would be familiar with the Child's academic background including his IEPs. *Id.* They would be with the Child at all times during the day, effectuating the 2009 IEP as well as to collect data on goals and objections. HT at 65-66. Related providers are in the classroom as needed such as the speech therapist, the occupational therapist. HT at 67. Finally, volunteers would assist in classroom on a regular basis. *Id.* Mr. [redacted] opined that the Child does not need "one-on-one" assistance; *i.e.*, a LEA employee to aid the Child at all times. HT at 44, 62-63, 72, 75, 77. Such assistance would rob the Child of the opportunity to achieve IEP progress independently. HT at 44-45, 62-63 and 77. Further, given the 3:5 ratio, the Child would receive the necessary attention to effectuate the IEP goals. HT at 46-47. Moreover, such one-on-one "hand-over-hand" assistance is reserved for individuals who have little or no ability to communicate or pose a health risk, both of which do not apply to the Child. HT at 70-73. In fact, the Child's ability level would be higher than the other students in his class next Fall. HT 41-43. In regard to the second issue of whether the Child was sufficiently evaluated so as to create a valid IEP, Mr. [redacted] opined, general, that a formal evaluations have a benefit insofar as they summarize, but may not be necessary when teachers, therapists and other professionals work with a student on a daily basis. HT at 53-54. Their data and descriptions regarding daily interactions with a child are the best information available for creating an IEP. HT at 49-50, 53-54. As a participant in the IEP team that generated the 2009 IEP, he opined that he possessed the necessary evaluations to make valid recommendations regarding the 2009 IEP. HT at 48. Mr. [redacted]'s testimony was undisputed, unbiased, informative and persuasive.

Ms. [redacted] was qualified in the area of special education instruction. HT at 84. She has been the Child's teacher and case manager for the last three years. She opined that the Child progressed academically and socially in these years, especially the last year. HT at 90-93, 100, 102, 104, 114, 121-124, LEA Exhibit 44. She described in detail the Child's success with following directions and his ability to redirect his attention with prompts. *Id.* Further, she testified that he had achieved a measure of independence. HT at 100, 124-126. She testified of his success with the Child's "communication book," LEA Exhibit 40. With this device, the Child can communicate by pointing at pictures for, *e.g.*, the bathroom, chips, *etc.* HT at 97-99. She opined that the Child did not need a one-on-one attendant to follow him around all day. HT at 115, 117, 148. In fact, the Child received individual attention or "individualized instruction" during the 2008-2009 school year, with the small teacher-to-student ratio. HT at 116, 148. Additional interaction with LEA employees would be detrimental to the Child by causing stress and undermining his opportunities (and desire) to act independently. HT at 115-117. In regard to the evaluation issue, she participated in the preparation of the 2009 IEP. HT at 123-124. She opined that the IEP team possessed sufficient information, evaluations and data to formulate the 2009 IEP. HT at 122-124. This was based on her interaction with the Child over the last three years (including the resulting progress notes and daily evaluations) as well as the regular tests performed. *Id.* In other words, no formal evaluation was necessary. Ms. [redacted]'s testimony was undisputed, unbiased, informative and persuasive.

Ms. [redacted] was qualified as an expert in the area of speech-language pathology and the provision of speech language services to special education students. HT 159-160. She has been the Child's speech therapist for the last three years. HT at 160. She described, in detail, the

Child's success and progress with the "Picture Exchange System" or, as referenced by Ms. [redacted], the Child's "communication book." HT at 165-174, LEA Exhibit 40. She further opined against one-on-one communication services during the entire school day; instead, she recommended small group setting, similar to the environment utilized in the 2008-2009 school year. HT at 175-177, 181-183, LEA Exhibit 26. This would promote independence and self reliance. HT at 181-183. In regard to the evaluation issue, she participated in the preparation of the 2009 IEP. HT at 161, 181. Because of her extensive background with the Child, she opined that she possessed sufficient evaluations and data to make recommendations for the 2009 IEP. HT at 187. Ms. [redacted]'s testimony was undisputed, unbiased, informative and persuasive.

Ms. [redacted] was qualified as an expert in occupational therapy and the provision of therapy services to special education students. HT at 225. She has been the Child's occupational therapist for five years. HT at 226-227. During that time, she participated in the Child's IEP teams. HT at 227. The Child has made progress to where she addresses problems as needed *via* periodic consultation with the teacher. HT 227-229. Additional occupational therapy is unneeded. HT at 232. One-on-one therapy during the school day would be detrimental by undermining the Child's opportunity and ability to be independent. HT at 233. In regard to the evaluation issue, she participated in the preparation of the 2009 IEP. HT at 230, 236. Because of her extensive background with the Child, she opined that she possessed sufficient evaluations and data to participate and make recommendations for the 2009 IEP. HT at 236-237. Ms. [redacted]'s testimony was undisputed, unbiased, informative and persuasive.

The Father testified as to their concerns, perceptions and factual observations regarding the Child's progress. HT at 246-250. In addition to the Parents' Exhibits and three letters, each dated June 22, 2009, from [redacted] ("Mother"), [redacted], the Child's brother, and [redacted], the Child's sister, the Parents made certain proffers which were accepted by the LEA. In general, these letters and proffers contained opinions and conclusions that the Child had not progressed and required one-on-one attention at school. Although the Parents provided opinions, they were not received as expert testimony. (Their testimony was unquestionably sincere.) No expert was called on behalf of the Parents.<sup>4</sup> With that said, the Parents did not introduce any persuasive testimony (expert or otherwise) on the issues raised by the Due Process Request.<sup>5</sup>

## **ANALYSIS:**

### **Introduction**

Major areas of the law are undisputed. In Board of Education v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034 (1982), the Supreme Court found that a disabled child is deprived of a FAPE

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<sup>4</sup>While the Parents introduced a document entitled "Psychological Evaluation Report," dated July 20, 2006, they did not produce its author or otherwise attempt to assert that this three-year-old evaluation was viable. As a result, little, if any, weight could be placed on its contents except as, at best, a background for the Child's social and academic progress.

<sup>5</sup>On July 30, 2009, the Father placed on the record his request that the Child be the subject of a formal educational evaluation, referred to as an Independent Education Evaluation. The Father did not articulate as to whether he wanted the LEA to conduct this formal evaluation or whether he wanted an Independent Education Evaluation. This issue was not raised in the Due Process Request and, based on the issues and evidence presented, was not addressed at the Hearing. As a result, no such evaluation was ordered.

under either of two sets of circumstances: (1) if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a FAPE; or (2) if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. Further, the Supreme Court opined "[i]nsofar as a State is required to provide a handicapped child with [FAPE], we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. (458 U.S. at 200.) In Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir.1985), the Court opined that no single substantive standard can describe how much educational benefit is sufficient to satisfy IDEA and that educational services must be reasonably calculated to produce more than some minimal academic achievement. In Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), the Court stated that IDEA "calls for more than a trivial educational benefit," but requires that the child receive a meaningful benefit and an opportunity to receive significant learning. In this administrative due process proceeding initiated by the Parents, they have the burden of proof. Schaffer, ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005). The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005). Expert testimony may be required when deciding complex issues surrounding the implementation of an IEP. See Arlington County School Board v. Smith, 230 F.Supp.2d 704, 715 (E.D. Va. 2002) where the Court reversed the decision of the Hearing Officer on the basis that he made factual findings that were not supported by expert testimony.

As to all issues, the undisputed evidence was that the Child made progress in the areas of behavior and academics during the 2007-2008 school year. (See, e.g., LEA Exhibit 44.) Ms. \_\_\_\_\_, Ms. \_\_\_\_\_ and Ms. \_\_\_\_\_ were the professional educators involved in the Child's daily school life. Because of their credentials, experience, intensive interaction with the Child, their team approach to special education and respective demeanor, they provided strong, credible, unbiased, undisputed evidence and opinions. In addition, the undisputed evidence was that the 2009 IEP, with the agreed-upon modification that the Child will be placed at the \_\_\_\_\_, was reasonably calculated to provide the Child FAPE. In addition, the overwhelming evidence was that the Child does not need "one-on-one" instruction as requested by the Due Process Request. Finally, the undisputed evidence was that the professionals who prepared the 2009 IEP possessed sufficient information, data and test results to ascertain what services are necessary to ensure the Child is provided FAPE.

### **Specific Issues**

#### **I. Whether the Child should receive "one-on-one" services and, if so, how much? [The term "one-on-one" services is defined as the use of a dedicated LEA staff person to effectuate the goals of the March, 2009 IEP.]?**

The Parents introduced no persuasive evidence on this issue. Further, evidence was introduced that the Child did not require a personal aid to obtain an educational benefit under the 2009 IEP. HT at 70-73. Further, the expert evidence was undisputed that the Child was

academically progressing. The overwhelming, undisputed, expert evidence was that the such services were unnecessary; in fact, such services would be detrimental to the Child by causing him needless distress and robbing him of the opportunity and ability to work independently.

**II. Whether the Child has been sufficiently evaluated to allow the IEP Team which created the March 2009 IEP to ascertain what services are necessary to ensure the Child is provided FAPE?**

The Parents introduced no evidence on this issue. The undisputed evidence from all the LEA expert witnesses was that the IEP team possessed sufficient information, data and results from previous testing and evaluations to formulate the 2009 IEP, without using a formal evaluation. In Robert B. v. The West Chester Area School District, 44 IDELR 123 (2005), the court held, with similar facts, that a formal re-evaluation was unnecessary where the LEA possessed sufficient information to generate a valid IEP. 44 IDELR at 126. In analyzing 20 U.S.C. §1414( c)(1), the court distinguished between an initial evaluation and a re-evaluation. *Id.* The former requires formal testing while the latter can be based on a review of all existing data including current classroom-based assessments and observations. *Id.* From this review, an IEP team can determine if additional testing is necessary to re-evaluate the Child. *Id.* In the instant case, the teacher, speech therapist and the occupational therapist have taught this Child for over three years. These professionals participated in the creation of the 2009 IEP. They determined no additional testing (formal or otherwise) was required. From their daily interaction with the Child over a period of three years, they have a wealth of knowledge no formal evaluation could reproduce. Further, at the time the 2009 IEP was created, these professionals possessed the data and knowledge contained in the Child's recent evaluations in general education, speech and occupational therapy, *e.g.*, LEA Exhibit Nos. 26, 27, 34-39. The total information available to the LEA was sufficiently comprehensive to identify the Child's special education and related services needed. As a result, the 2009 IEP, LEA Exhibit 17, with its agreed-upon modification to place the Child at the \_\_\_\_\_, provides FAPE to the Child.

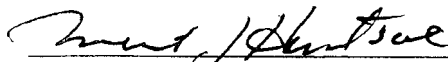
**CONCLUSION**

The appeal is denied. There was simply no persuasive evidence to grant the relief requested by the Parents in their Due Process Request.

**APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS**

1. **Appeal.** This decision is final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state court within 180 days of the date of this decision.
2. **Implementation.** The LEA shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision.
3. **Prevailing Party.** The LEA is deemed the prevailing party.



  
Hearing Officer

August 10, 2009  
Date

**CERTIFICATE OF SERVICE**

I certify that on this 10<sup>th</sup> day of August, 2009, a true and accurate copy of this pleading was mailed, *via* first-class, postage prepaid mail, to:

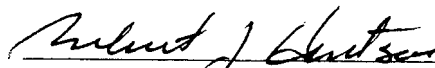
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