11-048

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

, et als. Complainants

v.

PUBLIC SCHOOLS Respondent.

Child & Parent:

Child's Attorney:
None

LEA's Attorney:
LaRana Owens, Esquire
Kamala Lannetti, Esquire

Administrative Hearing Officer:
John V. Robinson, Esquire
7102 Three Chopt Road
Richmond, Virginia 23226
(804) 282-2987
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REISSUED DECISION OF THE HEARING OFFICER

I. Findings of Fact

The requirements of notice to the parents were satisfied. The Student is a th grader whose date of birth is November . The child suffers from multiple disabilities, presents with a complex medical history and is eligible to receive specified education and related services under the primary disability category Emotional Disability ("ED") with additional disability categories of Specific Learning Disability ("SLD") and Other Health Impairment ("OHI"). SB B7.

The sole remaining issue for decision by the hearing officer in this proceeding is whether "[t]he LEA has caused a delay in services, and thereby failed to provide FAPE, by refusing to convene an IEP Meeting despite numerous parent requests since September 2010, and continues to do so." SB A1.

The Circuit Court entered on July 23, 2009, a Pendente Lite Order decreeing that the student's paternal grandparents would have temporary physical custody of the student and her older sister and that the parents would share joint custody. SB C5-C7. Ms. Sas was appointed the guardian ad litem. C5. The parents are separated and in the midst of divorce proceedings.

In the Summer of 2010, the father contacted Dr. the Director of the LEA's Office of Programs for Exceptional Children requesting her assistance in getting the student re-enrolled at the local public high school. SB C17.

At the request of the parents, an eligibility committee convened on August 23, 2010 for an eligibility determination meeting. SB B1-11. Both parents attended the meeting and the committee agreed to expand the student's eligibility categories of educational disability to include Emotional Disability related to the student's diagnosis of Pediatric Bipolar Disorder, Specific Learning Disability related to the student's weakness in math or math disorder and Other Health Impairment related to the student's diagnosis of ADHD. SB B7.

Following the eligibility meeting, the father enrolled the student at School, which the student's older sister attends. The student began school at School on about September 7, 2010. Tr. I, 43.

An IEP Meeting was scheduled for Tuesday, September 14, 2010 at 9:30 a.m. at School. SB B51. Numerous persons participated in the meeting (some not staying for the whole meeting as specified below) including the parents, the guardian ad litem, Ms. as the Principal/Designee/Special Education Coordinator, Ms. as the Special Education Teacher and the Student's case manager at School, Mr as the General Education Teacher and the Student's Earth Science teacher at School, Ms. as

Instructional/Teacher Specialist, Ms. as Guidance Counselor and Ms. Owens as City Attorney. SB B50.

About 3 ½ minutes into the meeting, the mother argued to the effect "that's not looking at what the best placement is for [the student]. . .," objecting that the "Determine Placement" box had not been checked on the Meeting Notice sent to participants on September 7, 2010. SB B51; SB J. (Emphasis supplied.)

Ms. tried to explain to the mother that placement would necessarily have to be covered by another box which had been checked, namely "Other: Discuss parental request for tuition reimbursement for unilateral parental placement of student in private school." B51; Tr. III, 40.

However, the mother was antagonistic and adversarial throughout the meeting and would not be mollified. SB J. To move the meeting along, Ms. agreed to revise the Meeting Notice, checking the box desired by the mother. Tr. III, 40.

The mother was concerned that there were no behavior interventions in the draft IEP which had been supplied to meeting participants and that missing were the school psychologist and the licensed clinical social worker ("LCSW") whom the mother had requested be at the meeting by e-mail dated Thursday, September 9, 2010. P B8. Ms. informed the mother that a functional behavior assessment and possible resultant behavior intervention plan would be addressed in a follow-up meeting to be scheduled and that the LCSW and school psychologist would be invited to that meeting. The mother asked for a vote but Ms. as Principal Designee and the appointed spokesperson for the LEA, rejected this and explained that IEP meetings are not supposed to be run and decisions made by majority vote. SB J.

During the IEP meeting the mother reiterated her concerns that the student needs small classes and that the LEA should not "dumb down" the student's curriculum. This concern had previously been expressed by the mother to Ms. , amongst others, in the mother's e-mail of September 9, 2010 as follows:

> **Concerns of the parent need to include**: [Student] needs to be in small classrooms (6-8 students) for all classes and STILL be eligible for a standard diploma. IT IS NOT OK TO DECREASE HER SERVICES to give her a standard diploma because [LEA] does not have a program suitable to educate my daughter. Further, Parent has grave concerns regarding [Student's] interactions with peers and teachers, for fear that symptoms of her disorder will be misconstrued as antagonism and be handled as disciplinary issues instead of opportunities to work on her social skills and give her the opportunity to calm down. Parent also has deep concerns that [Student's] curriculum will be dumbed down to accommodate her social needs in a smaller setting rather than teaching her grade level material and challenging her intellect to keep her engaged, but doing so in the

> small setting that she requires. Teachers must be well-trained on the differences between AD/HD and Bipolar symptoms and motivations so that [Student's] triggers and behaviors can be better anticipated and managed.

P B8.

Approximately 32 minutes into the IEP meeting, the guardian ad litem requested a 5-minute break. The mother and the guardian ad litem left the meeting room and the mother returns saying words to the effect "Congratulations [the father]." One of the participants recounts on the CD that the mother is very angry with me, the guardian ad litem and the process and has left the IEP meeting. SB J.

The remaining participants agree to carry on with the meeting in the mother's absence. The tone and atmosphere of the IEP meeting improves markedly and the IEP Team is able to progress smoothly and methodically through the remaining components of the IEP, making a deliberate and concerted effort to reach consensus.

Because of the presence of the guardian ad litem, an attorney at law, the City Attorney enters the meeting approximately 43 minutes into the meeting. SB J.

The participants agree that there will be a follow-up meeting to address how the Student's pediatric bipolar disorder and any negative behaviors impede her learning at the public day school. The LEA requests reports from A and the father agrees to provide consent for the LEA to obtain the information. SB J.

The team agrees to take up the issue of extended school year ("ESY") services for the student at a later meeting. SB B58; SB J.

To assist the Student adapt to her new setting in the public day school and to replace her recourse to her advocate at A, the Team agrees that when the Student or her teachers need to defuse a stressful or problematic situation, the Student has as needed "time-out" access to a guidance counselor, case manager or the assistant principal. SB J; SB B70.

The meeting continues smoothly and consensus is reached concerning placement in the public day school, after considering the least restrictive environment ("LRE") mandate, accommodations, services, testing, etc.

Approximately 1 hour 42 minutes into the meeting, the father gives written consent for the FBA (SB B76) and the participants agree to meet the first week in October 2010. SB J.

The father gave the LEA permission to implement the IEP developed on September 14, 2010. SB B45. However, late on Friday, September 24, 2010, Ms. received a phone call from the

father in which he reported that he had just left a court hearing in which the judge made a court order for the Student to attend Academy effective September 27, 2010.

On September 28, 2010, the mother sent an e-mail to Ms. and Ms. , amongst others, which read, in part, as follows:

> Ms.
> I wanted to make sure you were aware that [the student] was placed by Court order at Academy effective yesterday. She will not be returning to S. Please allow her sister to clean out her locker. Also, I have not received my copy of the draft IEP that [the father] signed (but neither myself nor the Guardian Ad Litem gave consent to) at the IEP meeting. Please email it to me as soon as possible.
> Thank you,
> [Mother]

SB C49.

The student only attended School from approximately September 7, 2010 to September 24, 2010. Tr. I, 43; SB C121. While at School the student received meaningful educational benefit, performing well academically, accessing and succeeding in the general curriculum and interacting well with her teachers and her nondisabled peers. SB C122-127; Tr. I, 78, 81, 90; Tr. III, 131, 175. The student's behavior was not a problem and she wanted and was excited to be at School. Tr. I, 123; Tr. III, 68-70, 121-2, 131, 176; Tr. IV, 35.

The student went back to Academy and the LEA did not hear again from the parents until December 15, 2010, when Dr. received the following e-mail from the mother:

> Dr.
> I respectfully request an IEP meeting to determine placement for [the student]. Please CC me on all emails pertaining to this matter. Thank you!
> [Mother]

SB C61; Tr. I, 126.

Dr. responded by e-mail on December 17, 2010:

> Dear [Mother],
>
> Thank you for your email inquiry. It is my understanding that your daughter, [the student], was withdrawn from the division in late

September or early October of this 2010-11 school year. Therefore, it will be necessary to officially re-enroll her according to her current address of residence. Once [the student] is re-enrolled in the School division, we will be able to convene an IEP meeting at the school to discuss implementation of her IEP.

I am copying the special education coordinator who is familiar with [the student's] IEP and whom you may contact to facilitate re-enrollment.

Sincerely,
Dr.

SB C61.

In turn, the mother responded to this email on December 17, 2010:

Dear Dr. ,
[Student] was removed from Public Schools in accordance with a Court Order issued by Judge of the Circuit Court after an extensive hearing on the matter where [the student's] Guardian Ad Litem testified as to the insufficiency of [the student's] IEP at S and the appropriateness of her placement at Academy.

I will not violate a court order and re-enroll her at S.
Public Schools is still required to conduct a Placement IEP meeting at the parent's request, and is still financially obligated to pay for private placement when the school has failed to provide FAPE. I am not required to disrupt [the student's] progress at just to effect my parental rights to FAPE. I understand that you are required to schedule the placement IEP meeting within 10 days of my request.

Thank you very much for your compliance with the law.
Sincerely,
[Mother]

SB C56.

On February 24, 2011, Ms. sent the following email, in part, to the mother:

> Dear [Mother],
>
> PS provided [the student] with a free appropriate public education. [The father] provided the school division with written, informed consent, allowing PS to implement the September 14, 2010 IEP.
>
> This due process proceeding is the second one regarding [the student]. PS prevailed at the first hearing when you first requested that PS pay [the student's] tuition at Academy. The hearing officer ruled that [the student's] IEP provided the student with a free appropriate public education and also determined that PS was not required to reimburse you for tuition at A. Thereafter, during the IEP meeting on September 14th, you again requested that [the student] be placed at CBA and that PS pay the cost of tuition. At that time, the IEP team refused your request for private placement because [the student] could be provided a free appropriate public education with PS. PS's position regarding tuition reimbursement remains unchanged and therefore your request for tuition reimbursement . . . is again rejected.
>
> You mentioned in your email that [the student] may be returning to PS on Tuesday, March 8, 2011. Upon [the student's] return, PS will implement the September 14th IEP which was consented to by [the father]. At that time, you may request an IEP meeting so that the IEP team can consider your request for modifications to [the student's] IEP.
>
> I have also attached a copy of the September 14th IEP.
>
> Sincerely,
> LaRana J. Owens, Esq.

SB C63.

The mother responded by email the same day as follows:

> [The student] will NOT return to S without an appropriate IEP in place BEFORE she returns. If you are so willing to do a new appropriate IEP, then why can't you do it now?

SB C63.

On March 2, 2011, the mother requested another eligibility meeting from the LEA. SB C71. In a Prior Written Notice dated March 8, 2011 the LEA refused the request because the last evaluation was conducted less than a year ago and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia (effective July 7, 2009) (the "Virginia Regulations") provide that the LEA shall not conduct a reevaluation more than once a year unless the parents and the LEA agree otherwise. 8 VAC 20-81-70(F)(2). The parents continued to challenge the appropriateness and validity of the September 14, 2010 IEP and request modifications. *See, e.g.* SB C81-83.

On March 14, 2011, Ms. Owens sent an email to the father which provided, in part, as follows:

> If the court ordered [the student] to attend a school other than PS, please understand that the ruling pertains to the custody/divorce proceeding only.
>
> You mention in your email that [the student] requires a BIP *before* the FBA and before she can return to PS. However, the FBA precedes the BIP. The FBA identifies a student's target behaviors that the BIP will address. You mention that [the student] may exhibit inappropriate behaviors at school without a BIP and that she cannot be singled out for any reason. The reasons why you have these concerns are unclear because while attending S in September without a BIP, [the student] had no disciplinary infractions. Notwithstanding this, the IEP team agreed in September to reconvene a meeting to conduct the FBA because [the mother] requested a BIP.
>
> You also mentioned that [the student] may need access to a clinical social worker who has experience with students diagnosed with pediatric bipolar disorder. This statement was presumably in response to my statement to you that [the student's] IEP provides for a time out to speak with her guidance counselor, AP or case manager. Your request to modify this accommodation would be considered by the IEP team upon re-enrollment.
>
> Also, it is not my intent to communicate to you that your concerns will not be addressed by the IEP team. To the contrary, once [the student] is enrolled, an IEP meeting will be scheduled. At this point, however, [the student] is a private school student and not a PS student. As such, PS will convene an IEP modification meeting at a mutually agreeable time after re-enrollment.

> Finally, you state that [the student] requires additional services and accommodations that were not included in the September 2010 IEP. If [the student] is enrolled, you should bring any new data, reports or other information to the IEP modification meeting for the team's consideration.

SB C81.

On September 7, 2010, obviously before the crucial IEP meeting concerning this proceeding, the mother sent an email to A staff:

> Much to my dismay, [the father] enrolled [the student] in public school this morning. The situation has become unmanageable and [the student] is the one who will suffer for it. I will keep you apprised of any new developments.

SB E4.

On September 10, 2010, the mother sent an email to A which provided in part:

> Good Morning All,
> A court order will be issued this afternoon ordering [the father] to immediately remove [the student] from public school and enroll her at A. She will likely start there on Monday. I anticipate an adjustment period because [the father] has her convinced that public school is her best option, so I have some re-teaching to do. I am hoping that they also order temp full custody to me so that I can facilitate this transition and avoid further negativity or conflicting messages from [the father] and give [the student] every opportunity to succeed.
>
> The first thing we will need to get out of the way will be her WIAT testing. I am hoping that on Monday she can get the WIAT completed and meet all of her teachers and some of her classmates, at a minimum. She will need a transition period to get caught up in her classes and re-acclimate with A. Please be patient with her as she will likely have some emotional reaction to the whole transition. I apologize that she has been exposed to manipulation all summer from [the father] and his parents with regard to public school, and that it stemmed from their unwillingness to be financially obligated for tuition and fees at A, and was never motivated by which school would <u>best serve</u> [the student's] needs. I have tried to mediate and give her consistent messages that A is <u>the best place</u> for her and that she loved it last year and that she really enjoyed having friends

> and finally learning things, but [the father and paternal grandparents] have done a good job of re-focusing all of her attention toward the public high school experience. . .

SB E5 (Emphasis supplied.)

On December 8, 2010, the mother sent an email to Ms. ., the School Division Director at A, stating in part:

> Thanks ....I was not aware that you had started the test. As soon as you have the results I need them so I can compare them to last year and see if she has improved on her grade-level deficiencies. I need that to submit to to try to get reimbursement for her tuition.

SB E9.

On January 19, 2011, the mother filed with the SEA and the LEA a Request for Due Process Hearing dated January 19, 2011 seeking relief including tuition reimbursement for the student's 2009-10 and 2010-11 school years. SB A115-116. Hearing Officer Vaden was appointed to hear the administrative proceeding. However, the mother withdrew her request and on March 9, 2011 hearing officer Vaden dismissed the proceeding with prejudice as to any claim for reimbursement of tuition and related costs at A for the 2009-2010 school year and without prejudice as to other issues raised. SB A126.

The mother filed the Request for Due Process Hearing, which is the subject of this proceeding, on March 15, 2011. SB A1-3.

During the period relevant to this proceeding, the mother in her determination to provide what she considers the best education for her child, has clearly made evident her ultimate goal of having the LEA fund her child's private placement at A. *See, e.g.,* SB E4, E5 and E9; Tr. III, 20-25.

The mother realizes that the LEA is not legally obligated to reimburse the mother or to pay for the mother's private placement of the child at A unless the LEA fails to offer the child a free appropriate public education ("FAPE"). Tr. II, 210-11, 218-9, 247-51.

Based on the totality of the administrative record, and despite the mother's positions that she is open to the possibility of an appropriate public day school placement, the mother has predetermined that no placement other than A would be appropriate for her child concerning the educational placements at issue in this administrative proceeding. Tr. II, 237-8, 241-54; Tr. III, 20-22, 24.

The mother was afforded the opportunity to fully participate in the development of the student's IEP. Walking out of the meeting was her decision and she must shoulder the legal consequences. The father and the guardian ad litem (who also left before the meeting concluded) fully participated in the meeting and the Team considered two placement continuum options, the public day school and private school. SB B72.

Numerous detailed accommodations, goals, objectives and services were carefully and skillfully crafted by the Team to support the child's unique educational needs. SB B50-76; SB J; Tr. I, 81, 83, 94, 111; Tr. III, 46-50, 192-3, 196, 206-11, 238.

During the IEP Meeting held on September 14, 2010, the IEP Team reviewed, discussed and made revisions to the IEP, based on information from the mother while she participated and even after she had left based on written concerns and issues she communicated in advance of the meeting. Tr. II, 257; Tr. III, 36, Tr. IV, 33; SB J. The IEP Team considered a public school setting. Specific goals and objectives were discussed and developed. The child would receive the following special education and related services under the IEP: (a) Math, 90 minutes/5 times bi-weekly in a special education classroom; (b) Special Education Services (A/B Academic), 45 minutes/5 times weekly in a special education classroom; and (c) English Inclusion, 45 minutes/5 times bi-weekly in the general education classroom. After consideration of all evaluative reports and other information, including curriculum based assessments performed by teachers at School, the IEP Team determined that the child's academic and other educational needs could be appropriately addressed in general, inclusion and special education classrooms in the LEA in accordance with the Virginia Regulations, 8 VAC 20-81-130 Least Restrictive Environment and Placements. Specific teaching strategies and supports for the child's success in a school environment would be determined by her teachers and related services personnel based on her individual needs, IEP goals and objectives. The proposed IEP for the child's 2010-11 school year was reasonably calculated to provide the child with the necessary quantum of educational benefit required by law. Tr. III, 46-57, 64, 68, 192-3, 196, 206-11, 238.

LEA representatives also testified that the student would have a case manager and access to the guidance counselor and Assistant Principal to ease any transition and the proposed IEP included numerous supports and accommodations to address any transition concerns for the child.

The LEA has offered the child and provided to the child for the brief time it was permitted to implement the IEP, an appropriate education during the current school year and the September 14, 2010 IEP offered by the LEA and consented to by the father was appropriate and was reasonably calculated to meet the child's unique educational needs and to provide educational benefit.

The hearing officer found the testimony of the LEA professionals more convincing and credible than that of the mother's non-LEA witnesses for the reasons described below.

Many of the mother's non-LEA witnesses expressed their opinions in terms of an optimization standard, namely that A was more appropriate or better than the public day school. For example, Dr. in the Psychotherapy Services report dated June 6, 2009 states: "I

am unaware of any other program that would be more equipped to offer [the student] an appropriate education." P A3. It was also Dr. who stated in this report that "[the student] needs to be in a class with no more than 8 students," a position which the mother understandably seized upon and adopted for the student's educational programming. Tr. I, 66, Tr. III, 158. The recently decided U.S. Supreme Court case of *Melendez-Dias v. Massachusetts*, 129 S.Ct. 2527 (2009) reminds us of the importance of sworn testimony under oath which is subject to cross-examination and for which the applicable state and federal regulations provide. Of course, although many relevant evaluations and reports were submitted by the mother, the authors did not provide testimony and, accordingly, their expert opinion testimony was not subject to cross-examination by the LEA and was given less weight by the hearing officer.

The witnesses who appeared from A while familiar with their own educational programming for the student were admittedly not subject to and not familiar with the legal obligations imposed on the LEA and had not observed the student in the public school setting. Tr. I, 194-5, 200-3, 219, 256, 258; Tr. II, 104, 108, 129, 141-150.

By contrast, the LEA representatives exhibited knowledge about and experience in complying with the many legal obligations imposed on them in the public school context. Tr. I, 78, 87-89, 94, 124, 146-8, Tr. II 28-95; Tr. III, 27-61, 234-6; Tr. IV, 17-52, 117-20, 189-200.

The mother herself has frequently adopted an optimization standard during the relevant period: ". . . the reason that her ultimate best placement is at A . . ." Tr. I, 31, 66, Tr. II 245-6, 259; Tr. IV 83, 92, 156-7; SB J; SB E5.

The testimony of the LEA's educational professionals was both credible and consistent on the major issues before the hearing officer and is entitled to deference from the hearing officer. The demeanor of such professionals at the hearing was candid and forthright. LEA personnel acted appropriately in exercising their considered professional judgment. well within the bounds of their professional, educational discretion.

The LEA has made a good faith, collaborative, coordinated, reasonable effort to develop and offer appropriate educational programs to the child for her 2010-11 school year. The LEA has offered the child an appropriate education during the current school year and the IEP provided and offered for the current school year was appropriate. The child did not suffer any loss of educational opportunity due to any action or inaction on the part of the LEA. For the brief period that the LEA was given the opportunity to implement the educational programs it has proposed for the child in the September 14, 2010 IEP, the child did well academically, behaved well with both disabled and nondisabled peers and with her teachers and appeared excited to be at School.

The LEA has offered the child a FAPE.

Any procedural violations were technical and did not actually interfere with the provision of a FAPE to the child. Any procedural violations did not cause the disabled child to suffer a loss of educational opportunity.

II. Conclusions of Law and Decision

In this administrative due process proceeding initiated by the parents, the burden of proof is on the parents. Schaffer, ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005).

The law retains the previous definition of a "free appropriate public education." IDEA 2004 Section 612(a)(1)(A). Accordingly, any analysis of the standard of FAPE must begin with Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). The Rowley Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education. The Rowley analysis provides that the disabled child is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. Rowley, *supra*, 206-7 (1982); Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990); Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987); Gerstmyer v. Howard County Public Schools, 20 IDELR 1327 (1994).

The issue framed by the mother is that the LEA has caused a delay in services, and thereby failed to provide FAPE, by refusing to convene an IEP Meeting despite numerous parent requests since September 2010, and continues to do so. SB A1; Tr. II, 216-17; Tr. IV, 108-9, 158.

The mother walked out of the September 14, 2010 IEP Meeting after one-half hour. This IEP which the father, guardian ad litem and other team members developed in accordance with applicable law was implemented for less than two weeks when, as the mother testified during the hearing, " . . . the guardian ad litem and myself went back to the Court, to the Circuit Court, and requested that [the father] be forced to reenroll her in Academy." Tr. I, 55.

The mother does not recognize the placement or the sufficiency of the September 14, 2010 IEP (Tr. I, 55, 77, Tr. II, 254) and while she is correct that she can request an IEP meeting at any time (Tr. I, 57, 63), the LEA might have been justified in asserting solely that it refused to convene a meeting because the parents had thwarted the LEA's ability to implement a procedurally correct IEP which was clearly providing educational benefit to the student. *See, e.g., Fitzgerald v. Fairfax Co. Sch. Bd.*, 556 F.Supp. 543, 551 (E.D. Va. 2008). Tr. I, 77-8, 107, 130, 131-2, 136, 234-6. Furthermore, the LEA had already agreed that it would reconvene the IEP team when necessary to consider issues, revisions and/or adjustments to the IEP such as the ESY services and the FBA. Tr. I, 92, 114; Tr. IV, 50.

However, one position consistently asserted by the LEA troubles the hearing officer and that is what appears to be the LEA's absolute condition that the child's reenrollment in the LEA is a precondition to any IEP meeting.

The hearing officer has not found any binding authority on this issue in this circuit but agrees with the mother that the reasoning in *James v. Upper Arlington City Sch. Dist.* 228 F.3d 764, 33 IDELR 122 (6th Cir. 2000) is convincing and highly persuasive and adopts such reasoning:

> We hold that that refusing to do an IEP pre-enrollment constitutes such a violation. See *Cleveland Heights-Univ. Heights City Sch. Dist. V. Boss*, 144 F.3d 391, 393 (6th Cir. 1998) (noting in passing that federal law required development of an IEP for a child still enrolled in a private school). To hold otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or, worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights. Neither action seems to be compelled by the statutory scheme or the case law.

While the LEA's position is problematic, it is not fatal in this proceeding. *James* is distinguishable because here the LEA did develop a legally sufficient IEP which was reasonably calculated to provide FAPE and has been shown to have provided the student FAPE albeit for a very short period. The LEA has at all times been willing to offer the student the services under the September 14, 2010 IEP while the mother has demonstrated that she is unwilling to accept any offer of FAPE by the LEA which does not include placement at A. Tr. I 62, 77, 235-6; Tr. IV, 199-200; Tr. II, 237-8, 241-54; Tr. III, 20-22, 24. Accordingly, this proceeding is more akin to *MM v. Sch. Dist.* 303 F.3d 523 (4th Cir. 2002), where the Court held:

> It is significant that there is no evidence that MM's parents would have accepted any FAPE offered by the District that did not include reimbursement for the Lovaas program. As we have noted, the District is not obligated by the IDEA to provide a disabled child with an optimal education; it is only obliged to provide a FAPE. Rowley, 458 U.S. at 192, 102 S.Ct. 3034. In these circumstances, MM suffered no prejudice from the District's failure to agree to her parents' demands. Because this procedural defect did not result in any lost educational opportunity for MM, the Proposed 1996-97 IEP did not contravene the IDEA.

The hearing officer finds the mother's assertion that the LEA predetermined the placement (Tr. 44) meritless. Tr. I, 44, 65, 139; Tr. IV, 95-96. Similarly, the mother's protestations that she and the guardian ad litem did not consent to the placements in the September 14, 2010 IEP are without merit. Under the Virginia Regulations only 1 parent need consent to the implementation of an IEP for the LEA to go ahead and implement. *See*, SB F1-3; Tr. I, 78. Certain other procedural deficiencies asserted by the mother, including not having the IEP in place at the beginning of the school year (Tr. I, 41), are subject to the same analysis and simply do not rise to the level necessary to cause the child a loss of educational benefit. Tr. II, 79, 85.

A small violation of IDEA's procedural requirements does not, without evidence of an actual loss of educational opportunity, constitute a failure to provide the disabled child with a free appropriate public education. Rowley, *supra*; Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997); MM v. School District of Greenville County, 303 F.2d 523 (4th Cir. 2002); Dibuo v. Board of Educ., 309 F.3d 184 (4th Cir. 2002); Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985); Tice, *supra*; Doe v. Alabama Department of Education, 915 F.2d 615 (11th Cir. 1990); W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Evans v. School District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988). Technical violations of IDEA procedures that do not deny the student FAPE are considered de minimis. See, e.g., Fairfax County Sch. Bd. v. Doe, Civil Action No. 96-1803-A (April 24, 1997); see also Roland v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990); Spielberg v. Henrico County Sch. Bd., 853 F.2d 256, 259 (4th Cir. 1988); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633-635 (4th Cir. 1985); and Board of Educ. v. Brett Y, 155 F.3d 557 (4th Cir. 1998).

In Dibuo, the Court reaffirms the law in our circuit that not every procedural violation of the IDEA warrants granting the relief requested. Before any relief can be afforded, the Court (or hearing officer) must proceed beyond the finding of any procedural violation of the IDEA to further analyze whether the procedural violation actually interfered with the provision of a FAPE to a child:

> Most recently, in MM, we relied upon our decision in Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997) to reiterate that [HN6] "when . . . a procedural [violation of the IDEA] exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA." MM, 303 F.3d 523, 533, 2002 WL 31001195 at *7.

Dibuo, *supra*, at 190.

Essentially, this standard has now been codified in the most recent reauthorization. IDEA 2004 Section 615(f)(3)(E)(ii); *see also,* 8 VAC 20-81-210(O)(17). Any asserted procedural violation concerning this proceeding simply does not rise to the level necessary to constitute a loss of educational opportunity and denial of FAPE to the child.

The determination of the IEP's reasonableness at the time of its creation is limited to the information known to the IEP team when it wrote the IEP. See Adams v. State of Oregon, 195 F.3d 1141, 1150 (9th Cir. 1999) (IEP "was reasonably developed based on information available to the [multidisciplinary team] including information from the parents").

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

In Hartmann v. Loudoun County, the court stated:

> Although section 1415(e)(2) provides district courts with authority to grant 'appropriate' relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section 'is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' (citations omitted)... [t]hese principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

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

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

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

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

While this issue was not discussed at the IEP meeting on September 14, 2010 (SB J), in this regard, it is important to note that A does not have a Virginia License to Operate concerning the disability category of Emotional Disability. SB I. To meet the standards of the SEA, placement of the student : A by the IEP Team might not have been appropriate even had the IEP Team determined that the public day school was not an appropriate placement for the student. Tr. II, 107-8.

The mother has attached a great deal of importance on making the LEA accept Emotional Disability as the primary eligibility category of the student's disability. Tr. 45, 49. The mother has also placed great importance on the LEA staff being trained to and able to tease out the differences between substantially similar negative behaviors caused by the child's pediatric bipolar disorder as opposed to the child's ADHD and responding appropriately. Tr. I, 45-6, 49; Tr. II, 29, 37-8, 71, 113; Tr. III, 25-6, 234-6. Dr. , a nationally licensed school psychologist with the LEA, who was called as a witness by the mother, testified that often the symptomatic negative behaviors associated with PBD will frequently present more seriously in the home setting as opposed to the school setting. Tr. 75. Dr. recognized that this dichotomy was applicable to the student based on data he was asked to comment on. Tr. II, 34, 41, 44-47, 73 So far, the student has not misbehaved while at School.

In determining the quantum of educational benefit necessary to satisfy IDEA, the Rowley Court explicitly rejected a bright-line, single standard test. Instead, educational benefit "must be gauged in relation to the child's potential". Rowley at 185 and 202; see also, Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985).

Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1000-1001 (4th Cir. 1997); Johnson v. Cuyahoga County Comm. College, 29 Ohio Misc.2d 33, 498 N.E.2d 1088 (1985).

The proposed placement of the child within School, her neighborhood school, pursuant to the proposed IEP provided the child the support to learn and progress academically in the least restrictive environment.

The IDEA 2004 like the IDEA 1997 requires that children with disabilities be educated in the least restrictive environment ("LRE") and have the opportunity to be educated with non-disabled children to the greatest extent possible. 20 U.S.C. § 1412(A)(5); see, also 34 C.F.R. § 300.550(b). Removal of disabled children from the regular education environment should only occur when the nature or severity of the disability is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily. Id. LRE is a mandate to all public schools which must be considered by the appropriate multi-disciplinary IEP Team in programming for children.

The LEA has looked at the child's strengths, weaknesses and progress in light of her disability and has proposed an IEP in which her weaknesses, both scholastically and socially can be addressed, but where her academic strengths can also be developed, accommodated and built upon. The LEA's proposed IEP also provided the child a regular opportunity to promote her socialization skills and participate in activities with non-disabled students in certain areas, as mandated by the LRE requirement. The children at A are all disabled. Tr. I, 272; Tr. II, 107, 112-3, 141, 174-5. While at School, the student benefited educationally from the frequent opportunity to mingle and associate with her nondisabled peers throughout the school day in a variety of settings. Tr. I, 85; Tr. III, 50-56, 67-70, 211, 224.

The mother bears the burden to establish by a preponderance of the evidence that the LEA has failed to provide her child with FAPE concerning her request for tuition reimbursement and concerning the issues she has raised in this proceeding and she has not sustained this burden.

The LEA is reminded of its obligations concerning 8 VAC 20-81-210(N)(16) to develop and submit an implementation plan to the parents and the SEA within 45 days of the rendering of this decision.

Right of Appeal. This decision is final and binding unless either party appeals in a federal District court within 90 calendar days of the date of this decision, or in a state circuit court within one year of the date of this decision.

ENTER: 5/31/11 nunc pro tunc

John V. Robinson

John V. Robinson, Hearing Officer

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