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VIRGINIA:

DUE PROCESS HEARING

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CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

and)
)
 Complainants)
)
 v.)
)
 PUBLIC SCHOOLS)
)
 Respondent)

In Re: S.H.

1:11 CV 128

REVISED DECISION

The United States District Court for the Eastern District of Virginia to which this matter had been appealed issued the following order on November 28, 2011:

“ Though neither party requested remand, for the reasons that follow, the Court finds it cannot conduct meaningful review of the administrative record without clarification from the Hearing Officer. Accordingly, for good cause shown, it is hereby ORDERED that this matter is REMANDED to George Towner, this matter's Hearing Officer, for clarification of his decision. Mr. Towner shall revise his opinion within thirty (30) days.” (AR 27 p. 1)

The Court noted that:

“The legal requirements regarding the detail of a hearing officer's decision are not expansive. See JP., 516 F.3d at 262. Rather, “our case law has never suggested that any particular level of detail is required in the hearing officer's decision. If anything, our case law suggests that the level of detail required of a hearing officer is relatively low.” Id. Additionally, the Court is aware that hearing officers work under time constraints, do not have the benefit of law clerks, and for a host of reasons “cannot be expected to craft opinions with the level of detail and analysis we

expect from a district judge." Id. at 263. Notwithstanding the minimal statutory and legal requirements, the Court finds several areas of the Hearing Officer's decision require fleshing out before this Court's review can occur." (AR 27 p. 4)

Thus the Court asked the following questions:

"First, did S.H. make educational progress during her fourth grade year, and was the June 2007 IEP adopted at the end of that year appropriate to provide S.H. with some educational benefit during her fifth grade year had she remained in the FCPS system. Second, were the FCPS IEPs for S.H.'s sixth, seventh and eighth grade years appropriately calculated to provide S.H. with some educational benefit." (AR 27 p. 4)

In resolving the questions posed by the District Court it is important to note the context whereby the Hearing Officer was asked to evaluate the testimony and exhibits presented by the parties over eight days of hearings.

First and foremost a great deal of the testimony related to events which occurred five years prior to the hearing with the result that witnesses were being asked to recall events that occurred a half a decade earlier. The exhibits tendered were certainly not prepared with litigation in mind. In addition each party was asking the Hearing Officer to import great meaning to written snippets in documents. While the parents were free to bring their due process hearing whenever they chose, the delay in filing the hearing did not contribute to an accurate understanding of what really occurred but it did have the effect of building up the financial stake in the outcome of the due process hearing.

Second, since SH had been a student at _____ for the past four years at the time of the hearing, the testimony and evidence presented forced the Hearing Officer into a determination of the value and appropriateness of projected “This is what we would have done” proposals by PS. The standard of “some educational benefit” is well known but it does not provide the Hearing Officer with a ready objective ruler with which to measure the actions taken.

So we come to the first question:

1. Did S.H. make educational progress during her fourth grade year at _____ ?

The evidence presented to the Hearing Officer showed that during S.H.’s fourth-grade year at _____, though not at grade level academically, S.H. was nonetheless able to understand and access the fourth grade curriculum, and thus did make educational progress during her fourth grade year. Tr. 1193-1200, 1787-88; AR 50, 52, 55.

Evidence of that progress took many forms.

a. S.H.’s report cards and IEP reports showed that she made progress.

Through the IEP progress reports S.H.’s teachers reported that she was making progress towards her IEP goals. Tr. 277, AR 50, 53, 55. The IEP progress reports use a 1-5 “Likert” scale similar to that used at _____. Tr. 543-44. The reports in the spring of

2007 showed that S.H. was making "some progress" toward achieving her goals in six areas while she was making "sufficient progress" in the seventh area.

S.H.'s grades on her report card "showed that she was achieving what she needed to achieve to show that she was making progress," acquiring new skills in all subject areas. Tr. 1566, 1529-30; AR 52. S.H. earned grades primarily of "B" and "C," indicating satisfactory work.

b. S.H. showed improvement in Reading Comprehension and Rate of Reading as measured by the Gray Oral Reading Test (GORT).

S.H.'s reading comprehension has consistently been measured as better than her individual word decoding. Tr. 212-12. The one standardized reading test administered to S.H. while she was still attending _____ was the Gray Oral Reading test, 4th edition (GORT-4). This was administered in December 2004 (AR 81), and again in April 2007 (AR 99). According to this test, S.H. improved from the 25th to the 37th percentile in Reading Comprehension over that span. *Compare* AR 81, p. 10 *with* AR 99, p. 10. She also improved in Reading Rate from the 2nd to the 9th percentile in reading rate during that time. *Id.*

c. There was an increase in S.H.'s performance of the Read Naturally Program

Working with her special education teacher Ms. _____, S.H. also made extensive use of the Read Naturally program, a fluency-based reading program, during fourth grade. AR 33, p. 37-48. Tr. 1203. She had started the previous year at a level 1.5,

which corresponds roughly to a grade level. *Id.*; AR 32, p. 1. And progressed steadily from a level 1.8 in the fall of 2006 to a level of 2.6 in June 2007. Tr. 1202-03, 1218-21, 1566, *see also* Tr. 276; AR 33, p. 37.

d. There was improvement in reading as shown by the result of S.H.'s use of the Lexia reading program.

Ms. testified S.H. was progressing in these areas, with many units completed in the 90 to 100 percent range, and others in the 75 to 89 percent range. Tr. 1223, AR 33, p. 135-40.

e. There was an increase in Instructional Levels as measured by the Qualitative Reading Inventory (QRI).

S.H.'s reading comprehension improved as measured by the Qualitative Reading Inventory ("QRI"), a criterion-referenced test. When she left , she had attained a third-grade instructional level. Tr. 276-77.

f. S.H.'s spelling showed improvement.

S.H.'s spelling also progressed over the course of the 2006-07 school year at as measured by the Developmental Spelling Analysis ("DSA"). This test was administered three different times: September 2006, and February and April 2007. Ms.

explained, based on her test scores over that time, S.H. had made progress in all these areas. Tr. 1216-18; AR 33, p. 17.

g. S.H. passed Standard of Learning (SOL) Exams in Reading, History and Science, and came within one question of passing the Math SOL.

S.H. passed all of her Standards of Learning ("SOL") tests in third grade, and nearly passed them all in fourth grade. Tr. 277-78, 1208-14, 153032; AR 51, 54. In the third grade these included exams in the areas of Reading, Mathematics, History and Social Science, and Science. AR 51. In fourth grade, S.H. passed the Virginia Studies and Reading SOLs and she fell only one question short of passing the Mathematics SOL exam. Tr. 1531; AR 54.

h. S.H.'s performance and social life were not adversely impacted in 4th Grade.

While the Hearing Officer understood his decision of November 22, 2010 to represent his evaluation of the evidence presented to him as well as his evaluation of the credibility of the witnesses testifying before him, apparently that evaluation was not spelled out sufficiently for the District Court. Accordingly and to elaborate, with regard to S.H.'s performance, attitude and behavior at _____, most of the negative comments about her stay at _____ came from S.H.'s parents. See previous decision of the Hearing Officer AR 336 pp. 25-42. However, the evidence clearly showed that S.H.'s parents made no objections during S.H.'s stay at _____ to the program being provided to S.H. nor did they attempt to get _____ PS to modify the program being provided for S.H. They signed each IEP and even signed the IEP presented after they had decided to move S.H. to _____. It was only three months after S.H. enrolled in _____ and after

counsel was finally employed and the attempt to recover financially had begun did the complaints about services provided at _____ come to the fore.

The notion that S.H. did not enjoy going to _____ during fourth grade is also not supported by the record. For example, a note from S.H.'s pediatrician on January 17, 2007, reported that S.H. enjoyed playing with friends and that school was "going well". AR 72. In their _____ application on January 31, 2007, the parents themselves had said that they were looking carefully for any recurring signs of frustration or loss of spirit, but had not seen any. AR 91. _____'s own speech language evaluation, done April 21, 2007, near the end of S.H.'s tenure at _____, reported that S.H. was "happy and likes school." AR 99, p. 3. Her IEP addendum at the end of that year, May 21, 2007, likewise reported that S.H. was "happy and enthusiastic" about school. AR 94. Nor is there anything in the parents' extensive e-mail communications with Ms. _____ or Ms. _____ during that period to suggest that S.H. was often sad or upset. AR 92. The record from both _____ PS and others demonstrates that all in all, socially and emotionally S.H. had a successful fourth-grade year at _____.

Accordingly, because the parents did not raise any complaints with _____ PS personnel at the time, the Hearing Officer gave less weight to the parents' testimony at the hearing and discounted those adverse comments cited and accepted the version presented by _____ PS staff. As they had done in bringing S.H. to _____ from Our Lady of Good Counsel, S.H. was simply picked up and moved to _____. The evidence showed that this was a radical move impacting significantly on the family's life style.

2. Was the June 2007 IEP adopted at the end of S.H.'s fourth grade year appropriate to provide S.H. with some educational benefit during her fifth grade year had she remained in the PS system?

To elaborate further on the Hearing Officer's original decision, the burden of proof to show that the services and placement contained in the IEP's proposed by PS were not "reasonably calculated to enable the child to receive educational benefits" rested with the parents.

In addition, as also noted in the Hearing Officer's original decision, whether the June 2007 proposed IEP was reasonably calculated to enable S.H. to receive some educational benefit must be judged as of the date it was proposed based upon the data available to the parties at that time. As also noted in the Hearing Officer's original decision, the IEP team in June of 2007 had only the recommendations from S.H.'s PS teachers given during the course of the 4th grade plus the Comprehensive Speech and Language Assessment prepared by staff member, , upon which to base the IEP for the 5th grade year.

IEP for 2007-08 Fifth Grade School Year Was Appropriate.

The agreed upon IEP and placement for the 2007-08 school year proposed specific goals in S.H.'s areas of need, which included reading, mathematics, written language, and oral communication/intelligibility. AR 93, 104. The IEP also provided for highly-structured special education to address S.H.'s goals. The agreed upon IEP and addenda for S.H.'s fifth-grade year identify language and motor coordination skills as an

area of need and proposed speech/language and occupational therapy to meet those needs. See AR 93, p. 8 of 16; 104, pp. 4 and 6 of 7.

The proposed placement for the 2007-08 IEP involved a combination of time for S.H. in general and special education classrooms at . For the majority of S.H.'s school week, she would be supported by a special education teacher. Under the proposed IEP, S.H. would receive assistance for a total of 15 hours from a special education teacher with assistance in the general education classroom for 9 hours per week. AR 104, p. 6 of 7. In addition S.H. would have spent 6 hours per week in a self-contained classroom with a special education teacher and a small group of students in order to supplement what S.H. would learn in the general education classroom. *Id.* S.H. would also receive occupational therapy (for 1½ hours per month) and speech language therapy (for 2 hours per month) in the special education classroom. *Id.*

During 4th grade at S.H.'s special education services had been increased from 9 ½ to 15 hours. The report from Ms. recommended one 45-minute individual speech and language therapy session and one 45-minute small group session a week. S.H.'s IEP set forth goals which called for special education speech and language services in the areas of "Reading-Word Recognition", "Reading Fluency" and "Written Language". The PS Progress Reports also note that S.H. was "... making sufficient progress toward achieving this goal during the duration of the IEP". In addition S.H.'s 5th grade IEP called for two hours of Speech and Language Therapy during a month. This represented only a 15 minutes a week difference from the program.

In light of the standards spelled out above, the Hearing Officer, in reliance on the observations of the PS staff who observed S.H. on a daily basis, concluded that the program which PS had proposed for S.H. for the 5th grade was appropriate and was designed to and would have enabled S.H. to receive some educational benefit had she attended .

3. “Were PS’s IEPs for S.H.’s sixth, seventh and eighth grade years appropriately calculated to provide S.H. with some educational benefit?”

The Hearing Officer’s initial decision treated consideration of the IEP’s for the sixth, seventh and eighth grades as one unit. However, as pointed out by the District Court, the 4th Circuit decision in *M.S. v. Fairfax Co Sch Bd*, 553 Fed 3d 315, (2009) requires that each school year be considered individually.

As was noted earlier, the analysis of these IEPs can only look at what PS proposed to provide to S.H.

Also in evaluating the proposed IEP’s it should also be noted that prior to developing the IEPs the PS staff listed below visited the and observed S.H. on a number of occasions after she left :

, occupational therapist	January 7, 2008; September 24, 2009
, physical therapist	January 7, 2008
, special education teacher	January 31, 2008; September 24, 2009
, special education teacher	September 24, 2009
, physical therapist	December 4, 2009

In addition the IEP’s reflect that on some occasions staff either attended the IEP or

participated on the phone. Also some of the records and reports were made available to the IEP team members.

PS's counsel has prepared a summary outline of the services called for in S.H.'s IEPs to cover the sixth, seventh and eighth grades, each of which is set out below and which will be considered individually.

6th Grade 2008-2009

School Year	Special Education & Related Services (in a Special Ed. Setting)	Class Sizes	Areas of Need
2008-09 Elementary AR 27	21.5 hours / week (7.5 hours / week) OT 1 hours / wk SL 4 hours / month Adapted PE 4 hours / month	Special Education: about 4 students General Education: around 26 or 27 students (See Tr. 96869, 1154-55, 1347-48, 1540-41)	Reading - Word Recognition Reading - fluency Reading - comprehension Language - oral narration Written language Mathematics - word problems Organization Language - word retrieval Communication - speech intelligibility Self-Advocacy in Physical Education Written expression

a. The IEP and Placement Proposed for 2008-09 Sixth Grade School Year Was

Appropriate.

For S.H.'s sixth grade year — the 2008-09 school year — PS again proposed an appropriate IEP and placement that, as can be seen above, would have provided S.H.

with educational benefit. She would have received 4 hours per month of Adapted PE and SL, and 1 weekly hour of OT. These related services, along with 21.5 hours per week of special education services, would provide S.H. with the support of a special education teacher for much more than half her school week. The IEP also continued to propose specific goals in S.H.'s areas of need. The June 18, 2008 IEP covered all three areas of attention, memory, and retrieval with annual goals in Reading — Word Recognition; Reading — Fluency; Reading — Comprehension; Language — Oral Narration; Written Language; Mathematics — Word Problems; Organization; Communication — Speech Intelligibility; Language — Word Retrieval; Self-Advocacy in Physical Education; and two goals in Written Expression. AR 27. PS's proposed IEP for sixth grade again identified the need to focus on S.H.'s language and motor coordination skills with the related services of speech/language and occupational therapy. *See* AR 27, pp. 11, 13, 14, 17, and 28 of 31.

As during her fifth grade year, the proposed IEP for S.H.'s sixth-grade year would have provided special education services and related services that were in form and in substance similar to the educational program that the Parents and their witnesses contended was appropriate for S.H. *Compare* AR 27 with AR 125.

7thGrade 2009-2010

School Year	Special Education & Related Services (in a Special Ed. Setting)	Class Sizes	Areas of Need
2009-10 Longfellow Middle AR 28	22 hours / week (18 hours / week) OT 4 hours / month (3 ½ hours / month) SL 5 hours / month (4% hours / month) Adapted PE 4 hours / month (4 hours / month)	English, math, science: 4 to 10 students, a certified special education teacher, and sometimes an instructional assistant. Tr. 998-99, 1236-37 Social studies: 22 to 24 students with one general education teacher and one special education teacher. Tr. 1001, 1398. Reading and basic skills: 5 or 7 other students with a special education teacher. Tr. 1398-99. General Education: around 26 or 27 students (See Tr. 1154-55, 1347-48, 1540-41)	Reading - word recognition & phonemic awareness Reading - comprehension Reading - fluency Articulation Intelligibility Word Retrieval (to retrieve specific words across content areas) Word Retrieval (to recall information related to curriculum) Written Expression (given prompt, to write assignments or a particular length to be scored based on ideas, organization, voice, work choice, fluency, and mechanics) Written Expression (to independently complete written assignments with accurate organization and content) Written Expression (to complete classroom written assignments within the allotted time with decreasing key strike, copy, and editing omissions) Written Expression (to legibly sign her name and write numbers within a designated space) Functional performance Math - calculation, fluency, word problems APE Self advocacy

b. IEP for Seventh Grade — 2009-10 School Year — Was Appropriate.

S.H.'s proposed IEP and placement for the 2009-10 school year, as set out above, would have been even more intensive than sixth grade. Beginning in middle school at _____, S.H.'s IEP proposed 21.5 hours of special education service. Of that amount, 18 hours would have been in small, highly-structured classes of only about a half-dozen students. Since reading is such an important area for S.H., one of her electives would have been a separate intensive reading class of only three or four students. The remaining special education services would have been provided in a team-taught social studies class.

PS designed the annual goals on the IEP for the 2009-10 school year to help S.H. advance in each of her areas of need. PS proposed services were structured to support S.H. in making educational progress. For example, S.H.'s proposed IEP included two annual goals in the area of word retrieval, and three goals in the area of need of reading (word recognition/phonemic awareness, comprehension, and fluency). AR 28, pp. 9-11 and 14-15 of 38. The PS proposed IEP for S.H.'s seventh-grade year was, as in previous years, in many respects similar to what the Parents and their witnesses determined was appropriate for her. *Compare* AR 28 with AR 146. The IEP continued to identify language and motor coordination skills as areas of need and proposed speech/language and occupational therapy to meet those needs. *See* AR 28, pp. 12, 13, 14, 15, 18, 19, 20, 21, and 35 of 38.

8th Grade 2010-2011

School Year	Special Education & Related Services (in a Special Ed. Setting)	Class Sizes	Areas of Need
2010-2011. Middle AR 187	22 hours / week (18 hours / week) OT 4 hours / month (3 ½ hours / month) SL 5 hours / month (4 ¾ hours / month) Adapted PE 2 hours / month	English, math, science, and reading: 3 or 4 students with one special education teacher. Tr. 1430. Tr. 1022-23, 1430-31. Basic skills: six students with one special education teacher. Tr. 1022-23. Civics: 12 students, with one general education teacher and one special education teacher. Tr. 1022-23, 1430-31.	Reading - word recognition & phonemic awareness Reading - comprehension Reading - fluency Articulation Intelligibility Word Retrieval (to retrieve specific words across content areas) Word Retrieval (to recall information related to curriculum) Written Expression (given prompt, to write assignments or a particular length to be scored based on ideas, organization, voice, work choice, fluency, and mechanics) Written Expression (to independently complete written assignments with accurate organization and content) Written Expression (to complete classroom written assignments within the allotted time with decreasing key strike, copy, and editing omissions) Written Expression (to legibly sign her name and write numbers within a designated space) Functional performance Math - calculation, fluency, word problems APE Self advocacy

c. The Eighth-Grade IEP for the 2010-11 School Year Was Appropriate.

Finally, with the IEP program and placement proposed by PS for S.H.'s eighth-grade year as the above table illustrates, S.H. would have received a significant

amount of special education services during the school years and it was also reasonably calculated to provide her with educational benefit. As in the prior three years, the IEP proposed specific goals in her areas of need, which included reading, mathematics, written expression, articulation, and intelligibility. AR 187. S.H.'s IEPs for eighth grade would have provided her with special education services for 22 hours with 18 of those hours provided in the special education setting. As detailed in paragraph G(3), above, S.H.'s English, math, science, and reading classes would include three or four students, her basic skills class would have six students, and her team taught civics class would be with 12 other students. Tr. 1022-23, 1430-31. Again, . PS' proposed IEP for S.H. for eighth grade was quite similar to that recommended by the Parents and their witnesses. Compare AR 187 with AR 183.

d. S.H's increasing physical disability required additional services.

The evidence clearly demonstrated that over the course of the time period subsequent to the fall of 2006 S.H. had a changing medical profile that required additional services as was reflected in her yearly IEP's. This is shown by the medical and other evidence introduced at the hearing. See, e.g., AR 92, p. 3 (email from parent to Ms.

: "We're noticing some problems more now than in the past"); AR 92, p. 4 (email from Ms. to Parent: "I've noticed an increase in miscues during her oral reading. She substitutes similar words, changes the word and is omitting words altogether."); AR 65, p. 8 (letter from Doctor : "[S.H.] appears to have had progressive weakness of the right side of her body. . . Her speech has become more slurred particularly on

awakening in the morning. She appears to be undergoing a neurological degeneration.").

, a PS Program Manager, also noted changed language needs and increased difficulty with articulation. Tr. 1041. , S.H.'s General Education teacher, also noted that "[H]er needs have increased as her situation has deteriorated." Tr 1563.

Her medical chronology during this period is set out below

MEDICAL REFERENCES TO S.H.'S NEUROLOGICAL PROBLEMS

Record	Date	Health Care Provider	Type
72	17-Jan-2007	Northern Virginia Pediatric Associates	Notes
96	14-Mar-2007	The Children's Therapy Center	Occupational Therapy Evaluation
97	16-Mar-2007	Pediatric Nuerology Clinic, , MD	Report
98	16-Mar-2007	Children's National Medical Center	Consultation Report
100	25-Apr-2007	The Children's Therapy Center	Physical Therapy Evaluation
107	09-Oct-2007	, MA, RPT	Physical Therapy Evaluation
114	15-Jan-2008	Johns Hopkins Medicine	Clinic Note
115	17-Jan-2008	Johns Hopkins Hospital	Radiology Report
118	06-Feb-2008	Johns Hopkins Hospital	Radiology Report
119	06-Feb-2008	Johns Hopkins Hospital	Report of Electro-encephalogram
65	15-Feb-2008	Johns Hopkins Hospital	Report of Dr.
127	04-Jun-2008	Johns Hopkins Medicine	Clinic Note
128	04-Jun-2008	Kennedy Krieger Institute	Initial Evaluation
133	25-Jun-2008	Johns Hopkins Medicine	Operative Report
138	08-Jul-2008	Medical Neurogenetics	Lab Report
141	14-Oct-2008	Johns Hopkins Hospital	Radiology Report
73	06-Aug-2009	Johns Hopkins Hospital	Clinic Notes

e. S.H. Required the opportunity to mainstream with non-disabled students.

At both PS's schools and at the typical school week was approximately 35 hours long. For S.H. at every minute of her time was with other students who were subject to disabilities. At and one half to one quarter of her days would have been with non-disabled students. It was clear to the Hearing Officer that it was this experience that S. H. parents wished to avoid and that the PS staff felt such association would not only comply with IDEA but would be of benefit to S.H. The Hearing Officer noted the requirements of IDEA with regard to LRE as well as this attitude of the parents in his original decision. AR 336 pp 45-46 and 53-55. This fear is best illustrated by the testimony of Ms. , the parent's educational consultant.

"BY MR. :

Q. And, finally, Ms. , how would you respond to this final statement, which is that the school system's current proposal for the last, I guess, two years now, seventh and eighth grade for (S.H.) of 22 hours or so of special education with 18 hours being in a self-contained setting is appropriate because it more closely approximates what she is getting at School, the full-time program?

A. Maybe the number 18 is closer to the number 35 numerically but the program does not approximate the School. It has inherent in it that recommendation, as I said, a third of S.H.'s time completely unsupported in the general education environment from special education. We see that in -- under a full-time program at School, she has made meaningful and significant progress, and she doesn't need to stand out in order to receive the amount and level and nature of specialized instruction that we know that she needs. A less restrictive setting at this time would not only have her stand out and exacerbate the social/emotional like it did before, but she would fail to make meaningful progress." (Underlining added) Tr 1924-25

"MR. : Okay. Does (S.H.) -- can (S.H.) go to lunch properly in either environment? Is she unable to go to lunch at ?

THE WITNESS: I don't think she would be unable to go to lunch but I think it would be -- the harmful effects of it, considering the whole rest of the day, would make it inappropriate. At this time at _____ she eats in her classroom. She gets extra support for reading and written language and social skills during lunch. So I'm not going to testify that she can't physically eat lunch, you know, in -- in the same cafeteria as her non-disabled peers but she can't afford to given the whole rest of the day"(underlining added) Tr 1934-35

The best analysis of the competing positions of the parties and the role of the "least restrictive environment" concept can be seen at pages 28-30 of the exhibit entitled "Information Related to Present Level of Educational Performance" (AR 28) in the proposed IEP of October 10, 2009. As succinctly stated in the note contained on page 30

".. Mr and Mr. stated that the proposed IEP is being rejected because of their belief that (S.H.) requires all self contained classes." (Underlining added) AR 28 p30

However, as was stated by the PS witnesses "

" PS proposes that (S.H.) receive services at Middle School. This decision is based on the team's belief that PS can meet (S.H.)'s identified needs and provide the required accommodations in the LRE which will allow her to receive educational benefit. MS provides small group specialized instruction in a special education setting as well as opportunities for interaction with nondisabled peers throughout the day. Systematic, research based reading instruction will be provided in a small group

special education setting. Related services can be provided in an integrated manner that will support progress in the general education curriculum. The team shared that (S.H.) was making progress as a student at ES until unilaterally withdrawn.” AR p 29

The Hearing Officer’s believes that S.H’s confinement in the environment does not comply with the least restrictive environment requirements of IDEA.

In addition to the notations contained in the IEP, the Hearing Officer gave considerable weight to the testimony of , the school psychologist with PS. In addition to being the only psychologist to testify, other than S.H.’s parents she was the only witness to have observed S.H. from the beginning of her qualification for special education services to the time of the hearing. Her responses as to why S.H.’s level of special education services increased while at the same time S.H. could benefit from contact with her non-disabled peers during the course of the school day were persuasive.

The following passages from Ms. ’s testimony are illustrative and the Hearing Officer gave weight to them:

THE HEARING OFFICER:

Q. Now, why are services increased? I mean, if it's the same, is it the same (S.H.) in 2004 as we get there? Is there something different that's happened to her? Is she -- why would somebody need more services at an advanced period unless the conditions deteriorate which require more services?

THE WITNESS:

A. Yeah. For example, with speech and language, (S.H.) was pretty much right in the average range for articulation, oral -- language being receptive-expressive language.

And then starting in the winter of 2007 was when she was having difficulty with articulation, so therefore she might not have had the problem before, but now she does. So therefore we have to increase time that's spent in special education.

Q. Well, were all the changes in something that developed after 2007?

A. A lot of it was the result of the 2007, with her changing, her condition. Tr 281

.....

THE HEARING OFFICER:

Q. Now, as I'm sure you are aware, School is a self-contained school system, has obviously taken the position that this young lady does need self-contained for everything. As a psychologist -- I know you didn't create the least restrictive environment requirement. But from a psychological point of view, what benefits, if any, does she get from the least restrictive, I mean, from the participation in, say, a school with non-educationally disabled students?

A. I think that she would get a lot of benefit. We are in a society that we shouldn't be segregated, and we should be exposed to all types of people, and all types of learning styles, disabilities, different levels of severity of disabilities. A whole wide range. And especially since she is going to be joining the work force. And she is going to be with all different types of people. So I think that for her, and any student just in general, that I think it's important that you learn to be in that large society. Tr 283-284

.....

THE HEARING OFFICER: Q. But I mean, with her. If she came to you --

A. Oh.

Q. -- and said, you know, I'm -- Ms. , this kind of bothers me. They are leaving me out of class early, all this other stuff. I feel uncomfortable. I think the father even called it degrading. How do you advise, in your school psychologist role, how do you advise her?

A. Well, there is support in the public school setting with guidance counselors, school psychologists, school social worker, all of those people could talk to her.

Q. Is an affirmative attempt made to see that that's done? Is that part of the IEPs that have been proposed?

A. Part of the IEP that's been proposed has been self-advocacy, in terms of teaching a child to identify their strengths and weaknesses, and to be able to advocate for themselves, like if they are having trouble understanding something, or needing accommodations, things like that.

Q. And how did you find her as a self advocate, based on your examinations of her?

A. I didn't really assess her in terms of that.

Q. Do you think that, in order for her to achieve educational benefit that she requires self-contained classes in every class?

A. I don't think that she needs a self-contained classroom in every class. I think she could benefit from a team-taught class of, such as has been proposed for social studies. Where you have a general education teacher and a special education teacher. (Tr 284-285)

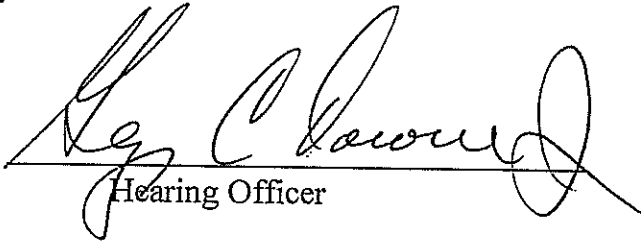
Conclusion

As stated in the Hearing Officer's original decision, it was clear to the Hearing Officer that the level of S.H.'s disabilities do not require that all her special education services be provided in a totally self-contained environment. As a result S.H.'s enrollment in _____ instead of attending _____ or _____ was not justified by the evidence nor required by IDEA.

Accordingly I continue to find that the June 12, 2007, June 18, 2008, December 15, 2009 and June 18, 2010 IEP's provided FAPE for S.H. and that her parents are not entitled to reimbursement for the fees and expenses incurred as a

result of her enrollment in for the 2007-2008, 2008-2009, 2009-2010, and 2010-2011 school years.

Entered January 30, 2012


Hearing Officer