# CASE CLOSURE SUMMARY REPORT

Public Schools

School Division Name of Parent

November 9, 2018

Name of Child Date of Decision or Dismissal

John F. Cafferky, Esq. Nicolas R. Ostrem, Esq.

Counsel Representing LEA Counsel Representing Parent/Child

Parent Parent

Party Initiating Hearing Prevailing Party

# Hearing Officer’s Determination of Issue(s):

1. Did PS fail to provide services pursuant to an agreed IEP in autumn 2018?

Hearing Officer’s Orders and Outcome of Hearing:

Child’s IEP found to be inappropriate. PS order to convene an IEP meeting and develop an appropriate IEP for the child.

Frank G. Aschmann

Printed Name of Hearing Officer Signature

# COMMONWEALTH OF VIRGINIA

# DEPARTMENT OF EDUCATION

# DUE PROCESS HEARING

In Re:

represented by Public Schools represented by

Nicholas Ostrem, Esq. John F. Cafferky, Esq.

# DECISION

This matter came to be heard upon the Request For A Due Process Hearing (complaint) filed by ‘s mother pursuant to the Individuals with Disabilities Education Act, 20 USC § 1400 et. seq. (IDEA) and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81.

The complaint alleges Public Schools ( PS) failed to implement ‘s Individualized Education Program (IEP). As the moving party, the mother assumes the burden of proof in this matter. Schaffer v. Weast, 546 US 49 (2005). The standard of proof is upon a preponderance of the evidence. 8 VAC 20-81 O. 13. All other issues were withdrawn prior to the hearing.

# Issue Presented

1. Did PS fail to provide services pursuant to an agreed IEP in autumn 2018?

# Findings of Fact

( ) is a five year old boy who has been found eligible for special education services, pursuant to IDEA, under the category of other health impairment, autism. had many health issues as an infant and has received early intervention in his education. has a diagnosis of autism and ADHD. At times has difficulty regulating his behavior. has developmental strengths and weaknesses. displays strength in reading and math. displays weakness in writing and fine motor skills. has had an educational evaluation and the educators have determined that he needs specialized education in his academic subjects. is capable of interacting with his peers and can be mainstreamed for home room, recess, lunch and “specials.”

is well known at his school, is popular and has adapted to the public school environment.

On March 13, 2018, an IEP was developed for and agreed to by the parties. The IEP provides for special education services to be performed in a public day school. receives his education in both the standard classroom and in a “pull out” special education setting. The IEP designates 6.25 hours per week for general education and 22 hours per week for special education. The IEP designates that will receive five hours per week of specially designed instruction in a special education setting for each subject, reading and written language. The IEP designates 7.25 hours per week for math in a special education setting. The IEP also designates 2.5 hours per week for behavior and 5.5 hours for related services, speech therapy, physical therapy and occupational therapy in a special education setting. The March 13, 2018, IEP for is the current IEP for the 2018-2019 school year.

is attending Elementary School for the 2018-2019 school year. is in kindergarten. is assigned to a mainstream class and participates in the “morning meeting” in a general education classroom with non-disabled peers from 8am to 9am. At 9am is pulled out of the general education classroom and goes to language arts from 9am to 10:30am in a special education classroom. has lunch from 10:30am to 11am in a mainstream setting. has specials from 11am to 12:15pm in a general education setting. has recess in the general education setting from 12:20pm to 12:50pm. receives math instruction in a special education setting from 12:55pm to 1:55pm. From 1:55pm to 2:30pm receives “content” instruction in a special education setting. At 2:30pm gets on the bus to go home. is provided with direct support from staff throughout the day.

Based upon her observations, ‘s mother does not believe he is making educational progress. PS kindergarten receives grades twice per year, not on a quarterly system like higher grades. has not received a report card for this school year yet. ‘s mother was confused by information she received prior to the start of the school year as to the setting would be in. She was unclear if would be in an “inclusion” class or if he would be exclusively in a special education setting. is receiving education services in both mainstream settings and special education settings. The complaint alleges that is not receiving the hours of special education in the proper settings as is required under the IEP. ‘s mother requested a due process hearing.

# Application of Law

Pursuant to 8 VAC 20-81-110A, a local education agency must develop and implement an IEP for every child eligible under IDEA. It is the responsibility of the IEP team to develop the IEP. 8 VAC 20-18-110C. The school system is obligated to provide special education services in accordance with the IEP that is developed. VAC 20-81-100B.6. The IEP for states very specific hours of service which must be performed in designated settings. ‘s mother argues that PS has failed to provide the required hours of service and demonstrates this by comparing the required hours in the IEP with teacher schedules. The teacher schedules detail the hours performed on each subject, which teacher performs the service and in what setting the services are performed. Comparison of the IEP hours and the teacher schedules reveals that the hours do not match up with mathematical precision. The school system even concedes in the testimony of one of its witnesses, the school principal, that PS has not provided the full number of hours of specialized math instruction as stated in the IEP. The uncontroverted testimony of the principal was that the IEP appeared to contain an error.

Unfortunately, both parties agreed to a document that is defective. Inspection of the IEP reveals that the document is defective on its face. The IEP requires a total of 22 hours of special education per week but the individual subject hours for special education services in the IEP total 25.25 hour per week. The IEP requires a total of 6.25 hour of general education per week but the individual subject hours for general education in the IEP total 5 hours per week. Thus under the totals required by the IEP, should receive 28.25 hours of services per week but under the individualized subject hours, should receive 30.25 hours of services per week. These inconsistencies in the IEP are unreconcilable.

The IEP does not include, in the hours specified, all of the services that receives in a general education setting. participates in mainstream activities for lunch, recess and specials. These activities add approximately 2.25 hours per day to the services received in a general education setting. Thus is receiving approximately 16.25 hours per week of mainstreamed educational services when only 6.25 are required under the IEP.

Comparison of the teacher schedules with the IEP demonstrates that is not receiving special education services, based upon hours, that is required by the IEP. The teacher schedules show that spends approximately 15 hours per week in designated special education classes for reading, writing, content and math. This falls short of the 22 or 25.25 hours required by the IEP regardless of which measure is used. PS points out that there are many crossover activities where these core subjects are integrated into activities taught in the general education setting. The time spent in these crossover activities is not accounted for in the IEP. Thus the IEP is not only defective on its face but fails to accurately track the actual schedule that follows on a daily and weekly basis.

‘s mother alleges that is not making educational progress. This claim is not substantiated by the evidence. has been in kindergarten for approximately two months. In that time no objective report of progress has been made on his record. The evidence presented by

PS demonstrates that is making very good progress on social integration with non-disabled peers and is doing well in reading and math. The progress has made socially demonstrates he is benefitting a great deal from the mainstream activities he has in his schedule. These activities could be eliminated from ‘s schedule to add more time in a special education setting but that does not appear to be in his best interest. Converting the time spends mainstreamed to an isolated special education setting would improve compliance with the IEP, however, it would deprive of the benefit he receives from interaction with non-disabled peers. The statute favors education in the least restrictive environment. 8VAC 20-81-130. The evidence demonstrates clearly that is capable of being educated in a mainstream setting for many activities. PS is properly following the principals of the statute by educating in a mainstream environment to the extent possible. The hours of special education service designated in the IEP simply do not reflect the benefits gained by in these general education classes both socially and academically.

The IEP is weighted inappropriately by subject. The IEP dedicates more hours to math than any other activity. This subject is one of ‘s strengths but is the area where the IEP is least fulfilled. needs the most help in writing but this area is less emphasized in the IEP than math. The IEP does not provide an appropriate level of services for the needs of CS, as written.

# Conclusion

For the above stated reasons the Individualized Education Program dated March 13, 2018, for is found to be inappropriate. It is the duty of the IEP team to develop an appropriate IEP for . An IEP meeting should be convened as soon as is practical to develop an appropriate IEP for .

This hearing officer declines to award any compensatory educational services as requested by ‘s mother. While it is clear PS has not provided services as specified in the IEP, it is held that the IEP is itself inappropriate and thus failure to meet its specific requirements does not, in itself, trigger a need for additional services. In reviewing the actual services PS is providing , this hearing officer finds that the educational program does provide with meaningful educational benefit. Additionally, the burden was upon ‘s mother to prove compensatory services were appropriate. ‘s mother did not produce sufficient evidence to demonstrate had lost educational progress or was in any way damaged as a result of PS’s failure to provide the services specified in the IEP.

The IEP needs to be adjusted to better fit the needs of . The IEP needs adjustment to the number of special education hours devoted to math and language arts. The component of academic services in a general education setting for needs to be clarified both in the IEP and with the parent. The hours required for related services including medical, clothing and transition should be clarified in the IEP and with the parent. This hearing officer declines to order any specific adjustments to the IEP, finding that the development of the IEP is the province of educational experts.

# ORDER

IT IS HEREBY ORDERED that Public Schools convene an IEP meeting for and develop an appropriate IEP for him.

# Right of Appeal Notice

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 180 calendar days of the date of this decision.

Date Frank G. Aschmann, Hearing Officer