11-019

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

FINAL DECISION

Public Schools **School Division**	Mr. & Mrs. **Name of Parent**
Division Superintendent	**Name of Child**
LaRana J. Owens, Esquire **Counsel Representing LEA**	None **Counsel Representing the Parent/Child**
Robert J. Hartsoe, Esquire **Hearing Officer**	Parents /Child **Party Initiating Hearing**

LEGEND

Mother

Father

Child

LEA — Public Schools

Parents

Department Chair

Case Manager

Speech Therapist

School Psychologist

Special Education Coordinator

Academy — Academy

Parties — Public Schools, and

FINAL DECISION

INTRODUCTION

This was a difficult case involving a year old young man, enrolled in the grade in a local public school. Complicated legal analysis was required. The Parties presented an excellent case in a professional manner. For the reasons stated herein, the appeal is denied on all issues.

PROCEDURAL BACKGROUND:

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), this matter came upon the Parents' appeal from the Individual Education Program ("IEP"), dated April 23, 2010 (LEA Exhibit B146-B173; HT at page 37) ("2010 IEP") as well as other issues raised by their Due Process Request, dated September 30, 2010, as modified by their Amended Due Process Request, filed November 15, 2010. Several issues were raised and addressed, as referenced in the PreHearing Reports which are filed herein.

The Hearing on the merits was held on January 6, 2011. The Parties exchanged preHearing Memoranda which were considered. The Father, Mother, Special Education Coordinator and the LEA's counsel were present throughout the Hearing.[1] On the morning of the first day of the Hearing, the LEA's Motion to Dismiss and Motion to Strike were denied for reasons stated on the record. The Parents' Motion requesting the School Psychologist not testify was denied with the condition that the Parents have the opportunity to discuss the psychological evaluation (LEA Exhibit C8 to C14) with the School Psychologist before she testified as a LEA

[1] Throughout the proceedings, Reginald Frazier, Esquire, was present. He served as the Evaluator of the proceedings, per mandate of the Virginia Department of Education, and was not otherwise involved in the matter.

witness.[2] By agreement, the LEA accepted the burden of production without prejudice and introduced evidence first. (Hearing Transcript ("HT") at pages 27-29.) At that time, the Parties presented evidence and argument. With the exception of the matters stated or filed herein, all procedural matters, notices, *etc.*, were satisfied or otherwise not at issue. At the request of the Parties, Post-Hearing Briefs were filed and considered.

ISSUES DEFINED:

I. **Whether the LEA Violated the Applicable Regulations and Procedures When Drafting Modifications to the 2010 IEP?**

II. **Whether the LEA Followed the Proper Procedures after the Parents' Initial Filing of the Due Process Request?**

III. **Whether the 2010 IEP Should Be Modified to Include Inclusive Classes and Additional Speech Services to Provide the Child FAPE?**

IV. **Whether the LEA Violated the "Stay Put" Requirement of the IDEA?**

V. **Whether the Parents Provided Proper Notice of Their Intention to Place the Child in Private Placement?**

VI. **If the Parents Prevail, What Relief Should Be Granted?**
   - A. **Relief Regarding Procedural Issues (Including the "Stay Put" IDEA Requirements and Notice Issues);**
   - B. **Relief Regarding IEP Modifications;**
   - C. **Relief Regarding Private Placement.**

FACTUAL FINDINGS:

The Parties were prepared and participated in the Hearing in a professional manner. Factual evidence conflicted materially on only one issue, the Mother's behavior during the IEP meeting of September 28, 2010. 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.

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[2]The condition was satisfied (HT at page 120-121).

(HT at pages 29-30.) Expert evidence was not in dispute. Despite this lack of evidentiary conflict, this was a difficult case, given the large difference of opinion between the Parents and the LEA regarding the Child's disabilities and the impact of these disabilities on the Child's capacity to participate meaningfully in an academic environment. Overall, the Parties demonstrated a strong commitment to derive an IEP which would provide the Child with IDEA's free appropriate public education ("FAPE").[3]

The LEA introduced the testimony of four witnesses: the Department Chair, the Case Manager, the School Psychologist and the Special Education Coordinator.

The Department Chair was a fact witness. She was the Special Education Department Chair. (HT at page 35.) Her testimony consisted of recounting the events regarding the attempts to modify the 2010 IEP which references only self-contained classes.[4] (LEA Exhibit B146-B173.) Specifically, the Department Chair met with the Father prior to the onset of the 2010-2011 school year. (HT at page 35.) He requested that the Child be placed in inclusion core classes.[5] (HT at pages 35-36.) The Child was ultimately placed in inclusion classes in September 2010. (HT at pages 36, 38.) An IEP meeting was scheduled for September 16, 2010, to modify the 2010 IEP to reflect the Child's placement in inclusion classes. (HT at page 38.) The Mother was present. (*Id.*) While these modifications were discussed, no changes were made to the existing IEP. (*Id.*) The Mother requested additional time to allow her to discuss the

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[3] Hopefully, this commitment can be the basis for the Parties to continue on this task, despite their differences.

[4] "Self-contained classes" are typically working towards a special education diploma and their services are given through special education teachers. (HT at page 49.) These classes usually may have six students. (HT at page page 53.)

[5] "Inclusion core classes" are classes when the LEA uses a special education teacher and the general education teacher in the same environment providing the instruction, and the core being required classes to graduate. (HT at page 49.) Inclusion classes consist of approximately twenty-nine students. (HT at page 53.)

modifications with the Father. *(Id.)* In addition, the IEP team decided that additional testing was required, a psychological assessment. *(Id.)* On September 18, 2010, the IEP reconvened to discuss the modifications. (HT at page 40.) The Mother requested accommodations to allow the Child to succeed in inclusion classes. *(Id.)* The LEA had already changed the Child's classes to inclusion classes. (HT at pages 39-40.) The Mother was against the Child's return to self-contained classes. (HT at page 40.) According to the Department Chair, the meeting ended abruptly when the Mother "walked out." (HT at pages 40-41.) On September 28, 2010, the IEP team reconvened. (HT at page 41.) The Mother was present, but did not stay for the entire meeting. (HT at page 42.) When present, the Mother "appeared rather defensive." *(Id.)* In response to the Mother's reaction, the other members attempted to assure her by discussing the purpose of the meeting and the accommodations to be used to address the concerns of the Parent in general education classes. *(Id.)* They also discussed the Child's disability and the severity of it. (HT at pages 42-43.) Specifically, the IEP team discussed several accommodations to allow the Child to succeed in the inclusion class; *e.g.*, providing the Child with a copy of the class notes, extending the time to complete tests, using calculators on assignment, *etc.* (HT at page 57.) In addition, the IEP discussed the Child's behavior in inclusion classes; *e.g.*, blurting out inappropriately, being off task, fixating on certain objects or tasks, and failing to perform the assigned work for class. (HT at page 43.) Despite this assurance, the Mother continued to advocate for accommodations so as to allow the Child to remain in the inclusion classes. *(Id.)* The other members of the IEP team responded with a possibility of his beginning with one inclusion class with the remainder of his classes being self-contained, starting the process slowly. (HT at pages 44-45.) This was not supported by the Parents. (HT at page 45.) At one point, the

IEP team's references or discussions regarding the Child's disability category (autistic) caused the Mother to be agitated. (HT at pages 45-46, 54.) The discussion was very heated. (HT at page 52.) Members of the IEP team expressed concerns that accommodations may not be available for the Child to allow him to continue in the inclusion classes, due to his disability. (HT at page 55.) The Mother left the meeting. (HT at page 45.) As a result, the 2010 IEP was not modified. (HT at page 46.) The proposed IEP that modified the 2010 IEP was identified as LEA Exhibit B221 through B253. (HT at page 56.) Before leaving the meeting, the Mother was notified that her failure to execute the IEP would require the Child to be returned to self-contained classes as referenced in the 2010 IEP. (HT at pages 46-47.) Sometime afterward, the Department Chair arranged for the Mother and Father to execute permission to allow the administration of a psychological assessment. (HT at page 47.) Despite the Parties' efforts, the Parents had not had the opportunity to review the assessment before the Hearing.[6] (HT at page 48.) With the exception of the descriptions regarding the Mother's behavior on September 28th, her testimony was undisputed. The Department Chair's testimony was unbiased, informative and persuasive.

The Case Manager was the LEA's second witness. She was both a fact and expert witness. The Case Manager qualified as an expert in special education with an emphasis on reading. (HT at page 71.) She teaches the Child in self-contained classes: "Read 180" and English. (HT at pages 61 and 66.) Further, she is the Child's "case manager."[7] (HT at page 62.) She sees the Child daily, three times a day, ninety minutes each. (HT at page 65.) The Child's

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[6]The Mother cancelled an appointment with the LEA to review the document. (HT at page 48.)

[7]The role of the case manager is to assure that the accommodations on the IEP are implemented and that the services on the IEP correlate with the Child's classes. (HT at page 62.)

strength is writing, but he has difficulties in writing paragraphs and essays. (*Id.*) He reads on a second grade level. (HT at pages 66-67, 72.) He has deficits with comprehension, speed and fluency, and at times memory. (HT at page 73.) His cognitive function is low to borderline, below the level of his peers. (*Id.*) The Child was placed, at the Parents' request, in inclusive classes in September and October. (HT at pages 63 and 112.) Teachers in the inclusive classes expressed concerns that the curriculum was too rigorous for the Child. (*Id.*) The Case Manager described a series of events which reflected the uncertainty of the Mother and Father regarding placement of the Child in inclusive classes. (HT at pages 76-78.) The purpose of the September 28th IEP meeting was to modify the 2010 IEP to match the Child's current schedule of inclusive classes as well as review the Child's progress in these classes. (HT at page 80.) All the members of the IEP were working as a team to discuss the Child's needs to find the "best fit" to allow the Child to achieve academically. (HT at page 86.) Members of the IEP team expressed concerns that the current schedule of inclusive classes was too rigorous for the Child. (HT at page 80.) There were descriptions of the Child's inability to keep up with the pace of the class. (*Id.*) Further, the Child displayed occasional outbursts in class. (*Id.*; HT at page 82.) There was a report from the math teacher that the Child struggled with completion of assignments. (HT at page 81.) He was not performing on grade level. (*Id.*) The teachers strongly felt that the Child could not succeed in inclusive classes. (HT at pages 82 and 113.) The IEP created a document which modified the 2010 IEP. (LEA Exhibits B221 to B253; HT at pages 84, 105.) Throughout the IEP meeting on September 28th, the Mother was provided the opportunity to participate in the process. (HT at page 86.) The IEP team considered her concerns. (*Id.*) Towards the end, according to the Case Manager, the Mother became upset and was obviously not happy with

what was transpiring at the meeting. (HT at page 85.) The Mother and the Special Education Coordinator discussed the Child's disability. (HT at pages 86 and 108.) The Mother became upset. (HT at page 86.) At no time did the Special Education Coordinator raise her voice or act inappropriately towards the Mother. (*Id.*) The Mother raised her voice to the Special Education Coordinator, stating "I'm going to get you" or "I'm going to have your job" or something similar. (HT at page 109.) The Mother was very angry. (*Id.*) The Mother was asked to leave. (HT at page 108.) She left. (HT at page 87.) As a result, the modifications to the 2010 IEP were not signed. (*Id.*) The Child returned to self-contained classes. (HT at page 89.) Since his return to self-contained classes, the Child has made academic progress; in fact, he is excelling. (HT at pages 90, 93-94.) The Case Manager opined that the modifications to the 2010 IEP (LEA Exhibit B221 to B253) would provide the Child FAPE, with the provision that the transition from self-contained classes to inclusive classes be "gradual." (HT at page 114.) While inclusive classes were contemplated (at the Parents' request) in the modifications, the IEP team felt that the Child's best placement, on September 28th, was in self-contained classes. (HT at page 115.) Overall, the strong implication of this expert's opinions was that the gradual process of changing the location of the Child's services would be dictated by the Child's reaction and successful performance and that, at this time, the services provided by the 2010 IEP provided the Child with FAPE. With the exception of the descriptions regarding the Mother's behavior on September 28th, her testimony was undisputed. The Case Manager's testimony was forthright, unbiased, informative and persuasive. Further, her testimony was given great weight because of: (1) her positions as case manager and teacher for the Child; (2) her daily (and extensive) contact with the Child; (3) her commitment (as evidenced by her conduct and statements during the school year)

to the welfare of the Child; (4) her personal knowledge of the Child's needs, strengths and weaknesses; and (5) her objectivity.

The LEA's third witness was the School Psychologist. She testified as an expert witness in school psychology. (HT at page 138.) She was employed as a school psychologist for the LEA. (HT at page 136.) She conducted the Child's recent psychological evaluation, LEA Exhibit C8. (HT at pages 138-139 and 154.) In preparation for the evaluation, she did a classroom observation, spoke with teachers, reviewed the Child's previous psychological evaluation and administered several psychological tests which are referenced in her testimony and evaluation. (HT at pages 139 and 167; LEA Exhibits C1-C7 and C8-C14.) She knew the Child was diagnosed with ADHD.[8] (HT at page 154.) After considering this information, she opined:

> Results of the current assessment suggest borderline to low intellectual ability overall. Verbal comprehension, working memory, and processing speed abilities were assessed to be low. Perceptual reasoning emerged a relative area of strength. Abilities in this area range from average to well below average.
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> Achievement was assessed to be low in reading and mathematics. Performance was more diverse for written and oral language. Average skills were demonstrated for combing [*sic*] sentence, while skills for sentence building and for spelling are below average. Significant difficulties were noted for essay writing. In regard to oral language, overall skills were better developed for listening comprehension than for oral expression.

(LEA Exhibit C13; HT at page 141.) She further opined that the results from both evaluations were similar. (HT at pages 155, 169-170.) Further, the Child's behavior patterns were similar to children with autism. (HT at page 157.) She opined that the Child's current placement in a self-

[8]There was no evidence that this Expert spoke with the Mother or Father or otherwise obtained observations regarding the Child's home life.

contained setting was appropriate. (HT at page 159.) She supported this opinion with the observations that the Child requires the amount of attention available in that setting. (*Id.*) She further opined that placement in the inclusive setting would not be a good placement at this time. (HT at page 166.) However, she did not observe the Child in the inclusive classroom setting. (HT at page 169.) She did not discuss the Child with the general-education or special-education teachers involved in the inclusive setting. (HT at page 168.) Overall, the School Psychologist opined that the report and her opinions provided an accurate reflection of the Child's functioning. (LEA Exhibit C9.) Although the Parents may disagree with some of her findings and methodology, her expert opinions were consistent with the opinions of the other experts. Overall, her testimony was informative and persuasive. However, her testimony was (with all due respect) discounted: (1) given her position with the LEA; (2) she had not discussed the Child with teachers involved in the inclusive setting; (3) her lack of "hands on" daily or weekly contact (with its resulting knowledge) with the Child; and (4) there was no evidence that she obtained information regarding Child from the Parents including the Child's background.

The LEA's last witness was the Special Education Coordinator who was both a fact and expert witness. Her area of expertise was in the area of special education. (HT at page 178.) She based her opinions on the School Psychologists's psychological evaluation (LEA Exhibit C8-C14), the previous psychological evaluation (C1-C7), and teacher observations from inclusion classes including general education teachers. (HT at 202.) She was the LEA's Special Education Coordinator whose function is to oversee special education programs within the schools of the LEA's division. (HT at pages175-176.) She ensures compliance with federal mandates. (*Id.*) She interacts with parents regarding special education. (HT at page 175.) She

trains teachers and develops "special development training programs" for teachers. (HT at page 176.) She was familiar with the Child. (HT at page 180.) According to this witness, she attended the IEP meeting on September 28, 2010, after being contacted by the Mother who was apparently confused about the Child's placement and the modifications. (HT at pages 180-181, 199.) At the meeting, the Mother affirmed her desire that the Child remain in inclusive classes. (HT at pages 181-182.) The remaining members of the team expressed their concerns. (*Id.*) The teachers expressed that the Child had difficulty completing assignments. (*Id.*) The Child exhibited signs of frustration. (*Id.*) The amount of work he was able to produce was so intermittent, the teachers could not assess his level of success. (*Id.*) Many assignments were missing. (*Id.*) While there were days the Child could act appropriately, the Child lacked the necessary skills to succeed in the inclusive setting. (*Id.*) Overall, the team felt that the Child lacked the necessary skills to succeed in the inclusive setting. (HT at page 182.) In response to this information, the Mother became defensive. (*Id.*) She felt that the other members of the team were simply dwelling on the negatives and ignoring the positives. (HT at pages 182-183.) The issue of autism was referenced. (*Id.*) The Mother got angry and raised her voice. (HT at page 182.) The Special Education Coordinator requested the Mother to calm down, explaining that they were trying to place the Child in inclusive classes with the necessary accommodations to ensure his success. (*Id.*) According to the Special Education Coordinator, the Mother explained that she did not want the Child to be placed in a "pigeonhole," rejecting the premise that the Child has autism. (HT at page 188.) Further, the Mother made general statements to the other members of the IEP team that they did not know the Child and that the LEA was not providing the appropriate services. (HT at page 194.) The Special Education Coordinator assured her that

the IEP team was attempting to "problem solve or brain storm together to solve the situation." (HT at pages 188, 195-196.) In response, according to the Special Education Coordinator, the Mother gathered her things and became verbally abusive to the other members of the IEP team. (HT at page 188.) In response, the Special Education Coordinator told the Mother that she was upset and that she could leave. (*Id.*) In fact, the Special Education Coordinator told her to please leave or the school resources officer would escort her from the building. (*Id.* and HT at pages 194-195.) Further, the Mother was told that the remaining members would continue the meeting in her absence. (HT at page 188.) Further, the Mother was told that the LEA would provide the Parents with written notice of what was discussed during the meeting.[9] (*Id.*) No new IEP (or modifications to the 2010 IEP) was signed. (HT at page 189.) As a result, the LEA provided the services required by the 2010 IEP. (*Id.*) Overall, the Mother refused to consider a scenario whereby the Child would return to the self-contained setting even with the promise of a gradual transition. (HT at pages 183, 114-115; LEA Exhibit B221 through B253.) On September 28, 2010, the IEP team members (excluding the Parents) did not believe that the inclusive setting would provide the Child FAPE. (HT at pages 185, 199 and 202.) The Special Education Coordinator opined that the modifications to the 2010 IEP were the IEP team's attempt to address the Parents' desire that the Child be placed in inclusive classrooms. (*Id.*) However, the Special Education Coordinator opined that the self-contained classes, *i.e.*, the 2010 IEP services, were appropriate at this time. (HT at pages 186-187, 199, 201, 204-205.) The Child would receive a significant amount of attention from the teacher and the teacher assistant who could keep the Child focused, implement the reward system and ultimately break down assignments to

[9] *See* Parents Exhibit 2.

meet the Child's needs, in a classroom consisting of six to ten students. (HT at page 187.) The Special Education Coordinator opined that the School Psychologist's findings and opinions were consistent with the opinions of herself and the other educational professionals involved in the September 28th meeting. (HT at page 189.) Further, the least restrictive environment for the Child would be the self-contained classrooms as referenced in the 2010 IEP. (HT at pages 189-190.) In regard to private placement, the Special Education Coordinator opined that she was familiar with the Academy. Further, placement at the Academy would be more restrictive than the academic environment referenced in the 2010 IEP. (HT at page 190.) Further, the services provided under the 2010 IEP are more appropriate than the services available at the Academy. (HT at pages 190-191.) With the exception of the Mother's behavior on September 28th, the Special Education Coordinator's factual testimony was undisputed. In addition, her expert opinions were consistent with the other experts. Overall, the Special Education Coordinator was informative and persuasive. However, her testimony was (with all due respect) somewhat discounted: (1) given her position with the LEA; (2) her lack of "hands on" daily or weekly contact (with its resulting knowledge) with the Child; and (3) her reliance on the evaluation, LEA C8-C14.

The Parents introduced testimony from two witnesses, the Speech Therapist and the Mother.

The Speech Therapist was both a fact and expert witness. Her expertise was in speech therapy. (HT at page 124.) As such, she sees the Child twice a week, thirty minutes each. Her services are administered in a small group in a small classroom with other children who receive speech services. (HT at pages 128-129.) In the inclusive class setting, she works with all of the

Child's teachers. (HT at pages 124 and 132.) Her purpose is to support and promote the Child's social skills such as controlling outbursts, interacting with peers and adults, initiating and maintaining topics. (HT at pages 128 and 134.) She opined that the Child progressed nicely. (HT at page 134.) Her testimony, both as a fact witness and an expert witness, was undisputed. The Speech Therapist's testimony was unbiased, somewhat informative and persuasive.

The Parents' last witness was the Mother. As to the September 28th IEP meeting, she testified she felt disrespected. (HT at page 245.) The altercation occurred while the members waited for the finalization of the modifications to the 2010 IEP, to sign and create a new IEP. (*Id.* and HT at page 264.) The substance of the meeting was over. (*Id.*) At that time, the Special Education Coordinator and the Mother spoke of behavior incidents during a PE class which may force the Child to discontinue with PE. (HT at page 247.) The Mother opined that this would devastate the Child. (*Id.*) The Special Education Coordinator remarked that such behavior was not unusual for children with autism. (HT at page 247.) The Mother became frustrated because she felt that the behavior was caused by the Child's medication as opposed to autism. (HT at pages 246-247.) The Mother hoped that the Child could remain in PE, perhaps using different strategies or exercises. (HT at page 246.) At that point, the Mother felt she needed to leave. (HT at page 248.) She indicated she wanted a psychological evaluation of the Child. (*Id.*) The Special Education Coordinator indicated that the LEA could have her escorted from the school. (*Id.*) She left on her "own." (*Id.*) Afterward, the Mother received notification (Parents' Exhibit 2) from the LEA that, because there was no agreement, the services rendered on the 2010 IEP would remain in place. (HT at page 265.) The Mother described her reasons for wanting the Child in inclusive classes: (1) the Child can socialize with his peers; (2) the Child can model his

behavior on that of his peers; and (3) he can receive some educational benefit. (HT at pages 250-251.) The Child is fourteen years old. (HT at page 252.) According to the Mother, the Child's diagnosis of PDD-NOS (pervasive developmental disorder not otherwise specificed) and ADHD. (*Id.* and HT at page 280.) The Mother disagrees with the placement of the Child under the special education category of autism. (HT at page 253.) Mother agrees that the Child needs special education services, but not to where he is placed in a self-contained environment. (HT at page 253.) At home, the Child is happy, always respectful. (HT at page 254.) He finishes projects and always does his best. (*Id.*) He wants to socialize. (HT at page 255.) Hygiene and related matters are not an issue. (*Id.*) The Child received superior awards for his work in a music ensemble last year. (HT at page 274.) The Child's work product and behavior at home are inconsistent with the concerns expressed by the other members of the IEP team during the September 28th meeting. (HT at pages 255-256.) According to the Mother, the Child's work product and behavior are better at home. (HT at page 256.) As part of her testimony the Mother related her actions regarding the filing of the Due Process Request, consistent with the findings in the Second PreHearing Report. (HT at pages 259, 281-286.) In regard to "stay put" under the IDEA, she related her position that the Child should have remained in inclusive classes because that was what was implemented on the day she filed the Due Process Request. (HT at page 260.) In regard to private placement, the Mother advised that the Academy was a good placement for the Child because of the quality of the classes including technology. (HT at page 262.) Moreover, there is an advocacy program, sort of a mentoring program. (*Id.*) However, the Mother conceded that the Parents first gave the LEA notice of their intention to privately place the Child on November 15, 2010, when the Parents filed their Amended Due Process Request.

(HT at page 261.) On cross examination, the Mother conceded that it was difficult for her and the Father to accept the results of two psychological evaluations, LEA's Exhibits C1-C14. (HT at page 268.) She further conceded that the Child operates below a ninth-grade level. (HT at pages 269-270.) Although the Mother provided opinions, they could not be received as expert testimony. Although unquestionably sincere, the Mother's testimony was not informative or persuasive as to the issues raised in the Amended Due Process Request. Other than the Speech Therapist, no other expert was called on behalf of the Parents. Further, the Parents did not call any witness from the Academy to explain its curriculum or what services would be available to the Child if enrolled.

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 FAPE 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 FAPE; or (2) if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive an educational benefit. Further, the Supreme Court opined "[i]nsofar as a State is required to provide a handicapped child with [FAPE], we hold that this satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. (Rowley, 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. (*See* Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), where 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). In DeVries v. Fairfax County School Bd., 882 F.2d 876, 878 (4th Cir. 1989), the Court recognized the importance of mainstreaming when it opined that "[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act." *In accord* Barnett v. Fairfax County School Bd., 927 F.2d 146, 153 (4th Cir. 1991). 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). Finally, in Arlington County School Board v. Smith, 230 F.Supp.2d 704, 715 (E.D. Va. 2002) the Court reversed the decision of the Hearing Officer on the basis that he made factual findings that were not supported by expert testimony:

> In summary, the preponderance of the record evidence points persuasively to the conclusion that APS's proposed placement of Jane in the Interlude program would provide her with a FAPE because it was "reasonably calculated to enable [her] to receive educational benefit." *See* Rowley, 458 U.S. at 206-07, 102 S. Ct. 3034. The hearing officer's contrary conclusion that Jane would not benefit from the Interlude program finds no support in the record, **as no expert testified to this effect**, and Jane had not yet fully experienced the program. It is apparent that the hearing officer succumbed to the temptation, which exists for judges and hearing officers alike in IDEA cases, to make his own independent judgment as to the best placement for Jane, instead of relying on the record evidence presented in the hearing. This temptation stems from the fact that judges and hearing officers are

> typically parents who are in the habit of making such judgments. Yet, the Supreme Court and Fourth Circuit have admonished hearing officers and reviewing courts alike when they substitute personal opinions or judgments as to proper educational policy, and best placements for the disabled student, in the place of the local educators' expert judgments. *See* Rowley, 458 U.S. at 206, 102 S. Ct. 3034; Hartmann v. Loundon County Bd. Of Educ., 118 F.3d 996, 1000-1001. These courts have also reminded hearing officers and reviewing courts that school districts are not required to provide a disabled child with the best possible education. *See* Rowley, 458 U.S. at 192, 102 S. Ct. 3034. The result reached here is properly deferential to Jane's educators' unanimous determination that the Interlude placement was appropriate. *See also* Hartmann, 118 F.3d at 1001 (holding that "local educators deserve latitude in determining the [IEP] most appropriate for a disabled child") [Emphasis added.]

A review of the applicable law is important to emphasize the restrictions, constraints or limitations placed on hearing officers when deciding IDEA cases in Virginia. Although a child is involved, current law prevents an hearing officer's reviewing evidence as a Virginia district judge must review in a custody matter with the "best interests of the child" standard as described in §20-124.3 of the Virginia Code. Instead, hearing officers must respect the limitations that evidence, especially expert testimony, determine the outcome in IDEA cases as well as respect the Federal directive that IEPs are reviewed with the standard established by Rowley and its progeny, *i.e.*, whether the IEP is reasonably calculated to enable the child to receive some meaningful educational benefit. The difference between the standard established by the "best interests of the child" and the standard established by Rowley (and its progeny) can never be reconciled. Quite frankly, this difference causes a great deal of litigation, cost and heartache.

For the reasons stated below, the appeal is denied.

As to Issue I, the Parents failed to carry the burden of proof that the LEA violated any regulations or procedures when drafting modifications to the 2010 IEP. As to Issue II, the issue is moot, given the findings and rulings in the Second PreHearing Report. As to Issue III, the

overwhelming and undisputed credible evidence, both expert and factual, was that the 2010 IEP provided the Child with FAPE. As to Issue IV, the evidence is overwhelming that the LEA did not violate the "stay put" requirement of the IDEA. Issue V is moot because the Parents failed to carry the burden of proof that the 2010 IEP did not provide the Child with FAPE as well as other issues. Finally, Issue VI is moot insofar as, based on the evidence, no relief can be granted to the Parents. The LEA is identified as the prevailing party.

Specific Issues

I. Whether the LEA Violated the Applicable Regulations and Procedures When Drafting Modifications to the 2010 IEP?

The Parents failed to carry the burden of proof that the LEA violated the applicable regulations and procedures when drafting the modifications to the 2010 IEP. Specifically, there was insufficient evidence that the LEA failed to give the Parents proper notice or otherwise prohibited the Parents from meaningfully participating in the IEP process. While there was undisputed evidence of a verbal altercation toward the end of the IEP meeting on September 28, 2010, the Mother conceded that she left the meeting voluntarily. (HT at page 248.) Despite this negative event, the overwhelming evidence was that the members of the IEP team (including the Mother) throughout the modification process and several IEP meetings, acted professionally and with the goal to provide the Child with FAPE. (*See, e.g.*, HT at pages 80-86, 181-182 as well as the positive examples of the positive behaviors and efforts of the Department Chair and Case Manager found throughout their respective testimonies and the transcript.)

II. Whether the LEA Followed the Proper Procedures after the Parents' Initial Filing of the Due Process Request?

This issue is moot. The issues raised and evidence presented at the Hearing were identical to the issues and evidence raised at the second PreHearing conference. As a result, the

findings and rulings contained in the Second PreHearing Report stand. Insofar as this may be a request to reconsider, that request is denied.

III. Whether the 2010 IEP Should Be Modified to Include Inclusive Classes and Additional Speech Services to Provide the Child FAPE?

With the exception of the Mother's testimony, the overwhelming and undisputed evidence from all the other witnesses (both fact and expert) was that the 2010 IEP provides the Child FAPE as required by Rowley and its progeny. (*See* the Case Manager's testimony, HT at pages 90, 93-94 and 114-115; Special Education Coordinator's testimony, HT at pages 186-187, 199, 201 and 204-205; the School Psychologist's testimony, HT at pages 159 and 166; and, the Speech Therapist's testimony, HT at page 134.) Their opinions are given great weight. *See* Rowley, 458 U.S. at 206 wherein the Supreme Court stated that such educational decisions of these professionals are given "due weight." *See also* Hartman v. Loudoun County Board of Education, 118 F.3d 996, 1001 (4th Cir. 1997) *quoting* Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 105 (4th Cir. 1991) wherein the Court opined that such decisions were "*prima facia*" correct. While the Mother expressed her reasons as to why inclusion classes would benefit the Child (HT at pages 250-251) or that the Child possessed attributes evidently only seen at home (HT at page 254-255), the Parents failed to introduce any evidence (expert or otherwise) as to why the services rendered under the 2010 IEP were deficient or why inclusion classes were necessary to provide the Child FAPE. In addition, there was overwhelming evidence that the Child was not receiving material educational benefit in the inclusion classes.[10] (HT at pages 43,

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[10] When determining whether a special education student should be placed in general education or inclusion classes, the Court in Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H. by Holland, 20 IDELR 812 (9th Cir. 1994) provided four factors to be considered;

(1) a comparison between the educational benefits available to student between the inclusion and self-contained classes;
(2) the nonacademic benefits of interaction with children who are not disabled;
(3) the effect of the disabled child's presence on the teacher and other children in the classroom; and
(4) the cost of mainstreaming, i.e, is it cost prohibitive.

In this case, the Parents introduced no evidence on these factors. Instead, the only evidence of these factors was from the LEA regarding factor (3) that the Child's presence was a negative influence on the teacher and other children. (HT at pages 43 and 181-182.)

8–82 and 113, 166, 185, 199 and 202.) Consequently, using the Rowley standard, no modifications are required.[11]

IV. Whether the LEA Violated the "Stay Put" Requirement of the IDEA?

"A "stay put" placement is the student's placement contained in her most recently agreed-upon IEP." *See* 20 U.S.C. 1415(j) and 34 CFR 300.518. *See also* Arlington County School, 230 F. Supp. at 716 FN9 interpreting 80VAC20-80-76.E. which has been recodified as 8VAC20-81-210J1. *In accord* Thomas v. Cincinnati Bd. of Educ., 17 IDELR 113 (17 EHLR 113) (6th Cir. 1990). As result, the LEA possessed the duty to implement the services required by the 2010 IEP when the Parents failed to consent to its modifications on September 28, 2010.

V. Whether the Parents Provided Proper Notice of Their Intention to Place the Child in Private Placement?

The Parents conceded that they first gave the LEA notice of private placement *via* the Amended Due Process Request on November 15, 2010. Such notice is improper. *See* 8VAC20-81-150. In addition, the Parents failed to introduce sufficient evidence that services under the 2010 IEP failed to provide the Child with FAPE. IDEA does not require the LEA to reimburse the Parents for a unilateral placement, if the LEA made an "appropriate educational program" which is reasonably calculated to offer a child some educational benefit." Rowley, 458 U.S. at 206-207. Finally, the Parents failed to introduce persuasive evidence that placement at the Academy would provide the Child FAPE. As result, Parents failed to carry the burden of proof as to why placement at the Academy would provide the Child FAPE or otherwise require the LEA to be liable for the cost of such private placement.

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[11] While the modifications to the 2010 IEP (LEA Exhibit 221-253) may have provided the Child FAPE with gradual implementation (as testified to by the Case Manager (HT at page 114), the Parents and LEA have refused to consent to its implementation since its creation on September 28, 2010. Further, at the Hearing, the Parties' respective position was not to accept these modifications. (HT at pages 96 and 101-106.) As result, no review of these modifications was requested or required.

VI. If the Parents Prevail, What Relief Should Be Granted?

A. Relief Regarding Procedural Issues (Including the "Stay Put" IDEA Requirements and Notice Issues);

B. Relief Regarding IEP Modifications;

C. Relief Regarding Private Placement.

Based on the above findings of fact and conclusions of law, no relief is granted.

RELIEF GRANTED:

None.

CONCLUSION

The Parents failed to introduce sufficient evidence to carry the burden of proof to grant the relief requested in their Due Process Request.

APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS

1. **Appeal**. Pursuant to 8 VAC 21-81-T and §22.214 D of the Virginia Code, 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

January 31, 2011
Date

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

NOTICE OF SERVICE

Public Schools **School Division**	Mr. & Mrs. **Name of Parent**
Division Superintendent	**Name of Child**
LaRana J. Owens, Esquire **Counsel Representing LEA**	None **Counsel Representing the Parent/Child**
Robert J. Hartsoe, Esquire **Hearing Officer**	Parent /Child **Party Initiating Hearing**

CERTIFICATE OF SERVICE

I certify that on this 31st day of January, 2011, a true and accurate copy of the Final Decision was mailed, *via* First-Class, postage prepaid mail, to:

Mr. & Mrs.

, Virginia

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