

VIRGINIA DEPARTMENT OF EDUCATION DIVISION OF SPECIAL EDUCATION 7 2008
 AND STUDENT SERVICES OFFICE OF DISPUTE RESOLUTION AND
 ADMINISTRATIVE SERVICES **Dispute Resolution & Administrative Services**

CASE CLOSURE REPORT

Public Schools

School Division	Name of Parent
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Division Superintendent	Name of Child
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John Cafferky

Joan Proper

Counsel Representing LEA

Counsel Representing Parent

Alan Dockterman

Parent

Hearing Officer

Party Initiating Hearing

Hearing Officer's Determination of Issues: FAPE offered for 2007-2008 and 2008-2009 school years and for extended school year services for summers of 2007 and 2008, as IEP reasonably calculated to enable student to receive benefits under *Rowley* standard; any failures in implementation not so substantial as to deny FAPE; and proposed IEP for 2009-2010 reasonably calculated to enable student to receive benefits under *Rowley* standard.

Hearing Officer's Order and Outcome of Hearing: School District prevailing party. See decision of 7/15/09.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing.

7-14-09

 Date



 Alan Dockterman

Received

JUL 17 2009

Dispute Resolution &
Administrative Services

DUE PROCESS EDUCATIONAL APPEAL

)
)
Appellant)
)
) In re:
)
PUBLIC SCHOOLS)
Respondent)

DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

Public Schools received a request for a due process hearing from Joan Heishman Proper, attorney for , the father of , on May 1, 2009. He requested a due process hearing, challenging, *inter alia*, the Individualized Education Plans (IEP) prepared for for the 2007-2008 and 2008-2009 school years both as to terms and implementation on the grounds that a free and appropriate education (FAPE) had not been provided because the school district had not addressed 's behavior needs, nor had he made meaningful educational progress during this period.

The parent also contended that the district had not set forth appropriate goals and services during those school years. With regard to the proposed placement and IEP for the 2009-2010 school year, he asserted PS was not offering FAPE. (See, generally, May 1, 2009 letter from Ms. Proper).

I was appointed as the hearing officer from a list supplied by the Supreme Court of the Commonwealth of Virginia and certified by the Virginia Department of Education. John F. Cafferky, Esq. and Donald Y. Yu, Esq. represented PS.

On May 13, 2009, a pre-hearing teleconference was conducted. The order of witnesses, issues in the appeal, exploration of settlement, and procedures for the conduct of the hearing were among the matters discussed. (See letter of May 14, 2009). We also changed the commencement date of the hearing from June 22, 2009 to June 23, 2009 and scheduled three consecutive hearing days instead of two days. A second prehearing teleconference took place on June 5, 2009.

The school district responded to the appeal by arguing that the student had made sufficient progress and that the IEP offered FAPE for the 2007-2008 and 2008-2009 school years. For the 2009-2010 school year, it contended that the proposed placement and IEP offered FAPE.

The school system also contended that the complaint was insufficient because the parent has failed to meet the requirements of 20 U.S.C. §1415(b)(7)(A) in that the complaint failed to include a "proposed resolution of the problem to the extent known and available to the party at the time," and because the parent appeared to have raised causes of action outside the IDEA claims without providing sufficient notice or information other than statutory language or boilerplate conclusory language. See letter of May 11, 2009, p. 11.

I rejected the district's arguments, finding that the parent had proposed a resolution to the extent known and

available and that the challenge to the sufficiency of the due process request predicated on the additional claims raised by the parent would be premature and, regardless, beyond the scope of permissible challenges under the statute. See letter of May 14, 2009.

The hearing began on June 23, 2009 in the located at , VA , continued through June 25, 2009 and then resumed on July 2, 2009 for the fourth and final day of the hearing. Both parents attended the hearing, although Ms. Proper represented only the father. The mother, , stated that she concurred in the position of the father and in the relief he seeks. (TR-IV-1328-1329).

The parties elected to submit post hearing and reply briefs in lieu of closing arguments at the hearing. Pursuant to agreement of the parties during the prehearing teleconference, the district cooperated with the parents in providing information regarding private placement and assisted in providing access to such placements.

Ms. Proper elaborated on the scope of the relief sought should the parent prevail by letter of June 2, 2009. The father seeks private placement at one of three identified schools and requests that a new IEP be drafted. If there is a determination that FAPE had not been provided the last two years, but the proposed placement is appropriate, then the father requests compensatory services in the form of a one year private placement. If the proposed placement is found inappropriate and private placement is ordered, then the relief requested is up to three hours a week of private speech and language therapy for three years.

I issued subpoenas without opposing counsel objection and the parties filed their exhibits and list of witnesses prior to the hearing. Nineteen witnesses testified at the hearing.

References in this Decision refer to the transcript for each of the four days of the proceedings. (TR-I-IV). The parent filed thirty-eight exhibits and the district filed one hundred forty exhibits. Closing briefs were submitted on July 11, 2009 and reply briefs on July 13, 2009. References to those exhibits are identified as those from the school district as (SD) and those from the parent as (P).

II. FINDINGS OF FACT

The following represents findings of fact based upon a preponderance of evidence derived from the testimony of the witnesses and the documents admitted into evidence. Additional findings will be found in other portions of this decision.

A. Factual Background Prior to Preparation of 2007 IEP

was born on July 21, . During his second year, he was evaluated for early intervention and received services for delays in speech and motor skills. By the time he entered preschool, he was assessed as a child with autism, functioning within the mildly mentally retarded range.

His parents divorced in 2005 and they share custody of him and his sister, . (SD-31). The student lived in and attended kindergarten and first

grade there. In November of 2005, the mother moved into the current school district and her son began school at School. (TR-III-867-869).

As a grader, he was placed in a self-contained classroom which included his sister. The placement consisted of an enhanced program employing Applied Behavior Analysis (ABA) methodology, where the ratio was 2:1 student/staff with an aide assigned to the student. (SD-32). An IEP meeting was held on September 26, 2005, at which the parents agreed to its contents. The parents approved in writing the IEP which provided for twenty eight hours of autism service, one hour of occupational therapy (OT), and one hour of speech language therapy per week. (SD-7). It noted that his behavior was often aggressive and out of control. He was able to match shapes and colors. Based on the Vineland Adaptive Behavior Scales, he was found to have a score of 57, which was indicative of a low level of functioning. (SD-31).

Another IEP was developed on January 23, 2006, which reflected the student's deteriorating behavior that month and provided for extended school year services (ESY). (SD.8). Those summer services were further delineated in an IEP executed on June 7, 2006. The team believed that his aggressive behaviors were interfering with his ability to learn and an interruption of services during the summer would prevent him from progressing the following school year. (SD-9).

He attended during the summer of 2006, where his teacher reported that he did not exhibit the inappropriate behaviors with the same frequency or intensity as he had at . (P-11; TRI-290-294).

On January 23, 2007, an IEP was prepared for the following twelve months. Autism services totaling 105.4 hours per month were set forth in the IEP. For related services, it provided for four hours of occupational therapy, four hours of speech language, and three and one-third hours each of adaptive physical education and music therapy per month. The group noted that the nature of the student's disability required him to be instructed in a specialized program with a modified curriculum. His mother consented to the contents of the IEP. On the same date, the behavior resource teacher prepared a Behavior Intervention Plan (BIP). (SD-12).

B. Development of the June 17, 2007 IEP

By the end of the 2006-2007 school year, the staff determined that the student was ready to transition to a less restrictive program in a general education building since his behaviors had become more manageable. The behavior resource teacher observed a number of placements and the staff finally decided upon

School. officials provided support to the school in the fall to assist in the transition. (TR-I-84-88, 300-303).

The IEP team convened on June 12, 2007 to prepare an IEP for the student for services at . The parents accepted the June 2007 IEP and did not raise any concern regarding the goals, objectives, or enumeration of baseline data. (TR-IV-1187-1190). The mother testified that she and the father agreed to its terms and she signed it. (TR-II-632, 834-836).

C. The student's education at _____.

The student's teacher at _____ has taught him since he transferred in September of 2007. For the past five years, she has been exclusively teaching children with autism and was qualified as an expert witness in the field of special education instruction. (TR-IV-1040-1043).

She is not a board certified behavioral analyst (BCBA), but implements the program with the assistance of the ABA coach, the ABA program manager, and private consultants. She noted that special education teachers are generally the individuals hired to teach in ABA autism enhanced programs. She has taken graduate level courses in behavioral management and receives monthly training. Her instructional assistants receive intensive training on behavioral issues and work with ABA coaches. (TR-IV-1202-1205).

Initially the transition to _____ proceeded smoothly, but after a few weeks the student began displaying some of the negative behaviors he had had at _____.

The student encountered considerable difficulty in adjusting to the new school during the first semester of the 2007-2008 school year. The student was still under the BIP from _____, which primarily focused on giggling. It was not revised because the more negative behaviors had begun to subside by December and remained under control for the remainder of the school year. She communicated with the parents through daily logs during this period. (TR-IV-1049-1051, 1055, 1059-1060, 1166-1171, 1183, 1185).

During the first six months, _____'s behavior resource teacher, _____, visited _____ on five to ten occasions to consult on his behaviors. (TR-I-306-312, 327-328, 306-312; TR-IV-1049-1050). In the first three months, _____ staff also consulted with _____, an inclusive resource teacher, and the ABA coach,

(TR-I-203-208; TRII-412). The coach visited the student one to two times a week, observing that he engaged in silly and some aggressive behavior which escalated through the fall of 2007. (TR-I-205-206; TR-II-412-413). The behavior resource teacher agreed that the BIP that had been developed at _____ was no longer applicable given the increasingly aggressive behaviors. (TR-I-337-338).

For the second semester, the teacher believed that the student's behaviors improved considerable and he was doing well at school. (TR-IV-1066-1067).

The IEP team convened on June 5, 2008 and determined that the student had shown great improvements in his behavior during the 2007-2008 school year, and the consensus was that he should continue at _____. The mother signed the June 5, 2008 IEP and agreed to its terms, even though, she testified, she had requested additional speech therapy at IEPs at least yearly. The response of the school members had always been that it was incorporated in the everyday program. (TR-III-845-847, 860-861; TR-IV-1066-1067). The teacher disagreed with the mother and testified that she did not raise any concern regarding the goals, objectives, or the enumeration of baseline data. Nor did she object to or request any additions to the IEP goals. (TR-IV-1189-1190).

The following year began smoothly, but in October of 2008 when the student began exhibiting poor behaviors, the school officials attempted the intervention strategies that had worked the prior year. The ABA coach and the behaviorist from became involved. (TR-II-416-417; TR-IV-1068-1070)

The ABA coach is an ABA resource teacher who services and five other schools. Her duties include providing direct support and training to teachers in the ABA classrooms. (TR-II-445). Based on her experience and training, she was certified as an expert in the field of behavioral analysis including ABA. (TR-II-365-376).

She began working closely with the student in November of 2008, when staff began focusing on interventions. The school district developed various data collection sheets, known as the ABCs of data. The ABCs are the antecedent, which is what occurred before the behavior, the behavior itself, and the consequence, which is the staff response or what happened after behavior. (TR-II-419; SD-62, 68, 69). They sought to use reinforcement to change his challenging behaviors, looking at this data that was being collected daily and reviewing the environmental or instructional matters which immediately preceded the behavior. She worked with the student two to three times a week. (TR-II-377-382, 416-417).

There were a number of incident reports stating that in November and December of 2008 he was removing his clothing, destroying property, attempting to run away from staff, and striking, biting, and kicking teachers and peers. (TR-II-416-417, 510-512; SD-6). School officials

notified the parents of only some of the instances of aggressive behavior because, according to the testimony of the principal, , the father told the teacher and her on October 30, 2007 that he did not wish to be informed of each instance of poor behavior and that the district needed to manage the problem. (TR-II-518-520).

The APE teacher testified that the APE goal of participation in gross motor activities with a reduction of adult assistance was a reasonable short term objective. By November of 2008, the student's behavior had deteriorated so much that he could no longer participate in an inclusive setting. (TR-III-907-910).

For the 2008-2009 school year, the teacher testified that the related service providers worked with her in preparing quarterly progress notes on the student's progress under the short term objectives. (SD-72, P.20; TR-IV-1081-1082). Through cross examination, parent's counsel was able to establish that some of the measurements on the data sheets were erroneous and that the quarter progress notes indicated progress where no work was done on the objective that quarter. The teacher explained that what was meant was that they were engaged on the activities preparatory to work on the objective. (TR-IV-1140-1145).

The teacher explained that during the last year, the class size ranged from five to six children, taught by her and two to three instructional assistants. According to the ABA coach, the student received individual instruction nearly all the time during a school day, except for one to two small group times and lunch time. As the school year ended, the setting became more two-to-one. The class was

assisted with an aide beginning in December of 2008 who worked primarily with the student. (TR-II-431-432; TR-IV-1044-1045).

The teacher testified that the student was receiving approximately fifteen hours of intensive ABA, either on a one-to-one or two-to-one basis. The school system does not implement Applied Behavioral Language Evaluation System (ABBLES). She stated they used ABA methodology continuously. (TR-IV-1193, 1200-1201).

The teacher was asked questions regarding the IEP for the 2008-2009 school year. She acknowledged that the baseline was missing from many of short term objectives. (TR-IV-1114-1115, 1118-1123). She explained that even if the June 2008 IEP lacked baseline data, she determined progress on goals by classroom observation and by the data taken from it. (TR-IV-1190-1191). The therapist said that baseline information missing from the IEP would be in the data sheets. (TR-II-602-603).

, who coordinates and manages support and services for the ABA enhanced autism program, was qualified as an expert witness in the field of childhood special education and ABA, based on her prior experience as an ABA coach, ABA therapist, and special education teacher of autism classes. She is the ABA program manager. (TR-II-444-447).

In her review of the data, she found that there was a sharp increase in the student's aggression toward himself, his peers, and staff and in episodes of running away in November and December of 2008. That behavior decreased in frequency in the February-April timeframe, which she

attributed to successful intervention by school staff. (TR-II-449-456).

On cross examination, she acknowledged that the multi purpose data sheets beginning in September of 2008 often lacked antecedent behavior information and specific information about the kind of objectionable behavior. However, she explained that patterns emerged from which antecedents were ascertained, and, in some instances, the narrative revealed the antecedent. In March 11, 2009, the district began utilizing a form with more informative and descriptive data. (P-25, p.76; TR-II-468-470, 489-495).

The school district offered the testimony of Ms.

, one of its pyramid resource specialists. She acted as a liaison between its office of special education and eight elementary schools, providing support to the schools on instructional or behavioral issue and assisting in IEP development and implementation. She had considerable experience and training with students with autism and mental retardation. (TR-I-120-127).

She characterized an ABA enhanced classroom as one that uses ABA techniques in a setting of two-to-one, designed for students with more severe autistic needs. (TR-I-203-204; 273-274).

During the student's time at , staff kept nearly daily logs of his behaviors. Introduced into the record were behavior sheets for the 2007-2008 school year (SD.62), multi purpose data sheets showing annotating cold probe data on his IEP goals (SD-68; P.19), and records of aggression for the past school year (SD-69). According to the teacher, the aggression records were modified in March of 2009 to provide more information on the antecedents of

the behavior (TR-IV-1078-1080). She also provided examples of daily communication notes which were sent home to the parents during the 2008-2009 school year. (TR-IV-1080).

The program manager reviewed the multi purpose data sheets in determining whether the student made progress. (TR-II-489). The sheets listed a short term objective which was part of a long term goal and where data was kept which stated the progress as positive or negative on days where the teacher recorded the student could or could not do the objective. For some days, no recordation was made; for some objectives, there were no measurements at all, perhaps because the student was not ready to work on those targets. Nevertheless, she maintained, in some instances, the progress reports indicated that the student had made progress. (P-19; TR-II-477-485).

The student had ACDs for both years. (TR-IV-1114, 1125, 1137-1138, 1161-1162). The 2007-2008 IEP erroneously did not have ACD marked, but the student used one and he was on the district's caseload. (TR-IV-1126, 1128-1130). The therapist testified that his ACD in the 2008-2009 school year was PECs, a picture exchange program. (TR-II-610-611). The student has been on the Assistive Technology Services (ATS) caseload, even though the proposed IEP stated that the team will consult with ATS. (TR-II-611). If he were to go to , the therapist expected to convey information regarding his communication needs even if the IEP were unclear. (TR-II-585-590).

, the communication disorder supervisor for the District, demonstrated the operation of a number of ACDs, including PECs, Tech/Talk, Tech/Speak, and DynaMyte. She testified that the devices could be used in any of

schools in the district and the system had the capacity to enable staff to use the ACD for the period set forth in a given student's IEP. (TR-IV-1311-1328).

The teacher explained that the district administered the Brigance Diagnostic Inventory of Early Development to the student. It is a criterion referenced test in which the behavior or skill is given a number corresponding with an age level. It was given in January of 2007, September of 2007 and September of 2008. For example, it appeared he improved in some of the gross motor and fine motor skills between the first and second periods, although his scores generally did not improve in the final test. Overall, I find that the student showed some improvement during the first one-half year period in some of the categories and did not regress in the second period. (SD-38; TR-IV-1056-1060, 1062-1063, 1199-1200).

The teacher related that beginning in March of 2009, three people had been sent to the hospital because of the student's attacks. (TR-IV-1174-1175). Although incident reports were prepared, they were not sent home because the father had given instructions not to be notified. (TR-IV-1177). The student also had to be restrained physically in order to move him to another location. The father told staff to sit on the student if necessary to deal with his disruptions. (TR-IV-1178-1180). The teacher did not believe that was an appropriate placement in the late fall of 2008, but did not request transfer to another school. (TR-IV-1174-1181).

The teacher testified that the student had made progress. For example, on his reading goal his receptive identification of words had improved during the first

quarter, and he began using a reading program. For the second quarter, progress could not be determined because of the impact of his behavior. For the rest of the year, his progress was sporadic. (TR-IV-1081-1084). The progress reports for the last two years were sent home. (TR-IV-1109-1111).

The ABA coach, who was qualified as an expert in the field of behavioral analysis and had been certified as an associate behavior analyst, testified that the student had made significant gains from 2007 to the present time in receptive language. He is better at sitting at a table, working on skills and following instructions. (TR-II-366-368, 440). The program manager reviewed his skill acquisition data and concluded that he made progress in his academic and IEP oriented goals without regression. He was showing emerging skills, including reading sight words and survival signs, copying shapes, receptively identifying numbers, and progressing with functional communication skills. (TR-II-457-459).

The school speech therapist testified concerning the student's improvement in his communication skills. (TR-II-551, 558-561). The APE teacher was unable to conclude whether he made any progress during the last year. (TR-III-891-892).

Dr. Ronald S. Federici, a Neuropsychologist/Clinical Psychopharmacologist, testified on behalf of the parent by telephone. He had over twenty years of experience in performing neuropsychiatric evaluations of children with significant neurodevelopmental and emotional difficulties. (P-1A).

The neuropsychologist had performed neuropsychological evaluations of the student in March of 2005 and four years later in March of 2009. In the earlier evaluation, he found that he had a moderate to severe autistic spectrum disorder, without functional language, and with severe neurological impairments. He had gross impairments in all areas of speech, language, motor, sensory, and learning aptitudes. (P-1B; TR-I-135-136).

He compared the scores from the Leiter International Performance Scale conducted during each evaluation. He uses this assessment because he feels it provides better information for lower functioning children because it is less language driven and more culture free than other measures. (TR-I-134-136, 168). The scores showed deterioration in his overall intellectual-cognitive functioning. (P-B). In comparing his skill levels, he opined that the level was about the same, which meant that it had dropped since four years had passed. There had been a lack of language skill development and more evidence of confusion and neurological difficulties. In terms of speech and language, he found his skills were the same or had regressed. Further, exhibited far more mood dysfunction with unpredictable and impulsive behavior. (P-1C, p.15; TRI-139-140, 158, 169-170).

He concluded that although he would expect at least and 25% to 40% improvement in language and speech given the student's level of autism and developmental disabilities, he had not made any progress in the four year period and had likely regressed. (P-1C, p.15; TR-I-139-141, 158).

The psychologist attributed the stagnation to inadequate intervention strategies rather than the

student's disabilities. He believed he could develop better communicative skills and certainly could manifest better behavior by a program which utilizes full-time, formal ABA which includes ABLES, a verbal behavioral therapy program, modified sign language instruction, and augmented communication strategies such as the use of PECs. (P-1C, pp.15-16; TR-I-153-155). He would also need relationship development intervention (RDI), to address his volatile and aggressive behaviors. (TR-I-155).

He explained that ABLES is a tiered language learning model, an entire program involving books and catalogues and various manipulatives. The student advances from identification, to general concepts, to general sounds, to consonant and vowel sounds, to conjugation, and even to sentence structure. Data is charted on a computer system which provides a complete record of improvement or regression. (TR-I-181-185).

The mother testified that her son learned no new skills during his two years at . She unsuccessfully requested that pictures used in signing be sent home. ACDs came home in the second year, but not in the first. She had not been informed that his behaviors were so serious. She received only some of the incident reports, and the daily logs were coming home sporadically. She did not receive all the progress reports for the 2007-2008 school year. (TR-III-807-825, 830, 840-841). The mother testified that her son had acquired new skills from the efforts of his private therapists. (TR-III-830-832). On cross examination, the mother agreed that she would often speak to the teacher about her son when she dropped off or picked up her son. (TR-III-837-838).

D. Proposed IEP for 2009-2010 School Year

Another IEP meeting was held on October 9, 2008 because the student's re-evaluation was due. The school therapist testified that the goals and services remained the same in the June 2008 and October 2008 IEPs. (TR-II-637-638). The OT acknowledged that the October IEP lacked baseline information in the PLOP, though the special education teacher would have that information through her data collection. (P-16; TR-III-950-954).

The APE teacher assisted in drafting the goals for the IEP. In the short term objective section of the APE goal, she explained that the objective was to reduce the amount of adult assistance the student needed to perform the activity. She acknowledged that the objective was unclear. (TR-III-882, 886-888).

The mother was unable to attend. She was contacted by telephone from the meeting and she asked that the IEP be sent to her for consideration and signature. She testified that she signed despite issues with its terms because of a note from the teacher stating that she must sign in order to continue her son's services. She did not know where the note was. She was also told that her issues could be resolved. She was not aware of any other potential placements for her son. (SD-17; TR-III-848-851, 856-858; TR-IV-1070-1072).

The teacher denied ever telling the mother that services would be denied if the IEP were not signed. When not signed by the parents, she noted that the prior IEP

would have remained in effect. (TR-IV-1198). The goals did not change from the June IEP. (TR-IV-1136).

On December 11, 2008, the IEP team reconvened. The father expressed his disagreement with the proposed goals. The group met again on January 12, 2009 at which time they continued to discuss the goals which had been revised but reached no agreement with the parents. (SD-19, 20; TR-I-207-208, 247; TR-II-565-566; TR-IV-1073-1074, 1076).

On April 14, 2009, the team reconvened again and discussed physical therapy services and speech and language goals and placement. (TR-I-214-215; TR-II-566-568; SD-23). The team discussed various placements available through the district such as the current school, and private placement. (SD-25, p.14). The consensus of the school representatives on the team was that the student had been successful at and had made progress there; thus, it would be the best placement to work on his behaviors so that he could access the academic curriculum again. (TR-I-215-216). The IEP stated that the school officials believed would be appropriate because its facility had few students and a high level of support was available to address the student's behavioral issues. (SD-25, p. 14; TR-I-216-217).

The resource specialist shared in that assessment based on data sheets and summaries from which showed he had been successful at and had made some progress on his goals. (TR-I-220-223). She testified that given the data she had reviewed, the level of service at , the small structure of the building and program and the low teacher-student ratio, it would be an appropriate placement

which would meet his needs for behavioral intervention for 2009-2010 school year. (TR-I-316-317, 321).

On April 29, 2009, the team met again, where they completed the IEP goals, the Functional Behavioral Assessment (FBA) and the BIP. They also reviewed the report of the student's neuropsychologist. The team modified the speech and language goals based on suggestions of the parent. The team wanted the student to move toward being more spontaneous in initiating communication instead of having to waiting for an adult to direct him to the next activity. They re-evaluated the student and found that he should also be identified as eligible for special education on the additional bases of mental retardation and multiple disabilities. (SB.5; TRI-212-214). The resource specialist reported that there was general consensus on the goals at this meeting.

The school speech and language therapist testified that she was quite familiar with because she had worked there as a secondary placement for two years. The primary therapist has the same qualifications as she does. (TR-II-571-573). She recommended four hours a month at

. She expected that the therapist would provide consultation and supplement the services of the special education teacher so that she would use that expertise to adjust and mold the activities within the full classroom day. She opined that the goals and objectives would enable the student to educationally progress in the area of communication and could be implemented at . (TR-II-575).

In her view, the student would benefit from the smaller ratio than existed at and the presence

of professionals with training to deal with his aggressive behaviors. (TR-II-571-576). She would expect to consult with a new therapist should the student attend to provide information and would forward her anecdotal notes. (TR-II-635-636).

The special education teacher agreed with the consensus of the school system members at the IEP that the student could be appropriately placed at because he had once been successful there, staff understood his behaviors, a behaviorist and psychologist were on site to quickly resolve issues, and he was able to work on the same academic skills as at . (TR-IV-1086-1087, 1157-1159).

Under the proposed IEP for the 2009-2010 school year, the resource specialist offered the opinion that the student could benefit educationally, and it would allow him to work on his behaviors and make academic progress. (TR-I-223-225).

The school speech language pathologist, who worked part-time at for the first two years with the school district, believed that the goals of the proposed IEP could be met at . The student would benefit and progress educationally from being in a small ratio classroom, with trained professionals able to deal with his more aggressive behaviors. (TR-II-571, 574-576). Although the speech and language services are four hours a week, the expertise of the speech and language teacher helps the special education teacher to adjust and mold and have activities for a full classroom day. (TR-II-573-574; SD-67). At neither of these meetings did either parent propose a particular private day school. (TR-I-226), although a representative from the

district's contract services department discussed possible private placements at the first meeting. (TR-I-276-277, 280-282).

The occupational therapist testified that neither parent requested additional OT hours at either of the two IEP meetings in April of this year. She was comfortable with the proposed two hours of OT a month, given the effort to reach accommodation with the parents and the IEP team. (TR-III-958-959, 970-972). She also stated that the student could get OT as a related service at . (TR-III-972).

The private supervisory private therapist reviewed the student's IEP for the past two years. She did not believe that four hours of speech and language services was adequate given his inability to communicate. At the IEP meetings, she recommended increasing the time as much as possible since four hours was inadequate. The school officials responded that the service was provided in the classroom and that a speech and language pathologist was not necessary to implement his goals. She disagreed with their position, stating that the teacher would not likely have the training to do so. (TR-IV-1238-1239, 1278, 1289-1292). It was her opinion that the student needed two-three hours a day of speech and language instruction with a one-to-one teaching ratio. She asserted that one-to-one is necessary because he needed to catch up from the prior lack of instruction and because he was easily distracted. (TR-IV-1247). She also testified that the student would not learn to communicate with only four hours of speech and language therapy a month. (TR-IV-1285-1286). She thought that a special education teacher who was not a BCBA could

not teach the ABA program without extensive experience. (TR-IV-1302-1303).

At the IEP meetings, she unsuccessfully recommended increasing PT and OT services because of his severe limb apraxia and the gross motor and fine apraxias. She said that the staff informed her that they were working on his motor skills but without progress. (TR-IV-1256-1258, 1277-1278). She did not specify a certain number of hours of increased services because the IEP team does not allow it and would not have been open to the suggestion. (TR-IV-1277-1278, 1291-1292). She admitted that she had not talked to any of the student's therapists except the one for the past school year or reviewed the clinical notes. (TR-IV-1296-1297).

The APE teacher testified that the reduction in APE hours on the IEP from four to three and one-half was a mistake. She was unable to answer whether he made any progress during the year and stated that his skills remained the same from June 5, 2008 to April of 2009. She believed that she had recommended four hours of APE and that the goal was appropriate and could be implemented at

. (TR-III-890-892, 917-919, 922). She stated that the IEP team added physical education goals at the request of the father, but she did not think learning to play particular sports was an appropriate goal because the student needed to develop lead-up skills first and an accumulation of skill were necessary. (TR-III-913-914, 926-927).

The APE teacher conceded that a new teacher would be unable to determine from the proposed IEP whether the student could perform such activities as throwing a ball or

hitting an object. (TR-III-897). She explained, however, that she prepares anecdotal notes from the student's sessions which are part of the educational file that is transferred with him to new teachers. (TR-III-901-902).

The private psychologist reviewed the proposed IEP for 2009-2010 school year and concluded that the student would not make progress under it. It lacked specific instructional sets and personnel who are board certified in behavioral analysis and verbal behavior therapy or RDI. Nor did it contain ABA goals, or state how the ABLES program would be begun or implemented. (TR-I-155-156).

He strongly recommended that the student be considered for a full ABA program with discrete trial training. In his opinion, educators need to intensify the use of PECs, as well employ augmented communication strategies such as the Dynovox type of programs. He also believed that sign language techniques could be beneficial to improve his communication and interactive skills. (P-1B).

In reply to counsel for the school district's questions, the psychologist admitted he had not participated in any of the IEPs, observed the student in any classrooms, or discussed him with any of his teachers. He had reviewed numerous documents, including written notes and comments from teachers. (TR-I-162-163, 167).

When his credentials were questioned, he stated he had never been a teacher but was a licensed school psychologist who had taught teachers at the university level, had taught speech and language therapists, and had the credential of diplomate in behavior analysis which was higher than that of a BCBA. (TR-I-164-166).

He had limited familiarity with the school district's program or the qualifications of the personnel administering it but assumed that staff was not trained in ABBLES, verbal behavioral therapy, or RDI. (TR-I-185-190).

The behavior resource teacher from , who is a BCBA and was qualified as an expert in the field of behavior analysis, did not agree with certain conclusions from the neuropsychologist's report. She did not agree that the student needed twenty to thirty hours of intensive ABA. Rather she maintained tht he needed a small structured program with discrete trial teaching but not for extended periods of time. (TR-I-284-287, 315, 326-327).

The mother testified that school speech and language specialist said her son did not need more therapy because he received it in the everyday setting and didn't need one-to-one therapy. She has never suggested a particular private placement at an IEP meeting. (TR-III-861, 864-866).

The mother visited recently and met with the assistant principal there. Her understanding was that they would target his behaviors and, upon improvement, transition him back to a less restrictive school. (TR-III-804-805). She did not believe that would be an appropriate placement for her son because he required more than the regular system could offer; he needed continuous one-to-one instruction. She stated that during the last few months she had been excited by the promising therapies provided outside the school system. When he was at , there was improvement only in behavior, not in academics, and he demonstrated no new skills there. In fact, she had not seen much of any improvement in his academic or

functional skills as a student in public schools. (TR-III-805-809).

The father testified that he asked for increased speech and language therapy in the development of the proposed IEP but was told it was unneeded because it was incorporated in the classroom. (TR-III-985). He had also requested physical therapy but was told it was unneeded. He did not request increased OT. He was frustrated that since October of 2008, he had been trying to get some changes in his son's education and, finally, was able to have added some self-help skills for the OT goal. He is now pursuing OT privately, and his son is on two waiting lists. (TR-III-989-990).

The parent has been working on the student's physical education at home. He was unsuccessful in convincing the IEP to develop more concrete goals focusing on specific sports. (TR-III-996).

The parent visited _____ in May of 2008. He opposed that placement because his son had already been there, and he had not progressed either behaviorally or academically. He considered it only a transitional placement for students who return to a regular school once there behavior improves. If _____ were an appropriate placement, he contended, his son would already have been there or his behavioral issues would have been fixed. Thus, a return would be a waste of resources and his son's time. (TR-III-989-999, 1015-1016).

_____, who has been the principal at _____ since 1993, testified regarding the proposed placement of the student at his school. Based on his experience and educational background, he was found

qualified as an expert witness in areas of administration of special education for students with moderate to severe disabilities, including the making of recommendation about educational programming. (TR-I-38-48).

's transition program has six classes of no more than four students per class, with six teachers, six assistants and six attendants, a student-teacher ratio of 4:3. Two of the teachers are resource teachers, one of whom is a BCBA. These teams are supported by a full time social worker, psychologist, and vocational coordinator. (TR-I-50-53).

The student began at the _____ in the 2006 summer program. His teacher was _____, who taught him later as a behavior resource teacher for the 2006-2007 school year. The current transition program at _____ is not markedly different than the program that existed in 2006. (TR-I-69-71). It has a full time speech therapist, and two occupational therapists, each of whom works half time. In addition there is a full-time physical therapist and two part-time physical therapists. (TR-I-70).

The teachers complete progress reports every quarter, prepare a narrative, and record data daily specified to the IEP goals and objectives. A psychiatrist also visits _____ to provide recommendations to parents (See SB-35; TR-I-70-75). _____ prepares reports which are sent home to parents with information on daily developments. (SD-53; TR-I-79-80).

The principal opined that the student could be successful at _____ for the 2009-2010 school year under the proposed IEP because of its small classrooms and ability to provide instructional and educational support.

has experienced teachers who function well as a team and can handle challenging incidents. Moreover, the has greater experience with bad behavior and greater clinical support than do general educational programs. (TR-I-89-91).

The behavior resource teacher defined their approach as looking at behavior as a result of environmental changes, accumulating empirical data on that data, and then developing a hypothesis as to why the behavior is occurring. From that hypothesis, they seek to develop strategies so that the child behaves more appropriately. As a behavior specialist, she seeks to develop and implement strategies with staff to teach the students replacement behaviors in order that the students can be more successful. A background in behavior analysis is not required, but is strongly encouraged. (TR-I-288-289).

Both the resource specialist and the behavior resource teacher believed that the student was more likely to be successful at than at because of its smaller teacher to student ratio and because it employed two behavior specialists who could immediately address behavioral issues whereas none are on site at . (TR-I-227, 232-233, 317-318).

E. Speech and Language and Occupational Therapy Services

, a speech and language pathologist for twenty-one years, testified for the school district. Since January of 2008 until June of 2009, she had been seeing the student for four hours a month, usually divided into two

nonverbal, she used an augmentative system with some sign language, models and pictures. By carefully watching the instructor, the student was able to obtain cues to attempt to do the tasks. She used a picture exchange book, with pictures to choose to answer questions and Tech/Talk, a device with a voice output, where one can press on a picture and a voice can be programmed to respond.

The student's success with the program has been inconsistent. (TR-II-538-543, 563-564). The student, she believes, will never be a verbal communicator. He has too much difficulty imitating even basic speech sounds. He will try to imitate sounds, but has no functional knowledge as to what the sound means, except for the word "no". (TR-II-554-556).

In the last year and one-half, he has progressed from being able to match like pictures to being able to match a digital photo to a black and white drawing. (TR-II-559-561). In January of 2008, she began using a picture-based system as the best way to work with him. She also used a modified sign language, though she is not fluent in American Sign Language. (TR-II-620-622, 630).

The school therapist agreed with the parent's counsel that the student did not have a functional way to communicate except by his negative behavior. She believes he can learn to communicate, but he has shown very slow progress. She cannot recall that the parents have asked her to increase speech and language services. She has not considered an increase because the student is in an all-day inclusive language-based program where she is able to work with staff to ensure that all-day programming uses communication in the best way. She found his teacher quite

receptive to her suggestions and they implemented the same type of activities. (TR-II-616, 618-620, 627-628).

Three speech and language pathologists testified on behalf of the parent regarding the services they have been providing to the student, his skill level in January of 2009 when they began their therapy, his skill level now, their views about the prior IEPs, and the proposed IEP for the 2009-2010 school year.

., a speech and language pathologist and former adjunct professor at George Washington University who is the owner of the , testified on behalf of the parent. She has considerable experience in the development of IEPs. She was found qualified as an expert witness in the area of speech and language pathology and the formulation of IEPs. (TR-IV-1211-1225).

With regard to IEPs in general, she testified that baseline information was important for PLOPs so that a new service provider would know what the student could currently do. (TR-IV-1261-1262).

The 's initial consultation with the student occurred in December of 2008. The therapist recommended four to six hours a week of therapy, targeting severe verbal, oral and gross motor apraxia based on her observation that he was a ten-year old non verbal student who was unable to communicate and had great difficulty with receptive language, including following directions. She acted as the supervisory therapist who did not provide direct therapy but supervised two clinicians, worked with the school and parents and observed the sessions. (TR-IV-1226-1228, 1283).

The therapist visited the student's classroom at _____ in March of 2009 for ninety minutes. She did see him anywhere else at school because the school system has a strict policy restricting observations to forty-five minutes in every three month period. His teacher told her that they had been unable to target his IEP goals until they got his behavior under control. From her observations at the school and at the _____, she concluded that he did not have a functional communication system and could not communicate. He was unable to convey his basic wants. When children cannot communicate, she noted, they become frustrated and negative behaviors occur. Though he used some sign language and vocalizations, he needed a higher level augmentative electronic system. (TR-IV-1232-1233, 1264-1265, 1283-1284).

_____, has been a speech therapist for sixteen years in various venues and had received specific training in the PECS and Dynavox systems. (TR-II-642-648, 687-688). As an independent contractor, she began working with the student through the _____ in January of 2009. At that time, the student had no expressive communication skills and his receptive skills were quite low. He could imitate some one-step commands but could do nothing on his own. In February, he demonstrated some minor negative behavior but that ended. Even where there were incidents of poor behavior, she was still able to provide services to him. (TR-II-653-655, 658-659, 661-662, 686).

The direct therapist noted progress since January. From successfully matching pictures to pictures then, he can now match pictures to drawings and objects. He now can identify body parts, shoes, some numbers, and occasionally

pants and shirts. He has also improved in following directions and has learned to say an approximation of the words "more" and "ball". (TR-II-663-668, 692). His general progress has been noted in the progress notes. (P-4D).

In her opinion, he could not communicate on a functional level in January, but she believes he can learn how to communicate because he has been trying more each time she sees him. She believes he will never be primarily a verbal communicator but can learn specific words which will be beneficial to him. She did not know whether the school district was also working on the same skills as she was or whether they were also using ACDs. She has been using PECs and the Dynavox machine with the student. It was her opinion that he needed five hours a week of individual speech therapy in order to learn to communicate functionally. (TR-II-679-680, 682-683, 685, 699-700, 713-715).

also provided speech and language services to the student through the during the January to March time frame for four hourly sessions a week. (TR-III-725-730, 732).

She basically concurred in the assessment of the other direct therapist as to his skill level in January of 2009. (TR-III-735-739) and the improbability he might be a verbal speaker (TR-III-767-768). However, she encountered more serious behavioral issues which progressed to physical aggression against her as well as against himself. (TR-III-736). He was not able to make any progress on sign language because he has verbal and limb apraxia. She defined verbal apraxia as the inability of being able to use the speech articulators-the tongue, lips, jaw, teeth, and soft pallet-

apraxia as the inability of being able to use the speech articulators-the tongue, lips, jaw, teeth, and soft pallet-to produce intelligible speech sounds. He doesn't have the capacity to motor plan from the brain to the muscles of the articulators to produce the sounds. Limb apraxia refers specifically to fine and gross motor skill deficits. (TR-III-742-743). As explained by the school therapist, apraxia is a motor planning deficit where there is no actual muscle weakness or paralysis. (TR-IV-1227). The therapist said that the student made progress with her in identifying colors, counting numbers and pronouncing the letter "m." (TR-III-745-748).

In February of 2009 she visited _____ with the supervisory therapist. The special education teacher there told her that there was no academic focus because they were working on behavioral matters. When she said that she did not know why the negative behaviors were occurring, the therapist recommended that they document the behaviors by using the ABC system. (TR-III-750-759). The therapist agreed that the student's behaviors impeded her instruction and that not much learning occurred when he engaged in negative behaviors. (TR-III-793-794).

The parent called as a witness _____, the school occupational therapist, who had fourteen years experience in her profession. She began working with the student in September of 2008. In reviewing the June 12, 2007 IEP for the parent's counsel, she conceded that the short term objectives lacked baseline information. She testified that she believed that the reduction in occupational therapy hours from four per month in the June 2008 IEP to two hours a month in the October 2008 IEP

likely occurred because the student had adequate dexterity and manipulation skills for sorting, cutting, and tracing, and had been making progress in those areas, so that the skilled intervention of an OT was unnecessary. The student would be able to work on these skills in the classroom setting. There was still the need for her to continue to consult and modify, but less of a need to work with him directly. (P-11; TR-III-932-943, 945).

She stated that she did not recommend an increase from two hours a month of OT for the 2009-2010 school year because the student lacked cognition to write letters, and, in fact, doubts that he needed an OT at this time. She recounted that he can use and manipulate tools that are required in school and do most of his self-care activities with adequate strength and range of motion but lacks the cognitive component to use these motor skills. (TR-III-958-959). The therapist further stated that OTs maintain notes for the working file. (SD-45, 71, and 73; TR-III-965-966;). Much of her time is spent in working with teachers to reinforce the skills they had taught. In this student's situation, his activities can be supervised and instructed by others. (TR-III-968-970).

F. Private Placement Options

The father visited three schools which he believed would be appropriate placements for his son. School in , has an ABA-based program which uses PECS. He believed that they are really committed to the program, whereas the district's tried various programs. He was also impressed that the staff was moving toward further

certification and education. He noticed that the staff wore protective gear and were ready for behavioral issues. When he visited the classes, he did not see any behavior issues and thought the classrooms were well-managed. Data was collected every five days. The school program is for twelve months, with a three week break in the summer. The school has a division called _____, which provides support in the home. (TR-III-1001-1011, 1015, 1018).

The parent also recently saw _____ School _____. It was much smaller than _____, with each student in his own partitioned space. The ABA school taught on a one-to-one basis in a twelve month program similar to the length of the program at _____. Staff also wore protective equipment. The third school he visited was _____ in _____, which employs six BCBA's in its ABA based program at two locations. The student to teacher ratio is one to one and one-half. (TR-III-1012-1018).

The parent visited each school once, spending at least an hour and one-half at each of these locations. None of the schools had processed an application, but _____ reviewed the student's records and left a telephone message with the parent stating that his son had been accepted and waitlisted due to no current openings. The district has contracts with each of these schools which are approved for student placement. (TR-III-1019-1029).

The private supervisory therapist testified that she thought the _____ program would be an appropriate for the student. It utilizes ABLES in a highly structured, year-round program with a one-to-one ratio. She also believed that placement at _____ could be appropriate. Both

schools have ABA intensive services with speech therapists and occupational therapists on staff and contracts with physical therapists. (TR-IV-1249-1251, 1272-1275).

The private therapist was an extern at School for two months in 2006. Staff there was performing one-to-one ABA instruction and verbal therapy with the children throughout the day. They had an effective mechanism for data collection. They used a behavioral analyst to help in managing behavioral issues. She believed that would be an appropriate placement from the standpoint of speech and language services. (TR-III-759-763, 765, 785).

The psychologist testified that would be the best match for the student because the school does nothing but intensive ABA, ABLEES and verbal behavior. (TR-I-176-177, 184).

, was employed in the contract services department of the school system until July 1, 2009. The specialist attends IEPs where there is a possibility that the child might need private placement, and if so, she identifies schools and monitors the program at the schools. She testified that an IEP needs to identify the particular private school or schools. In her experience, the School usually has a waiting list. (TR-IV-1305-1311).

G. Extended School Year Programs for 2007-2008.

In the summer of 2007, the student attended the ESY program at . According to the principal, he was successful in the program. (TR-I-111).

The June 5, 2008 IEP states that "[the student] qualifies for extended school year services due to critical

life skills being at a breakthrough point. Interruption of services and instruction is likely to prevent [the student] from receiving benefit from his educational program during the regular school year without these services." (SD-17).

The school therapist testified that he needed speech services to maintain his skills, but not necessarily from a speech and language pathologist as long as work on the goals would continue. The IEP did not list communication goals for the summer session, but he received enhanced ABA services. (TR-II-614-615).

The pyramid resource specialist saw him every day during the ESY program at _____ School in the summer of 2008. That was an ABA supported class for three hours a day for four weeks. During the period, he attended class with three or four children and three adults. He did well in the program with no behavioral issues arising. (TR-I-128-130).

H. Behavior Implementation Plan.

In December of 2008, the teacher met with the behaviorist and the ABA coach and formulated a draft BIP, which was sent to the parents. The Staff began work on a BIP with strategies to curtail his behavior on December 9, 2008. The behavior improved for the remainder of 2008 and incidents of aggression were of shorter duration. The teacher sent home the BIP and FBA in March of 2009, but the documents were never approved or signed. (SD-18; SD-21; SD-112; TR-I-265-267; TR-IV-1072, 1074, 1162).

On May 12, 2009, they prepared another draft and then revised it on June 1, 2009. It added additional strategies

based on better conclusions as to the antecedents for the student's behavior. The June 1, 2009 team produced a draft FBA and BIP, which the teacher deemed appropriate. (SD-140; TR-IV-1088-1089).

The coach testified that she believed that the data showing the antecedents, behavior, and consequences was too general and that it needed to be more detailed. They consulted with a national ABA consultant. They expanded the token system, created a safe area within the classroom rather than always removing him from the class, and made sure that he was asked to perform tasks that were familiar along with new tasks to reduce his frustration. The staff also focused more on teaching him things he was strongly interested in. (TR-II-389-397).

The plan was discussed with the parents on June 1, 2009. Based on reports of the teacher and ABA coach, the program manager believed that the student was making progress with his behavior. She stated that the BIP was appropriate for the student based on the FBA which led to the development of intervention strategies designed to meet his needs and decrease his aggression toward staff, peers, and himself. These improvements were calculated to make him more available for learning. It was the view of the ABA coach and the program manager that the BIP was appropriate for the student and that could implement its terms. (SD-140; TR-II-400-408, 455-463).

The draft FBA and BIP were prepared by the special education teacher and sent to the parents for approval. The resource specialist testified that the drafts were never returned. (SD-21; TR-I-265-267).

III. GENERAL LEGAL FRAMEWORK

The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* (2005) amended the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (1997) (IDEA). IDEA requires states, as a condition of acceptance of federal financial assistance, to ensure a "free appropriate public education" (FAPE) to all children with disabilities. 20 U.S.C. §1400(d), §1412(a)(1). Virginia has elected to participate in the program and has required its public schools, which include this school district, to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., §22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. §1415. See also *Board of Education v. Rowley*, 458 U.S. 176 (1982). The safeguards guarantee "... both parents an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think inappropriate." *Honig v. Doe*, 484 U.S. 305, 311-312 (1987).

The primary safeguard to protect the child's rights is the IEP. The educational program offered by the state must be tailored to the unique needs of the handicapped child by means of the IEP. 20 U.S.C. §1414. IDEA directs that local school districts, in consultation with parents, the child, and teachers, develop an IEP for each handicapped child. 20 U.S.C. §1414(d)(1)(B). Should there be any complaints regarding the content of a child's IEP, the parents have

the right to an "impartial due process hearing" 20 U.S.C. §1415(f); See also *Barnett v. Fairfax County School Board*, 927 F.2d 146, 150 (4th Cir. 1991). The safeguards guarantee "...both parents an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision that think inappropriate." *Honig v. Doe*, 484 U.S. 311-312 (1987).

A school district fulfills its obligation to provide FAPE as long as the IEP "consists of education instruction specially designed to meet the unique needs of the handicapped child...supported by such services as are necessary to permit the child to 'benefit' from the instruction." *Rowley, supra*, at 188-189. Each year the IEP sets out a curriculum to address the child's disabilities, with appropriate objective criteria and evaluating procedures and schedules for determining whether the instructional objectives are being achieved. 20 U.S.C. §1414(d).

IDEA does not require the school system to provide the best possible education or to achieve outstanding results. *Rowley, supra*, at 187-192, 198. An appropriate education is one that allows the child to make educational progress. *Martin v. School Board*, 3 Va. App. 197, 210, 348 S.E.2d 857, 863 (1986). The goal is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley, supra*, at 192.

"Congress did not intend that a school system could discharge its duty under the [ACT] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Board of*

Education, 774 F.2d 629, 636 (4th Cir. 1985). The Supreme Court has held that an IEP meets the requirements of IDEA if it is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, *supra*, at 207. The Fourth Circuit has determined that educational benefits meant "some form of meaningful education". *Conklin v. Anne Arundel Board of Education*, 946 F.2d 306, 308 (4th Cir. 1991).

Once there is a determination that the IEP is designed to permit the student to receive meaningful educational benefits, it is irrelevant that the private placement of the parents proposed would have provided greater benefits. *M.M. v. School District of Greenville County*, 303 F.3d 523, 526-527 (4th Cir. 2002); *A.B. v. Lawson*, 354 F.3d 315, 326-327 (4th Cir. 2004).

An IEP shall include "A statement of the child's present levels of academic achievement and functional performance..." (identified by the State as the PLOP), and "(a) statement of measurable annual goals, including academic and functional goals designed to" enable him to make progress in the general curriculum. 34 C.F.R. §300.320(a)(1), §300.320(2)(i)(A).

The applicable Virginia regulations provide that the PLOP "should be written in objective measurable terms, to the extent possible. Test scores, if appropriate, should be self-explanatory or an explanation should be included". The IEP should also include "a statement of measurable annual goals, including benchmarks or short-term objectives, relating to "...meeting the child's needs that result from the disability to enable him to progress in the curriculum...8 VAC 20-80-62F. The Virginia regulations were

amended effective July 7, 2009; the new language is similar. See 8 VAC 20-81-110G.

The IEP shall also include a statement of the special education and related services and supplementary aids and services, ...to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child" to advance toward his goals and progress in the curriculum. 34 C.F.R. §300.320(a)(4).

The IEP team is required to consider whether the child needs assistive technology devices and services. 34 C.F.R. §300.324(a)(2)(v).

In the case of a child whose behavior impedes the child's learning and that of others, the district should consider the use of positive behavior intervention and supports, and other strategies to address the behavior. 34 C.F.R. §300.324(a)(2)(i).

The district must provide ESY services if the team determines such services are necessary and "may not unilaterally limit the type, amount, or duration of those services". 34 C.F.R. §300.106(a)(3)(i). The school system is not required to meet the same standards as during the regular school year. The level of services must be sufficient to ensure that the student's academic gains from the prior school year are not seriously jeopardized. *MM, supra*, at 538; *JH ex rel. JD v. Henrico County School Board*, 326 F.3d 560 (4th Cir. 2003).

Hearing officers ordinarily engage in a two step inquiry to decide whether FAPE has been provided under IDEA. First, they determine whether school officials have

complied with the procedures contained in the Act and, secondly, whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Rowley, supra*, at 181.

Turning to the question of procedure, there does not appear to be any dispute as to whether the school district followed the procedures set forth in IDEA. The parent does not allege any violations. (TR-I-11). In any event, technical violations that do not obstruct the student's participation in the process do not make a proposed program inadequate. *Burke County Board of Education v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

In this case, the record demonstrates that the parents had a full opportunity to participate in a meaningful way in the decision making process that resulted in the development of the IEPs and the proposed placement for the 2009-2010 school year. See *Rowley, supra*, at 205-206.

Hearing officers have the authority to grant relief as deemed appropriate based on their findings. Equity practices are considered in fashioning a remedy, with broad discretion permitted. *Florence County School District Four v. Carter ex rel Carter*, 510 U.S. 7, 17 (1993).

The burden of proof on the issues of whether the IEP is deficient and whether any procedural violations deprived the student of a FAPE rests upon the party challenging the IEP. *Schaffer v. Weast*, 546 U.S. 49 (2005). For this hearing, that is the parent.

Hearing officers are to give appropriate deference to local educators. *Hartmann v. Loudoun County School Board*, 118 F.3d 996, 1000-1001 (4th Cir. 1997, *cert. denied*, 522 U.S. 1046 (1998)). They are entitled to latitude in the

development of an IEP appropriate for the student. *A.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004). However, that does not relieve the hearing officer of the responsibility to determine as a factual matter whether the IEP is appropriate. *County School Board of Henrico v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005).

An IEP which lacks relevant goals, ignores the unique needs of the child, or fails to establish any baseline for determining the goals or for monitoring progress may well deny FAPE to the child. However, momentary lapses in implementation or insufficient details on PLOPs, where the failure does not substantially impair the provision of services to the child, may not result in a defective program. The procedural deficiencies must be material.

If an IEP is reasonably calculated to enable the child to receive benefits, the hearing officer cannot reject it based on a belief that a different methodology is better for the child. *County School Board of Henrico, supra* at 308. In order to prevail in a claim under IDEA, the parent must show that the failure of the district to implement all the aspects of an IEP is material, that there was a failure to carry out substantial or significant provisions of the IEP. Such an approach enables school systems to exercise flexibility in implementing IEPs but holds them accountable for material failures and for providing the child a meaningful educational benefit. *Houston School District v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000), *cert. denied* 531 U.S. 817 (2000). This approach has been accepted by other circuit courts. See *Fisher ex rel. T.C v. Stafford Township Board of Education*, 2008 WL 3523992 n.3 (3d. Cir. 2008); *Van Duyn v. Baker School District* 5j, 502 F.3d 811,

821-822 (9th Cir. 2007); and *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003).

IV. LEGAL ANALYSIS

A. The IEPs Offered by the School System for the 2007-2008 and 2008-2009 school years were Reasonably Calculated to Offer the Student Educational Benefits Based on the Standard Set Forth in Rowley and any Failure in Implementation was not so Substantial as to Deny the Student FAPE.

The educational progress of the student under his IEPs was more than minimal and establishes the appropriateness of the program. The progress must be seen from the standpoint of the limitations imposed by his disability. *Mrs. B. Milford v. Board of Education*, 103 F.3d 1114, 1121 (2nd Cir. 1997), citing *Rowley, supra*, at 202: "It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable at the other end."

Actual progress made is a factor to be considered in determining the appropriateness of an educational program under IDEA. *M.M. v. School District of Greenville County*, 303 F.2d 523, 532 (4th Cir. 2002). Given the extent of the student's disabilities, the student would not have been expected to achieve a more rapid rate of progress than higher functioning students or have had his progress measured in any more than incremental steps.

As stated in the Findings of Fact above, the student's teacher for the last two school years, the ABA coach, the

speech and language therapist, and the ABA program manager testified that he made progress in various educational areas. I found that testimony persuasive. For his first one-half year at _____, their position was supported by the results of the Brigance Assessment.

These school district educators had extensive experience in their fields with post-baccalaureate degrees and training in special education, ABA principles, and related areas. As a group they possessed in-depth knowledge of the student's educational and behavior needs and consistent experience with him throughout the last two school years. Their evaluation is based on classroom observation, data, and ongoing instruction.

The testimony from the parent's witnesses was less relevant to consideration of the program offered by the district. All three of the private speech and language pathologists had limited knowledge of the school district's program; only two had seen the student outside the

and that occurred only once at the school.

The private neuropsychologist could only speculate about the program at _____ or the nature of the ABA training of the school officials. He had never seen the student in the classroom. He compared the student's scores from the Leiter Assessments in 2005 and 2009 and determined that the student had not progressed and his behavior had deteriorated. While that is strong evidence that the student had not progressed, it is outweighed by the testimony of the school officials and is but one factor in determining whether FAPE had been offered by the district.

The decisions of the Fourth Circuit Court of Appeals advise hearing officers not to second guess professional

educators and to allow them the "latitude in determining the individualized educational program most appropriate for a disabled child. The IDEA does not deprive these educators of their right to apply their professional judgment."

Hartmann v. Loudoun County, 118 F.3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998). *See also* *Springer v. Fairfax County School Board*, 134 F.3d 659, 663 (4th Cir. 1998).

Neither the private therapist nor the parents ever proposed a program for the school district to implement at the IEP meetings. It is fair to conclude that they had decided that only a private school could provide an appropriate program for the student.

The parent claims that progress since January of 2009 is attributable to the sessions with the private speech and language pathologists. It is, however, impossible to determine to what extent the outside instruction is responsible for improvement. It can only be conjecture as to the reasons for such progress. *See Knight v. Fairfax County School Board*, 2006 U.S. Dist. Lexis 96337 (E.D. Va. 2006), *aff'd.*, 2008 U.S. App LEXIS 906 (4th Cir. 2008), where the Court rejected a similar argument.

The parent further asserts that the IEPs were defective because some goals were missing or not measurable, baseline data was absent, and PLOPs were inadequate. The school district, on the other hand, argues that the parents agreed to the IEPs and therefore are estopped from raising objections not raised at the IEP meetings. The parent rejects that contention, stating that the mother was misled and did not give informed written

in accordance with the IEPs. Rather, the parent's contention is interwoven with the argument that the IEPs were deficient in their goals, objectives, and PLOPs, thereby precluding full implementation. Under the *Bobby R* standard, I find that there has not been a substantial or significant failure to implement the IEPs and that the educators were often able, as they testified, to implement the goals without complete PLOPs or with vague objectives based on review of other data or their observations. Such lapses were not material and did not deprive the student of educational benefit.

The student attended ESY during the summers of 2007 and 2008. The parent maintains that he was denied FAPE because the IEP articulated fewer services and goals than for the regular school term. The parent offered no evidence contradicting the school witnesses who testified that he made progress during the summer sessions and that the staff worked on his goals even though not listed in the IEP.

The IDEA standard for ESY is more limited than for the regular school year. ESY services are only necessary if the student's gains would be seriously jeopardized if services are not provided in the summer. *M.M., supra* at 538. The evidence here shows progress, not regression.

The BIP prepared for the student when he was at in 2007 was still in force when he transferred to

. . School officials did not begin drafting a new BIP to to address his increasingly more aggressive behaviors until December of 2007. They soon abandoned their efforts when his behavior improved considerably in January of 2008 and no plan was deemed necessary. I find that the failure to immediately begin to revise the BIP for the student when he

had just transferred there was not a denial of FAPE. It was not unreasonable to delay a few months to understand the behaviors better before revision of the BIP.

The parent also argues that the student was denied FAPE because a new BIP was not completed until June of 2009. The delay arose in part from the parents' refusal to sign off on the draft and the improvement in the student's behaviors at the end of 2008. Two school officials testified that the revised BIP was appropriate and that the intervention strategies were properly designed to reduce his negative behaviors. The parent introduced no evidence to the contrary. The school officials devised strategies to cope with the student's behavior even without a formal revised BIP in place. I find that FAPE was not denied due to the delays in the drafting of the BIP.

Based on the evidence in the record, it is apparent that the student received meaningful educational benefits while enrolled at : he achieved progress in development of his skills; he received services adequate to make progress on his goals and objectives, to which his parents acquiesced; and the instruction was coordinated among the educators at , and the central office.

B. The IEP Offered by the School System for the 2009-2010 School Year was Reasonably Calculated to Offer the Student Educational Benefits Based on the Standard Set Forth in Rowley.

The two most important meetings in the development of the IEP for the 2009-2010 school year occurred on April 14,

2009 and April 29, 2009. The school officials on the team reached a consensus that the student would be successful at primarily because he had been successful there in 2006, the ratio of teachers to students was lower than at , and a behavioral specialist was on staff.

The principal testified that his educational program is similar to the one in which the student participated in 2006, with a teacher to student ratio of 4:3. He testified, as did four of the educators who participated in the IEP, that the IEP was appropriate and that the student could benefit and progress under it. Throughout the hearing, the educators consistently stated that the student did not need more than four hours a week of speech and language therapy, the amount that was provided for in all the IEPs, because the therapy was included in the curriculum provided throughout the day.

None of the parent's witnesses had visited . The parents believe their son had not advanced educationally there in 2006, would not progress in the 2009-2010 period under a similar program, and would be transferred out when his behaviors became under control. The private speech and language therapists maintained that more speech therapy was necessary, with varying recommendations of two-three hours a day, four-six hours a week, and as much as possible.

The neuropsychologist's major recommendations in his evaluation and testimony are that the student be provided a full time ABA program, with modified sign language and the use of ACDs. It appears to me from the record that the school district's program basically contained much of those components. The school system uses a number of well-accepted methodologies, such as ABA, discrete trials,

behavior modification, or the PECs system. The parent did not introduce evidence that the staff was not trained or competent in the methodologies.

There was testimony from the parent's experts who were not BCBAs that BCBAs were required, which was contradicted by school witnesses, who were BCBAs. I find that the parent failed to prove that the student must be taught by a BCBA to receive FAPE. I also note that the parent did not prove that any of the proposed private placements would have greater BCBA involvement than that of the school district. The school system does not use the ABBLES system, recommended by the psychologist, but there was insufficient evidence that it was necessary for the student to progress or receive FAPE.

I give greater weight to the testimony of the school district's witnesses than to the witnesses in support of the parent's position for basically the same reasons that were set forth in my prior finding that the school district had provided FAPE for the last two school years. See section IV-A above.

The parent and the witnesses urge that a one to one ratio be required; yet, according to the testimony of school officials, the program at is close to one to one. The parent did not show that the student could not receive meaningful educational benefits in a program with nearly a one-to-one ratio. Nor did the parent establish that a more intensive program at another placement would be much different than the enhanced autism program at .

I find that the parent did not demonstrate, by a preponderance of evidence, that a speech and language therapist providing more than four hours a week was

required for the student to receive FAPE, or that the district's proposed program, which stipulated four hours a week of speech and language therapy by therapists supplemented by work on communication skills throughout the school day, would not provide FAPE. As the Supreme Court noted, the appropriate methods of instruction and methodologies of providing special education and related services were best left to the discretion of the school staff. *Rowley, supra*, at 206.

Three schools were identified by the parent as possible placements, all of which have contracts with the district. There was limited evidence about their capabilities to carry out the program sought by the parent. No one from any of the schools testified and no written information from the schools was introduced into evidence. In any event, given the appropriateness of the IEP offered by the school district, it is not necessary to evaluate the appropriateness of potential private placement facilities or consider any additional occupational therapy, speech and language, or other related services for the student. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). I note, however, that to the extent that there was evidence in the record, the parent did not demonstrate that the private schools had staff better trained or qualified to implement an ABA program, or that the schools would be more capable of delivering better or more speech and language services to the student.

I recognize that both parents have shown extraordinary devotion to their son and have sought to act in his best interests to achieve the best possible education for him. I share in their frustration and that of the school system

witnesses that his progress had not been greater. It is understandable that the parents oppose their son's return to , where they believe he did not progress academically in 2006, a position supported by some evidence in the record. But this hearing is not about the appropriateness of the 2006 program there; the statute of limitations precludes its review.

Under the standards of *Rowley*, I find that the father has failed to meet his burden under *Wiest* to prove by a preponderance of evidence that the IEP for the 2009-2010 year is not reasonably calculated to offer his son meaningful educational benefits.

V. ISSUES

1. Whether the IEPs for the 2007-2008 school year and the 2008-2009 school year were reasonably calculated to enable the student to receive educational benefits under IDEA.

2. Whether any failure in implementation of the IEPs for the 2007-2008 school year and the 2008-2009 school year was so substantial as to deny the student FAPE.

3. Whether the proposed IEP for the 2009-2010 school year was reasonably calculated to enable the student to receive educational benefits under IDEA.

4. Whether the IEPs for the extended school year programs for the summers of 2007 and 2008 were reasonably calculated to enable the student to receive educational benefits under IDEA.

VI. CONCLUSIONS OF LAW AND FINAL ORDER

1. The student has the disabilities of autism, mentally retardation, and multiple disabilities and qualifies for services under IDEA.

2. The parent was afforded all procedural and notice protections required by IDEA.

3. The school district offered FAPE to the student for the 2007-2008 and 2008-2009 school years in that the IEPs for those years were reasonably calculated to enable him to progress and receive the level of educational benefits required by IDEA.

4. Any failure of implementation of the IEPs for the 2007-2008 and 2008-2009 school years was not so substantial as to deny the student FAPE.


5. The school district offered FAPE to the student for the 2009-2010 school year in that the proposed IEP was reasonably calculated to enable the student to receive educational benefits under IDEA.

6. The school district offered FAPE under IDEA to the student for the 2007 and 2008 extended school year programs in that the IEPs for those years were reasonably calculated to enable him to receive the level of educational benefits required by IDEA.

7. This decision is final and binding unless either party appeals to a federal District Court within ninety calendar days of the date of this decision, or to a state Circuit Court of local jurisdiction within one hundred eighty calendar days of the date of this decision.

Date:


July 15, 2009



Alan Dockterman
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have, this 15th day of July, 2009, caused this Decision to be sent via first-class mail, postage prepaid, and by e-mail to Joan Heishman Proper, Esq., counsel for Mr. _____, Drive, Suite _____, VA _____; to John F. Cafferky, Esq. counsel for _____, Public Schools, _____ Drive, Suite _____, VA _____; sent by e-mail to _____ and _____, parents of _____; and sent via first-class mail, postage prepaid, to _____, Coordinator, Monitoring and Compliance, _____ Public Schools, _____ RD, Suite _____, VA _____ and to Judy Douglas, Director, Dispute Resolution/ Administrative Services Department of Education, Commonwealth of Virginia, P.O. Box 2120, Richmond, VA 23218-2120.



Alan Dockterman

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