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Dispute Resolution &
Administrative Services

10-011

COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

Re: AM, by and through his parent(s) EM and VM v. PS

Child & Parent(s):

AM, child
EM and VM, parent(s)

Administrative Hearing Officer:

Ternon Galloway Lee, Esquire
215 McLaws Circle, Suite 3A
Williamsburg, VA 23185
(757) 253-1570
(757) 253-2534

Child's Attorney:

Malcolm B. Higgins, II, Esq.

NP School Attorney:

Derek Mungo, Esq.

Superintendent of PS:

Dr. SJ

DECISION

I. PROCEDURAL HISTORY¹

EM and VM (hereinafter "parents") filed a request for a due process hearing on July 30, 2009, received by the PS on August 3, 2009. On August 12, 2009, I scheduled the initial telephonic pre-hearing conference ("PHC") to be held on August 17, 2009, at 4:30 p.m. The parties agreed to the scheduling. After holding the initial PHC, I issued a scheduling order setting forth, among other matters, the hearing date and the date for the parties to exchange their exhibits and witness lists. The hearing was held on September 10, 11, and 21, 2009.

¹ Throughout the decision, I will use the following abbreviations:

September 10, 2009 Transcript	Sept. 10 Tr.
September 11, 2009 Transcript	Sept. 11 Tr.
September 21, 2009 Transcript	Sept. 21 Tr.
Parents' Exhibit	P. Exh.
Joint Exhibit	J. Exh.
Hearing Officer Exhibit	HO Exh.

II. ISSUES

1. Is the child receiving a free appropriate public education (“FAPE”) under the current Individual Educational Program (“IEP”) that places the child in a general curriculum educational classroom of more than 20 students with a regular education teacher, a special education teacher sometimes in the same classroom, and a one on one paraprofessional for the child?
2. Should the child receive Extended School Year (“ESY”) services?
3. Has the PS failed to provide a continuum of alternative placements?
4. Did the PS fail to implement provisions of the IEP regarding (i) written communication and (ii) quarterly reports?
5. Whether PS should reimburse the parents for the tuition and cost of educating the child at CB Academy?

III. STATEMENT OF FACTS

1. AM was born July 6, , and is now years of age. He has been diagnosed with autism spectrum disorder. On February 20, 2007, during his kindergarten year at BVE School, PS found AM eligible for special education and related services under the category of Autism. J. Exhs. 14, 26.
2. On November 2, 2004, AM had previously been found eligible for special education and related services under the category of Speech and Language Impaired. Eligibility under that category was terminated February 17, 2006. J. Exh. 11; Sept. 11 Tr. 38.
3. AM attended BVE School in the PS division from kindergarten to the second grade and was promoted each year. J. Exh. 47.
4. Assessments on AM’s year end kindergarten report card showed he mastered over 90% of the skills taught and he was making progress in the remaining skills that were assessed. J. Exh. 47.
5. AM’s report card grades in the first grade were as follows:

Subject	Marking Period				End of Year Grade
	1	2	3	4	
Math	A	A	B	A	B
Reading	C	C	C	C	C
Science	B	A	A	A	A
Social Studies	A	A	B	B	A
Writing	B	C	B* ²	B	B

J. Exh. 47.

6. AM's report card grades in the second grade were as follows:

Subject	Marking Period				End of Year Grade
	1	2	3	4	
Math	A	B	B	C	B
Reading	C	C	C	C	C
Science	A	B	C	B	B
Social Studies	A	C	B	C	B
Writing	B*	C	B*	B*	B* ³

J. Exh. 47.

7. At the end of the second grade, AM took tests in social studies, math, and science known as Year End Assessment tests to determine if he grasped the instruction in the respective subject areas. Test results show he mastered 75% of the social studies, 97% of the math, and 78% of the science. J. Exh. 52.

8. AM received his last referral for behavioral problems during his kindergarten year. Sept. 21 Tr. 141.

9. During the 2008-2009 ("2008-09") school year, AM interacted with other students, had friends, and was able to work through problems he had with peers. Sept. 11 Tr. 235- 238; Sept. 21 Tr. 9-12, 96, 141.

10. AM's individual educational program ("IEP") for school year 2008-2009 ("2008-09"), which is his current IEP, contained goals and objectives in three areas - pragmatic

² The asterisk denotes IEP criteria.

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language, writing, and behavior. The pragmatic goal is as follows:

[AM] will engage in turn taking, demonstrate appropriate eye contact, initiate conversation with teacher or peer, participate in conversational turn taking and topic maintenance, and engage in appropriate greetings with visual/verbal cues and prompts in the therapeutic setting with at least 80% accuracy. J. Exh. 7.

The writing goal is “[AM] will be able to write a 5 sentence paragraph on a given topic with at least 81% accuracy with minimal prompts and cues.” J. Exh. 7. The behavioral goal is [AM] will demonstrate the school appropriate behaviors with or after one warning prompt in 10 consecutive school days.” J. Exh. 53.

11. During the 2008-09 school year, AM received special education and related services in the general educational setting. J. Exhs. 6, 7, and 53.
12. AM’s special education and related services included providing him with writing instruction for one hour a day, five days a week. At the beginning of the school year, AM was taken by the special education teacher, Ms. H, out of his general education class and provided writing for an hour in an inclusion class. Beginning on or about October 24, 2008, he was taught writing for one hour by Ms. W in the general education class. Unless AM was absent or tardy to class during the time designated for writing, AM received the writing instruction one hour per day. Sept. 21 Tr. 48. Usually writing was provided from 2:00 p.m. to 3:00 p.m. Sept. 21 Tr. 38-49.
13. AM’s writing was his own product. Even though he was receiving special education and related services, he was graded more like a regular student because he exceeded his IEP writing goals. Sept. 21 Tr. 32-34.
14. AM’s IEP also provided the service of a one-on-one paraprofessional. One of the main reasons the paraprofessional was assigned to AM was to redirect him. J. Exh. 7.
15. AM’s IEP also provided for speech services 30 minutes per week in a special class to address pragmatic language deficits. J. Exh. 7. Occupational therapy was provided two hours a month and physical therapy was provided two hours per month. AM received these services during a weekly sensory motor group meeting. J. Exh. 7; Sept. 21 Tr. 211, 243.
16. Accommodations provided in the current IEP included extended time on assignments, the opportunity to respond orally, assistance with directions, individual or small group testing, preferential seating, one-to-one standardized testing, and environmental accommodation such as limiting fluorescent lighting. J. Exh. 7, 53.

17. Occupational therapy and physical therapy evaluations in 2007 revealed AM's gross and fine motor function and sensory needs required addressing. J. Exhs. 29, 37.
18. Physical therapy in the educational context focuses on whether the child has the gross motor skills to access his/her educational program. Sept. 21 Tr. 239.
19. Occupational therapy in the educational context focuses on whether the child can complete activities of daily living, fine motor skills, and sensory processing needs to access the educational environment. Sept. 21 Tr. 201.
20. AM fine motor and gross motor skills significantly improved from kindergarten to second grade. His sensory diet⁴ needs also decreased. Sept. 21 Tr. 209-218, 243.
21. A February 12, 2007 speech evaluation showed AM's receptive and expressive language fell at the lower average range. J. Exh. 30.
22. A speech language evaluation conducted on February 8, 2007, indicated AM demonstrated below average comprehension skills. J. Exh. 38.
23. AM made progress toward achieving his pragmatic language goal. J. Ext. 2.
24. Intelligence testing conducted by Dr. GM shows AM has an average IQ, is an average reader, has strong visual perception skills, and has deficiencies in decoding and phonological skills. J. Exh. 28.
25. Intelligence testing conducted by Dr. E also shows AM has an average IQ. Moreover, testing showed deficiencies in fluid reasoning, hand writing, story recall, punctuation, and capitalization. Scores showed AM's broad reading and broad math were in the average range. P. Exh. 3.
26. The parents received progress reports from the speech therapist regarding progress AM was making toward his pragmatic language goal; however, the parents did not receive data collected to support the progress indicated. Sept. 11 Tr. 95; Sept. 21 Tr. 308, 311.
27. The parents did not receive on the Goals and Objective Bench Mark sheet progress reports on how AM was progressing in writing and on his behavior. The parents received weekly progress reports from Ms. W and Ms. K regarding how AM was progressing academically and behaviorally in class. They were not regularly returned by the parents. Sept. 21 Tr. 51-52, 55, 81.

⁴ Sensory diet for AM denotes a menu of actions to be taken or devices to be used to address the sensory needs of AM.

28. SECEP is an acronym for Southeastern Cooperative Educational Program. SECEP is a regional special education program started by Commonwealth of Virginia to be a resource for public schools to serve children with a variety of disabilities, including autism. SECEP is the most restrictive setting in the public school system. Sept. 10 Tr. 211. SECEP serves autistic children with significant cognitive, social, and/or behavior problems. SECEP classes are highly structured and self-contained. Sept. 10 Tr. 175, 17, 187.
29. At the IEP meeting on April 30, 2009, to develop AM's annual IEP, the parents requested AM be referred to SECEP for an evaluation to determine if he was appropriate for SECEP placement or placement in the SECEP program. Stating PS can provide AM with a FAPE, PS denied the request. J. Exh. 1.
30. At IEP meetings on March 17, 2009, and April 30, 2009, the parents also requested that AM be provided extended school year ("ESY") services. The PS denied the request stating AM did not meet the criteria for ESY services because AM did not demonstrate (i) a significant loss in skill levels over a break in instruction and/or (ii) failure to recoup information/skills in a reasonable period of time when compared to his peers. J. Exhs. 2 and 3.
31. AM has not attended school in the PS district since the end of the 2008-09 school year. AM's parents enrolled him in a private school, CB Academy, for the 2009-2010 ("2009-10") school year. Sept. 11 Tr. 12.
32. A Diagnostic Reading Assessment ("DRA") is a reading assessment that is given to second graders on a quarterly basis to assess their level of fluency and comprehension. Sept. 11 Tr. 295; Sept. 21 Tr. 16.
33. The DRA is a standardized test used by teachers and schools to assess a child's reading level. http://www.ehow.com/about_5053078_dar-diagnostic-assessment-reading.html; Sept. 21 Tr. 13-14.
34. AM's reading grade was determined by DRA assessments. Sept. 21 Tr. 13.
35. AM's writing teacher used a grade 2 composition evaluating sheet to grade AM's writing. J. Exh. 50.
36. The parents seek relief in this matter. Thus, the parents bear the burden of proof. *Schaffer v. Weast*, 126 S. Ct. 528 (2005) (stating in pertinent part that the burden of proof in an administrative due process hearing under IDEA is on the party seeking relief).
38. During the 2008-09 school year, AM was tardy 68 times. J. Exh. 46. He was absent 17 out of 180 days which is more than the average student. Many of AM's absences were due to medical appointments and private therapy sessions. J. Exhs. 43, 46.

AM received therapy at SSC Program on Wednesdays from 3:30 p.m. to 6:00 p.m. Sept. 11 Tr. 158. AM also received private occupational therapy on Tuesdays from 9:00 a.m. to 10:00 a.m. and private physical therapy on Thursdays from 9:00 a.m. to 10:00 a.m. Sept. 11 Tr. 171.

39. AM's current IEP consists of Joint Exhibits 6, 7, and 53.

IV. APPLICABLE LAW AND ANALYSIS

A. Is the child receiving a FAPE under the current IEP that places the child in a general curriculum educational classroom of more than 20 students with a regular education teacher, a special education teacher sometimes in the same classroom, and a one-on-one paraprofessional for the child?

The main purpose of the Individuals with Disabilities Education Act ("IDEA") is to guarantee that students with disabilities have available a free appropriate public education ("FAPE"). See *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 179-81, 200-01. A FAPE includes special education and related services planned to meet the student's unique needs and provided in conformity with a written IEP. 34 C.F.R. Section 300.17[d] and 34 C.F.R. Section 300.320. A school district offers FAPE to a student when the procedural requirements of the IDEA are met and the IEP is reasonably calculated to enable the child with a disability to receive educational benefits. *Rowley*, 458 at 206-07. Furthermore, the benefit conferred by an IEP must be "meaningful" and not merely trivial. *Polk v. Central Susquehanna*, 853 F. 2d 171, 182 (3rd Cir. 1988, 109 S.Ct. 838 (1989)). The IDEA does not require that the school system provide the child with the best education possible, but that it provide a basic floor of opportunity that access to special education and related services provides. *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

In the present case, the parents assert that the child did not receive a FAPE under the current IEP. Particularly the parents argue that the IEP is not appropriate because it places the child in a general curriculum educational classroom with more than 20 students with a regular education teacher, a special education teacher sometimes in the same classroom, and a one-on-one paraprofessional for the child. I examine the evidence to determine if the current IEP is appropriate.

To support their contention, the parents argue AM is not mastering goals set forth in the IEP. One such goal addressed AM's writing. It provided that "AM will be able to write a five sentence paragraph on a given topic with at least 81% accuracy with minimal prompts and cues." J. Exh. 7. AM's mother testified that he did not achieve his writing goal in the first or second grade and in her opinion, AM's writing has regressed. She testified that generally PS provided her with no reports of his writing progress except report card grades. She did acknowledge receiving some hand written rough drafts of AM's work along with final drafts of writings that were typed using a keyboard. The mother testified that the final typed drafts were correct mechanically and consisted of

more complicated vocabulary not found in AM's initial hand written drafts. The mother doubted AM produced the final drafts without significant input from AM's writing teacher or one-on-one aide. Sept. 11 Tr. 74 - 90.

To further support the assertion that AM is not mastering IEP goals, the parents state AM did not achieve his pragmatic language goal in the second grade. That goal provided the following:

AM will engage in turn taking, demonstrate appropriate eye contact, initiate conversation with teacher or peer, participate in conversational turn taking and topic maintenance, and engage in appropriate greetings with visual/verbal cues and prompts in the therapeutic setting with at least 80% accuracy.

J. Exh. 7. VM testified that while she received progress reports for pragmatic language indicating AM was making sufficient progress to achieve the goal, she never received data to support the progress claimed by the PS. Sept. 11 Tr. 95. Moreover, VM contends that because the pragmatic language goal set forth on the proposed IEP is very similar to its counterpart on the current IEP, the 2008-09 goal could not have been met.

Also, the parents make additional complaints about the services or lack thereof provided under the IEP. For instance, the current IEP provided for two hours of occupational therapy a month and two hours of physical therapy per month. J. Exh. 7. VM testified that because AM is having trouble with fine motor and gross motor skills additional physical therapy services should be provided, not less as was proposed by the IEP team. Sept. 11 Tr. 97 - 103. According to VM, AM's problems included not being able to button his pants or tie his shoes and poor handwriting. Moreover, VM contends AM's IEP should include ESY services and the IEP team failed to consider all factors before refusing those services. Sept. 11 Tr. 100 - 105.

Furthermore, the parents expressed strong concerns about the reliability of AM's grades and questioned whether they accurately reflect progress.

The parents offered, among other witnesses, the expert testimony of clinical psychologist, Dr. GM, to support their contention. Dr. GM is a clinical psychologist at the Naval Medical Center Portsmouth Neurodevelopment Division of Pediatrics. She has diagnosed children with a variety of developmental disorders. She has worked with a number of children with autism in a variety of settings. Dr. GM has followed AM as a patient at the Naval Medical Center Portsmouth Neurodevelopment Division of Pediatrics since November 2005. Dr. GM attended three of AM's IEP meetings during the 2008-09 school year. She qualified as an expert to testify about children with autism, particularly AM. Sept. 10 Tr. 219-221; J. Exhs. 26, 28. Dr. GM contends AM needs (i) a smaller and more structured educational setting or self contained class without a one-on-one assistant

specifically for him, (ii) intensive reading instruction due to deficiencies in decoding, (iii) visually cued instruction since standardized testing showed his perceptual reasoning skills are superior, (iv) work on attention to task, and (v) possibly ESY services. Sept. 10 Tr.234, 251-261; J. Exhs. 26,28.

Dr. GM supported her recommendation by sharing her observations and evaluation of AM. For instance, she testified that even though psychological testing conducted by her in October 2008 showed AM is of average intelligence, his profile shows that he has deficiencies in several areas, one of which is phonological skills or decoding. She noted that AM scored an 86 on the WIAT-II Pseudoword Decoding subtest which fell at the 18th percentile and in the deficient range. Dr. GM testified that the testing shows AM does not have fundamental phonological skills to sound out words. J. Exh. 28; Sept. 10 Tr. 227, 232. Dr. GM further testified that as an emerging third grader, AM is at a critical stage in learning to read and if at his current stage in life he does not acquire phonological skills, he may significantly lose the ability to do so, thus permanently impairing his ability to read. Sept. 10 Tr. 233-234.

Moreover, Dr. GM testified that she had observed that AM writes extremely slow and that it takes a lot for him to get his thoughts on paper. She noted standardized pencil and paper coding test results showed AM is weak in the area of written production and timed production. Dr. GM attributed, in part, AM's weaknesses in writing to deficiencies shown in his Wechsler Intelligence Scale for Children, Fourth Edition processing speed subtest where he received a composite score of 85. According to Dr. GM, that scoring denoted a deficiency. J. Exh. 28; Tr. 228, 235. Also, Dr. GM voiced concern about AM's writing, which, according to her, showed problems with punctuation, spacing, spelling, and letter formation. Tr. 237-239. Regarding AM's second grade school writing samples, Dr. GM implied that AM was provided substantial assistance to produce final typed writings that were more coherent and mechanically correct. Tr. 243, 250. Further, Dr. GM conducted a Working Memory subtest under the WISC-IV wherein AM scored a 68, which test results show was 32 points below the average score of 100. Dr. GM testified that testing showed AM has difficulties with working memory which means that AM may have difficulty with such tasks as paying attention and following directions. Sept. Tr. 229. Dr. GM also suggested that AM's grades may be subjective. Sept. 21 Tr. 268-269.

Based on her testing and observations, Dr. GM made the aforementioned recommendations.

To further support their contention, the parents offered the testimony of Dr. E.

Dr. E is a licensed clinical psychologist, forensic psychologist and assistant professor of clinical pediatrics in the Department of Medicine at Eastern Virginia Medical Center. He is also a prior school psychologist. Dr. E has had training in the area of autistic spectrum disorder and he has examined a number of children with autism. In

conducting a psychological evaluation of AM in the summer of 2009, Dr. E reviewed PS psychological evaluation of AM, PS adaptive behavior and achievement assessments of AM, Naval Medical Center Portsmouth Neurodevelopment Division of Pediatrics psychological assessment, Ms. F's review of her classroom observation of AM, a listing of accommodations provided by CB Academy, and AM's proposed IEP. He also conferred with AM's mother about the child. Dr. E qualified as an expert to provide expert opinions in regard to children with autism. Sept. 10 Tr. 114-118; P. Exh. 4.

As noted previously, Dr. E administered a psychological evaluation of AM. The dates of the evaluation were June 27, 2009; July 2, 2009; and August 5, 2009. Using the Childhood Autism Rating Scale ("CARS"), he collected information from AM's mother. Based on that information, AM scored a 37 which indicated severe autistic functioning. Sept. 10 Tr. 120. Dr. E did not obtain CARS information from PS staff. Intellectual testing showed, among other scores, a full scale IQ score of 97 which placed AM in the average range of intellectual development; visual spatial processing score at 111 in the high average range; and a fluid reasoning score of 85 which placed AM's fluid reasoning skills in the deficient range.⁵ P. Exh. 3. Except for the fluid reasoning score, AM's scores on the Stanford-Binet Intelligence Scales, Fifth Edition intelligence testing was in the average range. Sept. 10 Tr. 121; P. Exh. 3. Dr. E's psychological testing also included administration of the Woodcock-Johnson III Tests of Achievement. Among other test results that testing showed AM scoring below average on handwriting, story recall and punctuation and capitalization. AM's word attack scoring was low average. AM's broad reading score was 94 and indicated he was reading at the age equivalent of two years and six months. P. Exh. 3, p. 4.

Regarding AM's IEPs, Dr. E had only reviewed AM's proposed one. He testified that the proposed IEP is deficient. He stated the handwriting goal was insufficient because it did not require him to work on overall punctuation and capitalization. Dr. E opined it was unrealistic to expect AM to write a six sentence paragraph as indicated in the proposed writing IEP goal. Further, Dr. E testified that AM's pragmatic goal should include specific short term objectives and take into account AM's significant deficits in the area of pragmatic language. Sept 10 Tr. 125-129. Further he states the proposed IEP does not address AM's word attack and math fluency weaknesses. Sept. 10 Tr. 126

Dr. E recommended an educational setting for AM that consisted of a small self-contained classroom with approximately eight individuals with language based learning disabilities, high functioning autistic students, a highly trained special education staff member, and an additional staff person that is not "velcroed" to AM. Sept. 10 Tr. 131; P.

⁵ According to Dr. E's psychological report, fluid reasoning skills indicate the ability to solve verbal and nonverbal problems using inductive or deductive reasoning. The ability to reason inductively requires the individual to reason from the part to the whole, from the specific to the general, or from the individual instance to the universal principal. The ability to reason deductively requires the individual to take general information and infer a conclusion, implication, or specific example. P. Exh. 3, p. 3-4.

Exh. 3, p. 11. Dr. E also testified that AM could benefit from reading instruction because his decoding skills were below expectancy. He also testified that AM could benefit from ESY services. Sept. 10 Tr. 135 - 137.

The parents also offered the testimony of Ms. F to support their contention that the 2008-09 IEP did not offer AM a FAPE.

Ms. F holds a bachelor's degree in psychology and a master's degree in special education. Ms. F also is endorsed in psychology in the areas of mental retardation and emotional disturbance for grades K through 12. She also has a certificate in applied behavior analysis. Ms. F is also a former special education teacher and former administrator of SECEP. Ms. F is the director of SSC program and director of RB Academy where AM has enrolled for summer programs during 2007, 2008, and 2009 and for therapy on Wednesday afternoons during the 2008-09 school year. Ms. F was qualified as an expert in the education of children with disabilities and in particular in the education of children with autism. Sept. 10 Tr. 32-38.

Mr. F observed AM once in his school environment during the 2008-09 school year. Initially she saw him in the classroom working on group assignments. Ms. F testified that she observed AM exhibiting both on task and off task behaviors while working on a class assignment. Next, Ms. F observed AM taking a test in the library. He was accompanied by his one-on-one assistant. Ms. F testified AM was dependent on the one-on-one assistant and would only work on the test when prompted by the assistant. Sept. 10 Tr. 47-56.

Because she opined that AM was too dependent on the one-on-one assistant, Ms. F recommended eliminating the assistant. Sept. 10 Tr. 63. Further, she recommended AM receive ESY services to, in her view, prevent AM from losing skills he had acquired and to address deficits he has in reading and writing. Sept. 10 Tr. 66 - 71. Also, Ms. F recommended AM be taught in a self-contained class with a group of no more than six students. Sept. 10 Tr. 58. She further recommended that AM be allowed to respond more orally and that he be given instructions on how to use the word processor. J. Exh. 27.

The parents also offered the testimony of Ms. DM who is the lower school director or director of grades K through five at the CB Academy. She testified that AM was enrolled in a small class with a student/teacher ratio of five to one. Also, she testified the class has one assistant and the teacher and assistant co-teach. Ms. DM indicated AM had been enrolled in CB Academy for a week and a half. Sept. 11 Tr. 4-17.

PS presented a string of witnesses to testify about AM's progress in school.

Ms. K taught AM second grade social studies, math, and science in a gifted cluster class.⁶ Sept. 11 Tr. 225. Ms. K saw AM daily except when he was absent from her class. She attended IEP meetings on October 24, 2008, January 22, 2009, and April 30, 2009. Sept. 11 Tr. 278-283; J. Exhs. 2, 6, 54. Ms. K holds a masters of science degree in education with a focus on early elementary education. She is certified to teach pre-K through third grade. She is pursuing a master's degree as a math specialist with an anticipated May 2010 date of completion. She has completed all math classes and most course work for the degree. Ms. K has been a teacher for six years and has taught second grade for two years. Ms. K. was qualified as an expert in the area of elementary education with an emphasis in math. Sept. 11 Tr. 225-227.

Ms. K's testimony indicates AM's behavior was good and he was able to socialize in her class. AM's school day in Ms. K's class commenced at 9:00, although instruction did not start until 9:10 a.m. after the tardy bell rang. AM's class time with Ms. K ended at 11:15 a.m. Sept. 11 Tr. 229. Enrollment in the class was set at 22 students who sat at large rectangular tables with approximately 4-5 students per table. Sept. 11 Tr. 231. AM was strategically seated at the end of one of those tables to provide him more room to spread out. Beside his table was a desk for his one-on-one assistant, Ms. B. Sept. 11 Tr. 232-233. Ms. K. testified that AM got along with other students in the class and he had good behavior. Ms. K imposed a behavior system wherein students were given stars which were removed for poor behavior. During the 2008-09 school year, she testified AM's behavior never warranted removal from the classroom and his star was removed only once or twice by his one-on-one assistant. Sept. 11 Tr. 233-236. She testified that he was more to himself at the beginning of the year, but as the year progressed he became more interactive with other students. He grew into making presentations before his classmates and did not hesitate to work in a group. She testified he had no difficulty moving to different groups at different tables. Sept. 11 Tr. 236-237. When he did encounter some disagreements with other students, he was able to resolve them by talking through them. Ms. K testified AM was not impulsive and was not regularly distracted. Sept. 11 Tr. 247-249.

Ms. K also testified that AM performed well academically. She stated he was the strongest in math, especially doing math in his head. Sept. 11 Tr. 238-239. Ms. K helped AM meet the challenge of doing word problems by breaking them down into smaller parts. She described AM as being in the higher end math group. Sept. 11 Tr. 243-245. Ms. K testified that AM did well in social studies also and he demonstrated no hesitancy in doing group work. When doing reports, he sometimes needed prompting. Sept. 11 Tr. 243-245. In science she testified he did well also. Sept. 11 Tr. 245.

AM's report card grades for the subjects taught by Ms. K were derived from class

⁶ A gifted cluster class consisted of gifted students and/or students considered high achievers who worked at a higher level of learning. The class usually moved at a faster pace than a regular second grade class. Sept 10 Tr. 232; Sept. 21 Tr. 38.

work, quizzes, and tests. Sept. 11 Tr. 259-260. Tests were administered by AM's paraprofessional outside the classroom at a table usually at the same time classmates were taking the test in the classroom. Sept. 11 Tr. 254. When AM missed class-work due to being tardy or absent, he made it up either at the table outside the classroom when nothing new was being taught in class or in class. Sept. 11 Tr. 253-254.

His report card grades for subjects taught by Ms. K appear below:

Subject	Reporting Period				Year 2008-09
	1	2	3	4	
Math	A	B	B	C	B
Science	A	B	C	B	B
Social Studies	A	C	B	C	B

J. Exh. 47.

In addition to AM being taught math, science, and social studies in the general educational setting, from October 2008, to the end of the 2008-09 school year Ms. W also taught him second grade reading and writing, also known as communication skills. Sept. 21 Tr. 13. Ms. W saw AM daily when he was not absent from her class. Ms. W holds a bachelor of science degree in nursery school through seventh grade education and a master's degree in reading education. She spent two years as a reading recovery teacher which took extensive training and at least seven years as a literacy teacher teaching small groups of struggling readers to read. Ms. K has been involved in teaching children that have special needs and IEPs for 15 years. Ms. W qualified as an expert in the area of reading instruction and communication skills instruction. Sept. 21 Tr. 5-7.

Ms. W's testimony indicates AM's behavior was acceptable during his school time with her. AM received reading and writing instruction from Ms. W from 12:55 p.m. to 3:05 p.m. Sept. 21 Tr. 44. Ms. W testified that at the beginning of the year, AM was well behaved. She described him as being very quiet and sitting to himself. She testified that he eventually became interested in interacting with a couple of friends. In the spring, during lunch time, he started receiving more warnings. After a warning, his behavior was usually corrected within a couple of minutes without outburst. Sept. 21 Tr. 9-10, 36.

Regarding his academics, Ms. W testified that in reading AM started the year reading on DRA level 16, the same DRA level he ended his first grade year on. According to Ms. W, that level indicated that AM had made average progress in his reading during the first grade. She testified that he ended his second grade year reading on a level 28 which, according to Ms. W's testimony, is considered average progress for a second grader. Sept. 21 Tr. 13-14. Ms. W also testified that AM exceeded his IEP expectations in writing and was graded more like a regular student. Sept. 21 Tr. 22-23,

32-33. In comparing his writing at the beginning of the year to his writing at the end of the school year she testified that initially he was writing unvaried, simple sentences. His writing then progressed to sentences using adjectives and paragraphs written with a beginning, middle, and end. As his writing evolved, it became more creative. She stated that AM's writing was on par with other students in the class and he was able to maneuver through the writing process by utilizing a graphic organizer, writing a sloppy copy which was the handwritten draft, conferring with Ms. W and then editing his writing and finalizing it on the word processor. Sept. 21 Tr. 24-33.

She testified that his grades in reading were derived from DRA assessments. Sept. 21 Tr. 13. In reading, AM received all Cs for each reporting period and a year end grade of C. During the second and third marking periods, his report card noted he needed improvement in decoding and fluency, respectively. J. Exh. 47.

His writing grade was determined by averaging three composition grades per nine week marking period. Each composition grade was calculated by using a grade 2 composition evaluation sheet. The written composition was evaluated in three areas - composing, written expression, and mechanics/usage. In each area, the student would receive a rating between 1 and 4. The rating in each area was then added to determine a score from 1 to 12 which translated to a grade. Sept. 21 Tr. 26-27. Specifically, a score of 11 or 12 resulted in a grade of A; a score of 9 or 10 resulted in a grade of B; a score of 8 resulted in a C; a score of 6 or 7 resulted in a D, and a score below 6 resulted in an E or assignment failure. J. Exh. 50. In writing AM received Bs for his end of the year grade and for all marking periods except the second one. During that marking period he received a C. J. Exh. 47.

The testimony of Ms. B, AM's one-on-one paraprofessional since kindergarten, substantiates statements made by Ms. K and Ms. W about AM's overall behavior and social skills. Ms. B testified that prior to the second grade, typical behaviors of AM consisted of his hiding under tables, hitting others, and going in the bathroom and not coming out. She testified that in the second grade his behavior problems had practically resolved. For example, he was no longer hiding under tables; loud noises in the cafeteria did not bother him; he could eat in the cafeteria; and he had friends and was invited to birthday parties. Sept. 21 Tr. 95-96.

Like Ms. B, Dr. DM, BVE School's principal, had a longstanding relationship with AM and was able to compare AM's behavior over a three year span.

Dr. DM also testified that AM's social skills and behavior were much improved in the second grade. She testified that in kindergarten AM was quick to take toys and cafeteria noise bothered him. Sept. 21 Tr. 137-138. By the first grade she stated, AM had joined a lunch bunch and was slowly reintroduced to the cafeteria. Sept. 21 Tr. 140. In the second grade she testified there were no behavior problems. Of particular note is that Dr. DM recalled that AM received his last referral for behavioral problems when he

attended kindergarten. Sept. 21 Tr. 141. She testified he made "good gains" socially and academically. Sept. 21 Tr. 141.

Regarding his academics, Dr. DM was able to assess them as well. Dr. DM was qualified as an expert in elementary education and the assessment and evaluation of student performance in the elementary school context. Dr. DM has been the principal of BVE School for 12 years and as noted previously has known AM as a student since kindergarten. She is certified to teach grades K-6 and certified as an administrator for grades K through 12. She has been involved in the IEP process for 29 years. In her role as instructional leader at BVE School she monitors the curriculum taught by teachers through, among other ways, teacher observations and teacher conferences. She deems herself as responsible for the successes and failures at BVE school. Because of this responsibility she checks report cards, meets with parents, and observes students in the classroom upon request from various individuals. She is responsible for assessing the data that is compiled on student progress or state assessments. Sept. 21 Tr. 32-36

During the hearing, Dr. DM reviewed AM's report card grades for kindergarten through the second grade. AM's kindergarten final report card enumerated 51 skills on which AM was assessed. Of those skills, AM was determined to have mastered 46 of them. He was assessed as "making progress" on four of them and no assessment was given for one skill. After reviewing his kindergarten report card, Dr. DM characterized AM's performance in kindergarten as good. J. Exh. 47; Sept. 21 Tr. 142.

AM's first grade report card indicated that he made the following end of the year grades:

Subject	End of the Year Grade
Math	B
Reading	C
Science	A
Social Studies	A
Writing	B

J. Exh. 47.

Dr. DM characterized AM's academic performance in first grade as good in math, normal progress in reading, outstanding in science and social studies, and very good in writing.

AM's second grade report card indicated that he made the following end of the year grades:

Subject	End of the Year Grade
Math	B
Reading	C
Science	B
Social Studies	B
Writing	B* ⁷

J. Exh. 47.

Dr. DM characterized AM's academic performance in second grade as very well in math, average in reading and above average in science and social studies. Further, she testified that even though AM missed a significant amount of time from the time allotted for writing due to AM's mother picking him up for non school related therapy, he still did well. Sept. 21 Tr. 143-144.

Dr. DM also reviewed AM's End of Year Assessments ("assessments") and testified that his mastery of 75% on the social studies assessment, 97% on the math, and 78% on the science indicated he grasped all three subjects. She opined that AM had benefited from the instruction in those subjects. Sept. 21 Tr. 148.

After reviewing some writing samples of AM, Dr. DM also testified that AM progressed in writing. She testified that AM went from writing simple sentences at the beginning of the year to varying his sentences. Further, he progressed in his writing by staying on topic. At the end of the year she noted that AM was writing a paragraph with a beginning, middle and an end. Sept. 21 Tr. 156-158. She noted that his K-5 Literacy Assessment ePortfolio showed he progressed in writing by noting he moved from the transition stage of writing to the conventional stage. Dr. DM concluded that a change in AM's writing setting for instruction was not warranted due to his making progress. Sept. 21 Tr. 156-158; J. Exh. 49.

The school's occupational therapist, Ms. ERS, and the school's physical therapist, Ms. CK, who also worked with AM from kindergarten to second grade substantiate AM's improvement. Ms. ERS testified that in kindergarten AM exhibited unsafe behaviors and had severe deficiencies in social skills and behavior. Sept. 21 Tr. 204-206. Ms. CK noted AM initially had severe deficits in his gross motor function. For example, he was not able to walk in the hallway with his peers; he was unable to sit in the stools in the cafeteria through his entire meal; and when he attempted to run, he would often fall due to awkwardness. Ms. CK also testified that initially, AM had problems transitioning from one activity/location to another. Sept. Tr. 241-245. Due to a referral for an occupational and physical therapy evaluation, Ms. ERS and Ms. CK conducted one in March 2007 and

⁷ The asterisk reflects IEP criteria.

determined AM's gross motor function and sensory needs required addressing. J. Exh. 37.

A sensory diet was instituted where strategies were employed such as allowing AM to use a scooter at school to calm him down and help him with organizational skills. Other occupational and physical therapy services provided to address the needs that were discovered by the evaluation included utilizing the curriculum Handwriting Without Tears. PS used this curriculum in kindergarten through first grade to help AM write legibly. Sept. 21 Tr. 218. ERS testified that by midway through the first grade AM could write legibly thus that handwriting curriculum was not used in the second grade. Sept. 21 Tr. 203 - 213. Also, Ms. ERS and Ms. CK provided two hours of occupational and physical therapy services which included a sensory motor social skills group that met weekly for one hour.⁸ Ms. ERS testified that concerns diminished to the point by second grade the scooter was no longer needed and only subtle sensory diet strategies were used such as allowing AM to be more mobile. She noted further that AM became a leader at times in the social group and upon prompting was able to talk through problems. Further, she noted that regression in social skills was minimal after breaks. Sept. 21 Tr. 207-214, 218. Ms. ERS testified that she eventually recommended AM receive only consult services because he was doing well academically and socially. Sept. 21 Tr. 221. Noting similar progress, Ms. CK testified that she recommended eventually that AM receive only consult services because AM got to the point he could safely and independently get around school. Tr. 260 -261.

Regarding AM's progress in pragmatic language, the speech pathologist Ms. HW described it as inconsistent. Ms. HW attributed some of the inconsistency to AM's absences from class, noting his progress, while not 100%, was better when he routinely attended therapy sessions⁹. Sept. 21 Tr. 297 - 300.

Considering AM's social skills, behavior, and academic performance, the educators and other PS professionals did not recommend changing AM's educational placement from a general educational setting with related services and aids to a self-contained class. Nor did they recommend summer instruction/ESY services as AM's teachers and therapists reported no regression or substantial lost in skills after AM returned from school breaks.

⁸ In the second grade that group met on Fridays from 9:00 a.m. to 10:00 a.m. According to Ms. CK, AM was frequently late due to his mother bringing him to school late. CK stated the tardiness caused him anxiety because he would be late starting an activity and would not be able to finish it. Sept. 21 Tr. 249-250.

⁹ School absentee records indicate, among other absences, AM missed his weekly speech therapy for a month in November 2008, because he was absent from school during days when speech therapy was scheduled. J. Exh. 46.

Having observed the witnesses and their demeanor, I find the witnesses for PS more persuasive than the witnesses for the parents.

I find that AM's academic, behavior, and social development was as described by the PS witnesses. Further, I find that AM's adjustment academically, behaviorally, and socially in the general education setting does not suggest he is in need of a more structured and restricted class or a self-contained class. I note that at the conclusion of his kindergarten year AM had mastered over 90% of skills wherein he was assessed. He was making progress in the other assessed areas. PS promoted him to first grade. At the conclusion of his first grade year, he was assessed two A's, two B's, and one C in subjects graded and PS promoted him to the second grade. At the conclusion of his second grade year he was assessed four B's and one C in subjects graded. Again, PS promoted him to the next grade. Further, AM has not had a behavior referral since kindergarten. Staff reported he could work through differences with his peers. Socially he interacted with others, established friends, and made progress with his pragmatic language.

I have considered the testimony of the parents' witnesses to include Dr. GM¹⁰, Dr. E, Ms. F and Ms. DB. None have had an extensive relationship with AM at school. I therefore find their testimony less persuasive and give less weight to their opinion that AM should be placed in a self-contained class with a small number of students with similar disabilities so that he can progress. I also note AM's mother reported the child was once lost at school during the second grade. Assuming this to be the case, I find the occurrence is isolated and not indicative of AM having a severe problem in his behavior or severe social problems at school. I also note the mother reports AM uses the teacher's bathroom. I do not find that this usage in and of itself shows deficiencies in behavior or social skills that would warrant placing AM in a self-contained class.

I examine also the suggestion by the parents' witness Dr. GM that AM needs a self-contained class because he needs intensive reading instruction. AM's reading teacher testified that AM's assessments on the DRA represented AM was making average progress in reading. I also note the teacher's testimony is consistent with data provided on the PS K-5 Literacy Assessment ePortfolio.¹¹ Likewise, on standardized testing AM's scores in the areas of broad reading, broad math, and broad written language fell in the average range which is consistent with his cognitive ability. This shows that AM's

¹⁰ I find PS did not allow Dr. GM to observe AM at school. I do note that it is unfortunate Dr. GM was not permitted to observe the child. I do not condone this action by PS nor draw any adverse conclusions against Dr. GM simply because she did not observe the child in the classroom.

¹¹ Because I was not provided with an explanation of the scoring method and acronyms employed by the PALS' portion of J. Exh. 49, I am unable to interpret the scores set forth on the PALS. Thus, I have given no weight to the PALS' portion of J. Exh. 49 because I was not provided with sufficient information to be able to interpret it. See J. Exh. 49

reading is at the expected level. Thus, I find persuasive the teacher's testimony that AM is making average reading progress. The evidence, therefore, does not suggest AM is in need of an intensive reading program in a self-contained class to progress in reading. I note, however, that testing does show AM is deficient in decoding. But I find a self-contained class is not necessary to implement any intensive reading program that may be provided to address the deficit. The hearing officer finds that changing AM's placement to a self contained class for that purpose would not meet the mandates of least restrictive environment ("LRE") under 20 U.S.C. 1412(a)(5)(A), which require that disabled students be educated in the same environment as non disabled students to the extent possible. The record as a whole fails to show that the child could not remain enrolled in a general education class and receive with supplemental aids or services intensive reading instruction. Accordingly, I find AM does not need a self-contained class to receive intensive reading instruction.

Further, I examine Dr. GM's contention that visually cued instruction is necessary. I find the instruction is visually cued. While AM's teachers may not have incorporated visual cues in all their instruction, they were used to some degree. For example, Ms. K utilized the smart board during math class and Ms. W utilized a graphic organizer during writing class.

What is more, even without having visual cued instruction at the level urged by Dr. GM, AM was able to acquire, commensurate with his average IQ, average to excellent grades. Those grades are credible despite claims that they are subjective and/or AM received substantial assistance from others to acquire them. While Dr. GM asserts those grades may be subjective, I find otherwise. For instance, AM's science, math, and social studies grades were derived from quizzes, tests, and class-work. And his reading grade was determined by standardized testing, the DRA. These methods of deriving AM's grades vastly reduced subjective grading and gives credence to AM's report card grades. Regarding Dr. GM's inference that NPS staff substantially edited AM's writing in order that he produce a more coherent and mechanically correct final draft, I find based on AM's writing teacher's testimony, which I find credible and persuasive, that the contention of Dr. G.M. is without merit. AM's writing grade was determined from scoring derived by using the composition evaluation sheet. AM's writing was rated on his ability to compose, use mechanics correctly, use adjectives, develop a story, and write creatively. I further note that I find his handwriting legible. Accordingly, I find that the instruction provided, possibly without the level of visual cued instruction urged by Dr. GM, enabled AM to obtain credible grades ranging from average to excellent.

I also examine the parents' contention that the child does not need a one-on-one assistant. The parents contend the appropriate placement for the child is a self-contained class with a one-on-one assistant not assigned to AM. I note the Present Level of Academic Achievement and Functional Performance on the proposed IEP establishes AM is in need of constant redirecting at times. J.Exh. 2. One purpose of the one-on-one assistant is to redirect AM. Sept. 21 Tr. 94. While eliminating the assistant is desirable,

because of AM's present work habits, and the unpredictability of when he may be off task and need redirection, I find the one-on-one assistant now necessary so she can be available for AM at those times he needs redirecting. Further I note the evidence shows efforts have been made to wean AM from the one-on-one paraprofessional and AM is not totally dependent on her. For example, the evidence shows during the second grade, Ms. B was slowly removing her physical presence from AM in the class setting and helping other students. Sept. 21 Tr. 162. Further, I note providing the one-on-one assistant enables the school to meet the mandates of LRE under 20 U.S.C. 1412(a)(5)(A). AM has been placed in the general education classroom which is less restrictive than a self-contained class. In order for him to be educated in a setting with nondisabled children, he is now in need of the one-on-one assistant to redirect him.

Accordingly, for the reasons set forth herein, I find the current IEP is appropriate and note that the parents' own witness, Dr. E supports this finding as when asked by counsel for the parent whether the current placement provided AM with an appropriate education, Dr. E responded in the affirmative. Sept. 10 Tr. 170-71.

I note that the parents contend that the goals on the proposed IEP are virtually the same as the goals on the current IEP. Further, they argue that the fact that the goals are the same is evidence that AM did not receive educational benefit from his current IEP. A comparison of the IEPs indicates the goals are not identical. For example, the writing goal on the proposed IEP increases the number of sentences AM is required to write in a paragraph. Also, the short term objectives/benchmarks are not identical to the ones in the current IEP. Regarding the pragmatic language goal/communication goal, the proposed IEP focuses on not only pragmatic language but on receptive language as well. Accordingly, I find the parents' argument unpersuasive.

B. Should the child receive ESY services?

ESY services are only necessary to FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if the child is not provided with an educational program during the summer months. *MM ExRel. DM v. Schl. Dist. Of Greenville County*, 303 F.3d 523 (4th Cir. 2002).

The parents' witnesses offered reasons why ESY services are necessary. Ms. F testified that after AM had a recent two week break from therapy, he lost some pragmatic language skills he had acquired. Sept. 10 Tr. 66. Dr. E, also an advocate for ESY services, testified and inferred that normally autistic students like AM or those eligible for SECEP receive summer instruction/ESY services. Sept. 10 Tr. 135. Dr. GM opined that AM required intensive reading possibly through ESY services in a self-contained class. VM contends that a significant danger exists that AM will lose learning acquired during the school year if ESY services are not provided. Ms. DM - lower school director of CB Academy - testified that AM needed ESY services to keep from falling behind. Sept. 11 Tr. 26. I note at the time of her testimony, AM had only been a student at CB Academy

for less than two weeks.

Witnesses for PS testified that AM was not eligible for ESY services. His teachers testified that AM retained skills even after school breaks and experienced zero to minimal regression. For example, Ms. W testified AM's reading level remained the same from the end of his first grade year to the beginning of his second grade year. She further testified that there were no regression in skills when he returned from school breaks. Sept. 21 Tr. 35. His math teacher testified she sent activities home to be completed during Christmas break to assist AM as well as other students in retaining information on which instruction was previously provided. She testified AM did not do the package of work sent home to be completed during the break. She testified she observed when AM returned to school from the break he was able to "pick up and go." The aforementioned teachers' observations were corroborated by other PS staff. Sept. 21 Tr. 217, 246-247, 301. I have observed the demeanor of the witnesses and considered their testimony. Having done so, I am persuaded by the testimony of PS witnesses. Accordingly, I assign less weight to the testimony of the parents' witnesses and find they have not met their burden of showing AM is eligible for ESY services.

C. Has PS failed to provide a continuum of alternative placements?

As previously noted herein, PS is required to educate AM in the LRE pursuant to the mandate of 34 C.F.R. 300.114. School districts also must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. 300.115. The continuum of educational environments or placements ranges from the least restrictive to the most restrictive; that is instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. 300.115(b).

Ms. U, an eleven year employee at SECEP and the assistant director of its autistic program, testified that classes within SECEP are self-contained. She also testified that students in the program have significant behavior problems and usually need a highly structured environment. Sept.10 Tr. 175-186. Her testimony was not contradicted and I find it credible.

She was qualified as an expert in the area of educating autistic children and in assessing whether or not an autistic child needs particular placement in a school setting. Tr. 192. She further testified that if a child was making progress in a regular education or inclusive class it would be inappropriate to refer him/her to SECEP for evaluation absent some serious behavior problem. Tr. 193. That testimony was not contradicted and I give great weight to it also.

The parents requested AM be referred to SECEP for evaluation to determine if AM was appropriate for SECEP placement. The IEP team denied the request. The parents now argue the IEP team should have granted the request and because it did not

somehow PS has violated the mandates of 34 C.F.R. 300.115.

As established previously herein, AM was making appropriate progress socially, behaviorally, and academically in his regular education class. I found the general education class with supplemental aids/services was appropriate. I further find the current placement is AM's LRE. A consideration of other alternative placements is needed when the general educational setting can not ensure that the child's needs for special education and related services can be met. In this case, AM's educational needs could be met in the general educational setting. Therefore, a referral to SECEP was not appropriate nor required by 34 C.F.R. 300.115.

D. Did PS fail to implement provisions of the IEP regarding (i) written communication and (ii) quarterly reports?

The current IEP provided that AM would receive one hour of writing instruction daily. VM testified that as of October 2008, she was told that AM received only 30 minutes of daily writing instruction.¹² Ms. W, AM's writing teacher from October 2008 to the end of the 2008-09 school year, testified she provided one hour of writing per day to AM unless he was absent. I have observed the demeanor of Ms. W and find her testimony credible. Accordingly, I find PS did not fail to provide writing instruction as required by the IEP.¹³

The parents also contend PS failed to provide quarterly reports on AM's IEP goals as required by the IEP. The evidence shows the parents did not receive progress reports on the Goals and Objectives page of the IEP for AM's writing goal and AM's behavior goal. I do note the evidence established the parents received weekly reports from Ms. W and Ms. K about AM's progress and behavior, but the parents did not regularly return those reports to the teachers. Sept. 11 Tr. 83-85, 294. Sept. 21 Tr. 51-52. The evidence also shows the parents regularly received progress reports on the Goals and Objectives page of the IEP regarding AM's pragmatic language goals. Those progress reports indicated AM was making progress sufficient to meet his goal. Sept. 11 Tr. 95. I find, however, the parents did not receive collected data that was evidence of progress made on the pragmatic language goal.

I further find any failure by the PS to provide progress reports as required by the IEP or data to support progress on a goal was a procedural error.

While school districts are required to comply with IDEA procedural requirements,

¹² The exact date was not established.

¹³ The parents argue that the proposed IEP is inappropriate because, among other reasons, it only provides for 30 minutes of writing instruction daily. Ms. W testified that an hour of writing daily was too taxing for AM and it was difficult for him to focus that long on just writing. Sept. 21 Tr. 46. I find the witness' explanation persuasive and find the proposed 30 minutes of daily writing appropriate.

not all procedural errors render an IEP legally inadequate under the IDEA. In matters alleging a procedural violation, a child with a disability does not receive a FAPE only if the procedural inadequacies (1) impede the child's right to a FAPE, (2) significantly impede the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child; or (3) cause a deprivation of educational benefits. 20 U.S.C. Section 1415(f)(3)(E)(ii).

AM received an educational benefit from his current IEP as evidenced by his progress academically, socially, and behaviorally. Further, the parents or mother attended several IEP meetings, participated, and was informed of AM's progress. The parents received weekly progress reports from the child's teachers. I therefore find there was no impediment to the child's right to a FAPE or the parents' opportunity to participate in the decision making process. Further, there was no deprivation of educational benefit. Accordingly, I find any procedural error harmless.

E. Whether the PS should reimburse the parents for the tuition and cost of educating the child at CB Academy?

Having previously found the current IEP is appropriate, I find no reimbursement is due the parents for the parents' enrollment of the child in the private school, CB Academy.

V. DECISION AND ORDER

I have reviewed and considered all the evidence of record whether specifically mentioned in the decision or not and I find the following:

(i) that the child is receiving or has received a FAPE under the current IEP which places/placed him in a general curriculum educational classroom of more than 20 students with a regular education teacher, a one-on-one paraprofessional for the child, and other supplemental aids/services;

(ii) that the child is not eligible for ESY services;

(iii) that PS has not failed to provide a continuum of alternative placements;

(iv) that PS daily provided one hour of written communication as required by the IEP;

(v) that PS failed to provide all progress reports required by the IEP; however, the procedural error was harmless;

(vi) that PS did not provide to the parent the data collected to support

progress noted regarding AM's pragmatic goal; however, the procedural error was harmless; and

(vii) that the parents are not due reimbursement from PS for tuition and cost of educating AM at CB Academy.

I have further denied PS' motion to strike because at the conclusion of the parents' case it was not conclusively apparent that the parents had proven no cause of action against PS. See, *Williams v. Vaughan*, 214 Va. 307, 309, 199 S.E.2d 515, 517 (1973) (quoting *Leath v. Richmond, Fredericksburg & Potomac R.R. Co.*, 162 Va. 705, 710, 174 S.E. 678, 680 (1934)).

I also find all requirements of notice to the parents have been satisfied; that AM is a child with a disability as defined by applicable law 34 C.F.R. Section 300.8 and is in need of special education and related services. I also find that the PS has provided for a FAPE.

VI. PREVAILING PARTY

I have the authority to determine the prevailing party on the issues. I find the prevailing party on each issue is PS.

VII. APPEAL INFORMATION

This decision is final and binding, unless either party appeals in a federal district court within 90 calendar days of the date of this decision or in a state circuit court within 180 calendar days of the date of this decision.

ENTERED THIS 19th day of October 2009.


Ternon Galloway Lee, Hearing Officer

Cc: Parents EM and VM
Counsel for the PS
VDOE Coordinator of Due Process Services, Dispute Resolution & Admin. Servs.
Counsel for Parents
Administrative Director of Special Education

Certified true copy