08-078

VIRGINIA DEPARTMENT OF EDUCATION DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES OFFICE OF DISPUTE RFESOLUTION AND ADMINISTRATIVE SERVICES

CASE CLOSURE REPORT

Public Schools

School Division

Name of Parent

Robert Smith

Division Superintendent

Name of Child

John Cafferky

Robert Perkins & Parent (an atty.)

Counsel Representing LEA

Counseling Representing Parents

Alan Dockterman

Parent

Hearing Officer

Party Initiating Hearing

Hearing Officer's Determination of Issues: Procedural defects, if any, not deny parent an opportunity for meaningful participation in IEP and child not thereby denied FAPE, and proposed June 19, 2006 IEP 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 7/14/08.

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

7-15-08

Date

Alan Dockterman

Form2report8

COMMONWEALTH OF VIRGINIA:

DUE PROCESS EDUCATIONAL APPEAL

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

DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

Public Schools (PS) received a request for a due process hearing from , parent of , on April 29, 2008. She appeals the decision of the group convened to develop an individualized education plan (IEP) for in which they proposed a placement within the school system. (See, generally, Request for Due Process Hearing and cover letter of April 29, 2008).

Ms. contends the placement was not appropriate for and would not provide with the education or services she needed. A hearing was scheduled to determine whether the placement was appropriate, and, if not, whether the private placement selected by the parent was appropriate and, if so, what monetary and other relief should be granted.

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. represented PS. Ms. , an attorney, represented herself and Robert Perkins, Esq., assisted her. On May 15, 2008, a pre-hearing conference was conducted in my offices. 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 16, 2008).

The parties had participated in a resolution meeting and mediation but were unable to settle their differences. Ms. decided that the hearing should be public.

The hearing began on June 17, 2008 in room of the Center located at St., VA and concluded on June 19, 2008. Twelve witnesses testified.

The parties elected to submit post-hearing and reply briefs in lieu of closing arguments at the hearing. Ms. had already submitted a pre-hearing brief. (L.Op.Br.). I received a post-hearing brief from PS on June 30, 2008 (A.Op.Br.) and reply briefs from Ms. on July 8, 2008 (L.Rep.Br.) and PS on July 11, 2008 (A.Rep.Br.). I issued subpoenas without objection and the parties timely filed their exhibits and list of witnesses.

References in this Decision refer to the transcript for each of the three consecutive days of the proceedings. (TRI-TRIII). The transcript for the hearing was delivered on June 27, 2008. PS filed eighty exhibits and Ms. filed forty-seven exhibits, including an exhibit filed after the hearing to which PS waived its objection based

on timeliness. References to those exhibits are identified as those from PS (A.) and those from the parent (L.).

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 2006 IEP and 's Third Grade Experience.

was born in Honduras on July 23, . She was adopted by Ms. with whom she had lived since she was two weeks old. (TRIII-678; A.33, p.1). The family lived in Honduras until she was three years of age, when they moved to Virginia. (A.34, p.1). Although 's babysitter spoke Spanish and moved to Virginia where she remained with the family until June of 2001, 's primary language is English. (A.20; A.34, p.1). Ms also adopted another child, , in Honduras, seventeen months after adopting who is five months younger. (A.33, p.1).

Ms. was concerned about 's language development and decided to have her evaluated by the Scottish Rite Center at Children's Hospital in Washington, D.C. (TRIII-678-679). Based on an evaluation on August 29, 2000, the Speech-Language Pathologist there determined that she demonstrated severe receptive and expressive language delays as well as a moderate phonological delay. She recommended that receive speech-language therapy

twice a week and referred her to the local Child Find Agency. (A.17). attended preschool at the School, and received such therapy beginning in January once a week at School, her neighborhood school, as a dual enrollee for one-half hour and once a week privately for forty-five minutes. (TRIII-679-680; A.20, p.2-3; A.22; A.29).

On November 19, 2000, the special education eligibility committee determined that had a speech or language impairment disability. (A.3). Upon the receipt of additional assessment information, the committee changed the disabling condition from speech/language impairment to developmental delay on May 15, 2001. (A.5).

In April of 2001, received a speech and language evaluation update as part of a full educational assessment. The pathologist found that her word meaning, syntax and articulation were problematic and recommended continued speech and language therapy. (A.22, p.3). Developmentally, she was found to be age appropriate in gross motor skills, in the three year old range for fine motor skills, one year below age in general knowledge and social and emotional development. (A.22). The following month the eligibility committee changed the nature of the disability from speech/language impairment to developmental delay. (A.5).

began kindergarten at School, her neighborhood school, in the fall of 2001. Dr. , current director of special education who was special education coordinator for from 2003 to 2006, testified in general about the educational program for during her final three years at . Based on a thirty hour a week schedule, she received from twenty-two to twenty-five hours of special education support. In her

opinion, received an intensive language program which used every opportunity to reinforce language whether receptive or expressive. (TRI-75-78).

received special education support in the kindergarten class and the special education resource room for part of the day. She received two half hour group speech therapy sessions. (TRIII-681-682; A.29). She repeated kindergarten for the 2002-2003 school year. (TRIII-682; A.31). During the second year, she received the two half hour group speech therapy sessions, occupational therapy, and perhaps some reading instruction apart from the general class. (TRIII-687-688). There were nineteen students in her general education class with two teachers. (TRI-80-81).

In order to obtain a more precise definition of 's disabilities, Ms. brought her to the Autism and Communications Clinic at Georgetown University Children's Medical Center in the fall of 2002. The five member team there found that she suffered from significant delays in both receptive and expressive language and understanding of vocabulary. Her cognitive skills were below average with considerable variability in her skills. There were concerns about her sensory processing, verbal reasoning, and short-term memory.

The five member clinic team recommended intensive daily speech and language therapy both within and outside the classroom environment. They also found hypotonicity, a condition in which the nerve system is not well connected into the muscle system and where there is low muscle tone. As a result, 's articulation abilities were adversely affected. They recommended that occupational therapy be continued and her IEP goals be adjusted to include basic

foundations of language. (TRIII-683-684; A.24, pp.12-13). According to Ms. , they told her that because of her severe language and speech disorder, she needed a special program with intensive focus on language the entire day, although that was not in their evaluation. (TRIII-684-685, 699; A.24).

For the 2003-2004 and 2004-2005 school years, first and second grade, the student progress reports showed that she was experiencing great difficulty in nearly all areas of reading, oral communication, written communication, and mathematics. (A.46-47). In first grade, she received special education support for 15.5 hours a week, of which half of that time was spent in small group instruction for reading (1.5 hours daily), and the balance in the first grade classroom during writing, math, and computer lab. She also received one hour of speech-language therapy and one-half hour of occupational therapy per week. Otherwise, she was with her regular class for other subjects. (A.29). For the Woodcock-Johnson III tests of achievement, scored in the low to low average functional level based on her age on the subtests. (A.29).

On March 9, 2004, the eligibility committee changed the primary disorder to speech language impairment/other health impairment from developmental delay. (TRIII-688-689; A.6). In response to S's recommendation, Ms. had evaluated at the Kennedy Krieger Institute in Baltimore, MD on April 4, 2004. Lisa Reichenbach, PHD, administered a number of tests which indicated that she functioned well below her age level. Her performance appeared more consistent with working memory and language processing difficulties than with attention problems. She recommended increasing speech and language services. If she became

oppositional or excessively frustrated, then more intensive special educational services should be considered, such as a small class setting specialized for children with significant language difficulties. (A.62, pp.4-6).

Dr. Reichenbach explained to Ms. that the language disorder was very severe and that she needed to intensify the focus on the disorder as that was the key to academic success for . (TRIII-691-692). She told Ms. that she saw no signs of cognitive impairment and that there were no real limits to 's potential if the speech and language disorder issues could be overcome. This assessment was not accepted by PS staff who indicated to Ms. that they believed she was mentally retarded. (L.16; TRIII-692-696). However, she was never formally identified as mentally retarded or cognitively disabled for purposes of receiving special education services. (TRI-69). Various interactions with PS personnel supported Ms. 's conclusion that many of 's PS teachers considered her cognitively impaired. (TRIII-712-713, 884, 889).

PS agreed to increase the speech and language therapy to three group sessions a week for second grade in response to the Kennedy-Krieger findings. (TRIII-698). There was no individual speech therapy in these sessions. (TRIII-700-701).

In the spring of 2005, Ms. returned to Kennedy-Krieger due to increased frustration since she thought was not progressing, falling further behind in reading every six months and even unable to carry on a conversation with her. The Institute's tests showed a dramatic drop in speech and language from kindergarten to second grade. (TRIII-702-704). She began asking PS personnel whether a more intensive program could be found,

one more specific to 's unique needs, but none was suggested by PS. (TRIII-709). Ms. testified that the recommendations from Kennedy Krieger were, for the most part, in place at . (TRI-72,79-83).

In the summer of 2005, attended a five-week PS reading camp. Her Developmental Reading Assessment (DRA) level scores increased from level 8 in March to level 10 at the end of the session. (A.51). However, had been a level 10 when she actually began camp. In Ms. 's view, her reading had improved but not measurably so. (TRIII-705-709).

, 's special education teacher for third grade and case manager for the IEP implementation, has thirty-one years of experience in the field of special education and had been a general education teacher as well. She testified that she saw five and one-half hours a day in both the general and special education settings. (TRI-178-187). She offered the opinion that definitely made educational progress in all subject areas. She improved on the DRA, The Phonological Awareness and Literacy Screening, and the Dolch Sight Wording tests. (TRI-201-225; A.45,53). She made steady advancement from June of 2003 to June of 2006 in reading levels. (TRI-222-224; A.45). As progressed in the third grade year, Ms. found that she made progress on her IEP goals. (A.58,73,74; TRI-226-227, 237-238, 247-248).

, a speech and language pathologist with PS, also has over thirty years experience in her profession. (TRII-362). She testified that she worked with from kindergarten until most of third grade, seeing her twice a week in kindergarten and first grade, three

times a week thereafter until November of 2005 when another speech pathologist, , replaced her for two of the three sessions. For third grade, the parties agreed that one of the sessions would be individual. (TRII-363, 365, 372-374, 518-519). Ms. offered the opinion that from kindergarten through third grade, advanced in her speech and language skills. 's comprehension and articulation improved considerably and she could finally communicate with others. (TRII-500-502).

Ms. questioned Ms. , who was 's special education teacher through second grade, about whether had an intensive speech and language program. She told her that it no longer existed in . (TRII-636; TRIII-686, 700). Ms. rendered her opinion that the disbanded PS program for students with speech and language disorders would have been inappropriate for because the students participating were functioning at a higher reading level than . (TRII-509-510, 512-513). , the speech and language coordinator for PS, supported her colleague's view by testifying that the program was for students who only had speech and language impairments whereas 's disabilities were far broader. The program, known as the Drew Communications Class, ended about five years ago. (TRIII-933-935, 941-943).

PS offered the testimony of who was 's general education teacher for third grade and who was present during both June 2006 IEP meetings. (TRII-616-620). She explained that was accompanied by the special education teacher or an aide for science and social studies, but not for physical education, music and art. (TRII-622-625). She testified that she thought that the IEP

proposed was designed to enable to make progress and was appropriate. She believed that it would address her educational needs and meet the concerns of Ms. regarding reading and language instruction. (TRII-621). She further stated that the IEP team was comfortable with the program for . TRII-620).

Ruth Chasanow Heitin is a special education consultant who has experience as a public school teacher and has a doctorate in special education administration. In October of 2005, she was retained by Ms. to advise her in regard to 's education. She reviewed her records, interviewed Ms. and , observed her in the classroom, and met with PS officials. She determined that 's language-base disability was one of the most severe she had seen and that she needed intensive early intervention as soon as possible. She advised Ms. to consider private placement because did not have an appropriate program for . (TRII-529-533).

Ms. began exploring private schools despite her strong belief in public school education. (TRIII-705, 897-898). Two of the schools she considered were too advanced for , and another was deemed too far away. She finally applied to School and was accepted in April of 2006. (TRIII-744-747; TRIII-802; A.68). Ms. kept Ashlawn staff fully informed of her efforts to find a private placement while she was simultaneously urging them to help her find a more appropriate placement within . (TRIII-748-749).

During 's third grade year, Ms. hired Gracia Holtz, a private speech and language pathologist, who began individual sessions with , beginning with one hour a week in November of 2005 and increasing to two hours a week

a few months thereafter. Additionally, Ms. herself supplemented the sessions with lessons at home for thirty minutes a day. During the second and third grade years, Ms. unsuccessfully requested PS to help her set up an in- home program to augment instruction at school, although she eventually received a list of vocabulary words for prior review. (TRIII-715-717). received speech therapy in group sessions three times a week during most of third grade which changed, at Ms. 's request, to 50% individual session for the final two months of the school year. (TRIII-719-720).

Ms. testified that she worked with from the fall of 2005 until August of 2006, then resumed therapy in July of 2007 until October of 2007. She believed that individual rather than group sessions would be more effective because additional children would not enable the therapist to provide the one-on-one streamlined treatment needed. (TRII-392). She worked closely with Ms. to ensure there was consistent reinforcement at home and described the visualizing and verbalizing program she set up for . (TRII-396-399). During the period of her treatment, she found that had made steady improvement in her pragmatic language abilities. (TRII-402-403).

On October 26, 2005, an IEP was prepared which provided for one hour of occupational therapy, three of speech-language therapy, and reading and written language instruction from special education staff in both the general and the special education classrooms. During the January 26, 2006 review, was found to have made sufficient progress on most of her goals. (A.11). By June 19, 2006, she was found to have mastered some of the goals,

and to have made both sufficient and insufficient progress in the others. (L.29).

was taught science and social studies with general education students. Ms. testified that she was often overwhelmed by the difficulty of the material. The success of her teachers' efforts to accommodate her was mixed, and they had difficulty providing timely and effective materials to Ms. to assist her with helping her daughter with her homework. (TRIII-756-770, 882-887).

In third grade began taking Concerta, a medication for her anxiety and lack of focus which improved her educational performance. (TRIII-867-868, 893-894). Ms. testified that though enjoyed school, she called herself "stupid", had low self esteem, did not read, and could not establish a relationship with her peers because of her inability to speak effectively with them. (TRIII-902-904).

Ms. considered third grade to have been more successful for than second grade, which she characterized as a disaster. She had always attempted to be as upbeat and positive as possible with PS staff, recognizing that had good teachers who worked hard. (See, e.g., TRIII-878, 884, 887, 900; A.62). She was also concerned that too much criticism would turn the teachers against and her, reduce their desire to work hard with them, and jeopardize the experience of her son, , at . (TRIII-754-755, 887, 900).

Ms. wrote on the comment sheet to the Student Progress Report that was making progress in the first three grading periods for third grade. (A.53). In her notes for an IEP meeting in February of 2006, she again stated she was making good progress but could achieve more with

the right program. (A.65). Her letter to on February 27, 2006 stated that 's academic performance and speech had improved dramatically, (A.66), though she explained that her remarks were designed to encourage the school to admit . (TRIII-896-897).

B. 2006 IEPs.

1. *March IEP.*

In Ms. 's quest to find a more appropriate program for , she spoke in December of 2005 with Ms. , then director of special education. She said that for special education classes was with three other students, two of whom were not on an academic track, and with students for the inclusion classes who were taught in such an intense verbal curriculum that she was overwhelmed. Ms. told her that had no data base enabling them to identify if a program existed which might be more appropriate for and that Ms. needed to find one on her own. (TRIII-710-712).

In January of 2006, Ms. was concerned that was not making any of her speech and language goals and believed she had never made any of them. She decided to request an IEP meeting, and one hour was scheduled for the meeting. The first of a series of 2006 IEP meetings began on February 15, 2006 at which the decision was made to revise the goals, which occurred at a subsequent meeting on March 20, 2006. With regard to Ms. 's proposals, the school officials agreed to make the goals more specific and reasonable and redo certain goals, but Ms. testified

that PS did not have a proposal for helping meet her goals. (TRI-85-89; TRIII-723-731, 735; A.13).

Under the March 2006 IEP, was found to have mastered three of her ten goals by June of 2006 and had made sufficient progress on two others. (A.13). That IEP called for special education support consisting of one hour of occupational therapy, five and one half hours of reading, four and one half hours of written language, five hours of mathematics and ninety minutes of speech-language therapy. Ms. signed the IEP, adding that she agreed to its implementation but not all its content. (A.13).

2. *June IEP Meetings.*

On April 3, 2006, was accepted at . (A. 68). On May 4, 2006, Ms. requested PS to consider private placement at public expense. PS responded by setting another IEP meeting for June 9, 2006. At that time Ms. was given a copy of a draft IEP which did not address placement. The meeting lasted about one hour, and was primarily devoted to present levels of performance with, according to Ms. , no discussion of placement. (TRIII-735-737).

Another meeting was called for June 19, 2006 and three hours were scheduled, though it lasted for approximately four hours. (L.Op.Br, p.6). On June 14, 2006, Ms. sent an e-mail to Dr. asking whether placement would be considered. Dr. forwarded it to Ms. and asked whether she should call her and explain the process to accept or decline the proposed IEP or should Ms. . On June 14, 2006, Ms. sent an e-mail to Dr. asking her to tell Ms.

that the IEP determines placement and that the least restrictive options are to be rejected only for legally sufficient reasons. (L.10).

On June 15, 2006, Dr. e-mailed Ms. and stated that Ms. would write on the draft IEP that she wanted consideration given to the option of private placement. (L-11a). Dr. agreed to Ms. 's request that placement be discussed and Ms. wrote on the Meeting Notice that she understood it would be about the appropriateness of placement, but, according to Ms. , the subject was not really discussed then either. (TRIII-738-739; A.15).

Ms. was assisted by one of her attorneys at the June 19, 2006 meeting. (A.14). Most of the meeting concerned the development of goals. When Ms. complained about the composition of 's special education class, Ms. stated that she would not know which students would be in the class until August and that it did not matter who 's classmates were as long as her program was appropriate. (TRIII-740-742).

Ms. told her that since she had agreed with the goals, she must also have agreed with placement. Ms. objected, stating that the program was not an integrated language program but fragmented. Then, according to Ms. , the IEP team, which had now lost a number of members who had left early, spent fifteen minutes unsuccessfully trying to cobble together an integrated speech and language program. Ms. then said that time was running out and the "IEP [was] fine. placement can do it." By the time the meeting ended, half of the team had left. (TRI-144; TRIII-743-744). A comparison between the IEP of October of 2005 (A.11) and

the proposed IEP of June of 2006 (A.15) reveals that the programs offered are not substantially different.

Dr. 's recollection of the June IEP meetings varied from that of Ms. . She testified that answering the numerous questions Ms. 's representatives raised left little time left to modify the IEP. At the second meeting, the representatives stated made progress and that third grade was a great year for her. They believed that was an appropriate place for to receive services and discussed why private placement was rejected. There were opportunities for integration with general education students, she was making progress academically, and peer and language models were available. At the meeting, Ms. agreed that the present level of performance, goals, and services were accurate, but objected to the IEP's implementation at . (TRI-92-99, 101-102; TRIII-964-967).

Dr. recalled that the team members discussed placement and reviewed accommodations for general education classes. officials also discussed with Ms. the contents of the Prior Notice and Consent page at the end of the meeting. The Notice, which was included in the IEP, noted that the parent requested private placement but it was denied on the grounds that it was not appropriate, governmental requirements mandated the action taken, and the proposed services would meet the student's need for appropriate education in the least restrictive environment. (TRI-102-106,147; TRIII-963-966, 978-979; A.15). Dr. prepared the Notice at the end of the June 19, 2006 meeting. (TRIII-961-963). Ms. acknowledged that she understood when the meeting ended that PS believed

that it could provide an appropriate program at . (TRIII-928).

Dr. Heitin recounted what occurred during the June 9, 2008 meeting. She said staff dismissed their concerns generally and refused to conduct updated testing. She also objected to the shortness of the meeting. According to Dr. Heitlin, placement was discussed, though not formally. She concluded that PS had decided had made progress, her needs could be met in the public school, and that it would not consider private placement. Thus, it would have been unwise of Ms. to invest further resources in paying for professional support to attend the next IEP meeting. (TRII-565-566, 585-586, 605-606; L.12).

Dr. Heitlin considered the classes in the general education setting not to be in the least restrictive environment (LRE) because, based on her observation, could not participate without assistance of an adult. (TRII-540-542). She did not propose a particular language-based program at the IEP meeting, although she did discuss it at the school observation on June 2, 2006 with the principal of , . (TRII-603-605).

Ms. testified that the proposed IEP was objectionable because it did not state what the delivery of services environment would be, explain what would happen in the general education classes, or review how the proposed programs at and would compare. Further, the speech and language goals were fragmented. Ms. did not propose specific language on the goals at either the June 9th or the June 16th meetings. Nor was her objection to 's participation in the general education classes discussed. Despite the presence of two attorneys and an advocate, they did not insist on placement discussions on

June 9, 2006 and, in any event, only one hour was allocated for the meeting. (TRIII-918-927).

Ms. testified that she was in agreement with the proposed IEP of June 2006, that she would have been 's fourth grade teacher, that PS was offering a program similar to the prior year's program and that it targeted her level of performance. In her view, it would have been educationally beneficial and appropriate for . (TRI-236-238). Ms. stated that based on her review of the IEP goals and involvement with the speech and language pathologist, she maintained that was making progress at as well. (TRIII-935).

Ms. rendered her opinion that the speech and language services outlined in the IEP for the 2006-2007 school years were appropriate, that implementation could enable her to make significant progress in all goal areas, and that the proposed IEP could have continued to provide appropriate services for her. (TRII-500-502, 507-509).

Ms. criticized the decision to mainstream for general education classes. In her opinion, would have been quite lost in a general education classroom with her inattention and inability to focus adversely impacting her learning. She would have needed considerable guided instruction, repetition of materials and visual support. (TRII-387-90). On cross examination, she said that she had neither seen in a general education setting nor served as a classroom teacher. (TRII-436-437). She also stated that in March of 2006 was exhibiting steady progress in areas that both PS staff and she had been covering. (TRII-445-446).

C. Post June 19, 2006 Developments. (Page 18)

On June 23, 2006, Ms. informed that the proposed IEP was unacceptable. (TRI-94-95; A.15). On August 30, 2006, Ms. received a letter from . , Ed.D. Assistant Superintendent, Student Services, stating that he had received her letter to school board members regarding her child's special education program. He outlined the position of the IEP team members from PS, informed her that the school district would not pay for unilateral placement, and included information regarding mediation and due process hearing rights. (L.11b). She met with him in an unsuccessful attempt to convince him to change his position on September 13, 2006, and he provided the Request for a Due Process form to her on September 14, 2006, adding that he had reviewed the dispute and found that the recommendations had been appropriate and that 's needs could have been met at . (L.11c).

Ms. enrolled in for the 2006-2007 school year. is an independent full-time special education school for children with language-based learning disabilities. (L.31). According to Ms. , found a warm, cohesive group of friends there. She had become much happier and popular than at . (TRIII-776-790).

, the Associate Head at , testified about the program. made some progress the first year even though that the first year was focused on adjustment, but progress increased the second year as she became more confident and demonstrated greater independence and self-esteem. (TRIII-808-809, 812-813, 830-831). Nevertheless, of her forty-seven objectives identified on the 2006-2007 IEP, mastered

only two of them. (TRI-117-118; Tr-III-831). There were ten children in her classroom. (TR-III-811-812).

Once Ms. pursued her claim for reimbursement again, PS decided to conduct a re-evaluation. The school system performed various reassessments of .

, the school psychologist, testified regarding the psychological evaluation she conducted on May 28-29, 2008 for purposes of updating information for the IEP team. She has performed over one thousand evaluations during more than fifteen years with the school system. (TRI-268-269). She conducted a range of tests, including the Wechsler Nonverbal Scale of Ability test and the WIAT-II cognitive test, measuring such areas as cognitive functioning, visual/motor integration skills, and achievement. (TRI-273-274; A.38). Ms. found that 's academic skills fell significantly below grade level. (TRI-294). She reviewed the prior tests and concluded that the tests were consistent with her evaluation with regard to 's cognitive functioning. (TRI-302).

Ms. also found that none of the tests indicated any emotional or withdrawal problems which were clinically significant. (TRI-303-304; A.3,5,6,79). She did not believe could have been expected to catch up or accrue skills more quickly as she grew older due to the many barriers she needed to overcome. Thus, her progress needed to be measured according to her own level, not normative groups. She described 's progress as steady but without dramatic gains in any years. (TRI-306-308, 340).

, a speech language pathologist performed a speech and language assessment of at on June 4, 2008. She offered her opinion that 's progression in speech and language skills during the past

two years did not significantly vary from the yearly progression at . Likewise, she did not find that her level of functioning was much different than during her time at and that her current scores were consistent with her earlier scores as an student. Ms. found that continued to have great difficulty with her receptive and expressive language in all five of the major areas assessed. (TRIII-949-952, 957).

Dr. analyzed achievement test scores and found significant improvement between April of 2007 and March of 2008 while was at . She characterized PS' recent scores which did not reflect progress as aberrations. (TRII-541-550).

On June 10, 2008, PS held an eligibility meeting at which 's classification was changed to multiple disabilities to reflect also her attention disabilities. (TRI-65-69; A.77,79). One preliminary IEP meeting was convened, but the IEP process for the 2008-2009 school year was not completed. (TRI-129-130; A.78).

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 this program and has required its public schools, which include PS, to provide FAPE to all children with (page21)

di abilities 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).

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 determined 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.

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 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).

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.

The Act establishes significant procedural requirements to safeguard the rights of the student to receive a FAPE. 20 U.S.C. §1415. *Rowley, supra,* at 207. These safeguards "guarantee the parents an opportunity for meaningful input into all decisions affecting their child's education." *Honig, supra,* at 311-312 (1988). "Congress placed every bit as much emphasis on compliance with procedures giving parents…a large measure of participation at every stage of the administrative process…as it did up the measurement of the resulting IEP against a substantive standard." *Rowley, supra,* at 205-206.

Parents are required to be members of the group that makes the decision on educational placement. 20 U.S.C. §1414(e). Under 34 C.F.R., §300.345,(2006), the school district is required to ensure that parents are present or have had an opportunity to participate at each IEP meeting. However, the right to participate does not give parents the power to dictate the outcome of the IEP team or veto educational decisions for their child without congressional mandate. *See, e.g., A.W. v. Fairfax County School Board,* 372 F.3d 674, 683, n.10 (4th Cir. 2004).

20 U.S.C. §1415(b)(3)(B) require school districts to give prior written notice to parents when their request for a change of placement is denied before a due process hearing. In general, the notice requirements include a description of the action refused, explanation of why the decision was made, description of documents used as a basis for the action, statement of procedural rights, sources to obtain assistance in understanding the rights, and a description of the factors relevant to the decision. *See* 20 U.S.C. §1415(c)(1). (page 24)

Procedural deficiencies alone are insufficient to set aside an IEP unless there is a rational basis to conclude that the defects hampered the parents' opportunity to participate in the decision making process, thereby compromising the child's ability to receive an appropriate education and depriving him of educational benefits. *O'Toole v. Olathe District School Unified School District,* 144 F.3d 692, 707 (10th Cir. 1998); *See also Roland M. v. Concord School Committee,* 910 F.2d 983, 994 (1st Cir. 1990).

A child is denied FAPE where the procedural defects have caused a material and inherently harmful impact on the IEP committee's ability to develop a plan reasonably calculated to enable the child to receive meaningful educational benefits under the *Rowley* standard. *M.L. v. Federal Ways School District,* 394 F.3d 634 (9th Cir. 2005); *Amanda J. v. Clark School District,* 267 F.3d 877 (9th Cir. 2001); *Deal v. Hamilton County Board of Education,* 392 F.3d 840 (6th Cir. 2004). The procedural violation must therefore *actually* interfere with the provision of FAPE. *DiBuo v. Board of Education of Worcester* County, 309 F.3d 184, 190 (4th Cir. 2002) (emphasis in original). Procedural flaws do not automatically require a finding of denial of FAPE. However, procedural inadequacies that result in a loss of educational support, or which seriously infringe on the parent's opportunity to participate in the IEP, result in a denial of FAPE. *Hall ex rel Hall, supra,* at 635; *Burke County Board of Education V. Denton,* 895 F.2d 973, 982 (4th Cir. 1990) Thus, If a school district has already determined placement prior to the IEP meeting, then that would constitute such a serious procedural infraction that it would deny a parent of her (page 25)

right to meaningful participation in the development of the child's IEP in violation of 20 U.S.C. §1414(e) and 20 U.S.C. §1415; *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988).

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 deficit 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., supra*, at 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).

IV. LEGAL ANALYSIS

A. Any Procedural Defects in the Development of the IEP Did Not Deny the Opportunity of the Parent to Meaningful Participation in the IEP Process or Deny her Child FAPE.

1. *Prior notice.*

Ms. maintains that the school system failed to provide her adequate written notice in connection with its denial of her request for private placement.(L.Op.Br, p.7; L.Rep.Br, pp. 2-3). I have carefully reviewed the Prior Notice and Consent Form (A.15) and have concluded that, in conjunction with the two letters from the Assistant Superintendent of Schools and their meeting, PS has complied with the prior notice requirements set forth in IDEA.

To the extent that there may have been minor deviations from the laundry list of items contained in 20 U.S.C. §1415(c), such as failure to identify sources to contact to obtain assistance with the process to safeguard her rights under 20 U.S.C. §1411 *et seq* or greater description of options considered or documents used for the decision, I find that any such omissions concerned matters known to the participants or irrelevant to the protection of the rights of the parent and therefore not in violation of IDEA. To invalidate an IEP for such minor procedural flaws would "exalt form over substance." *Doe v. Defendant 1*, 898 F.2d 1186, 1190. (6th Cir. 1990).

There was no loss of educational benefit as a result of the notification provided by PS. *See Burke County Board v. Denton*, 895 F.2d 982 (4th Cir. 1990). had already been accepted into at the time the IEP had been scheduled. In their discussion with Ms. at the end of the June 19, 2006 meeting, PS officials described the contents of the IEP. It was abundantly clear from the record that Ms. knew that the PS team members thought that the school district could provide an educationally beneficial program at under a (page 27)

proposed IEP they deemed appropriate, the reasons underlying their belief, and the steps she needed to take to challenge that decision.

Ms. 's reliance on *Massey v. District of Columbia*, 400 F. Supp. 2d. 66 (D.D.C. 2005) to support her position is misplaced. (L.Rep.Br, p.3). In *Massey*, the court granted a motion for a preliminary injunction to place a student in a private school where the District failed to issue a timely placement, respond to requests for a due process hearing, or hold a timely resolution session. That case presented a controversy in which the school system's administrative procedures were demonstrably inadequate given its actions in ignoring the statutory mandates. That is not at all analogous to the fact pattern in the instant situation.

2. *Pre-determination.*

Ms. contends that PS educators had already made a decision that placement would be made in the school system before they convened to prepare an IEP for the 2006-2007 school year, thereby rendering the proposed IEP defective. She argues that the school system had presented no evidence rebutting her claim of pre-determination.(L.Op.Br, p.7; L.Rep.Br, pp.1-3). The burden to show pre-determination, however, is on the parent under *Weast*. Her assertion that it occurred is unsupported by the evidence in the record.

In support of pre-determination, Ms. refers to evidence that the director of special education at the end of the IEP meeting and a teacher during the meeting testified that the PS participants had reached agreement

for placement at (L.Rep.Br, p.1).However, the teacher merely stated that the team was comfortable with the decision. In her cross examination of the PS witnesses, Ms. was unable to adduce any evidence of prior meetings or discussions of placement among PS staff.

Ms. introduced e-mail exchanges between the director of special education and the special education coordinator which pertained to explanation of process and correctly stated that the IEP determined placement. At best, the documents merely suggest that the director may have been inclined to support public placement based on LRE principles.

The courts have recognized that educators are entitled to have preformed opinions as they prepare for the IEP meetings and engage in the IEP process. The Court in *N.L.V. v. Knox City Schools*, 315 F.3d 688, 694-695 (6h Cir. 2003) noted that educators needed to be willing to listen to parents and have open minds. It was sufficient if parents had the opportunity to make objections and suggestions. *See also Nack v. Orange City School District*, 454 F.3d 604, 610 (6th Cir. 2006), where the court observed that pre-determination was not synonymous with preparation.

Ms. cites *Spielberg, supra,* for the proposition that a school district may not begin with placement and then develop an IEP to implement that decision. (L.Rep. Br, 1-2). Had that occurred in this instance, then Ms. would have been denied a meaningful opportunity to participate in the IEP process. In this case, however, Ms.

has failed to establish by a preponderance of evidence that PS pre-determined placement. (page 29)

3. *Parental Role in IEP Meetings.*

It is apparent that the recollection of the witnesses differed as to what occurred at the two June IEP meetings. Based on their testimony, I conclude that the parent and her three advocates were actively involved in the deliberations at the first meeting, but their efforts to shift the focus to placement were frustrated by the short time allotted and the reluctance of the PS staff to consider placement without extensive discussion of present levels of performance and goals. I also find that there was limited discussion of placement. Had PS been unwilling to schedule another meeting, I would have had no difficulty in deciding that the parent was denied a meaningful right to participate at the IEP meeting.

A second meeting was scheduled for ten days later, however, and the parties met for four hours. Placement was discussed and the conflicting positions of the parent and PS staff were articulated and apparent to the participants. Ms. contends that PS structured the meetings so that a "focused, honest, and substantively thorough discussion of alternative placement, in particular ", did not occur. (L.Rep.Br, p.4). As this Circuit has made clear, however, there is no requirement that an IEP team consider an alternative placement if a placement in the public school is appropriate. *Hessler v. State Board of Education*, 700 F.2d 134 (4th Cir. 1983).

It may have been unfortunate for Ms. that two of her advocates were not present at the second meeting because it is conceivable that they could have persuaded the PS representatives to change their minds, but there

is no evidence that they were excluded or deprived of notice.

I acknowledge that the atmosphere in a meeting controlled by the school system whose representatives opposed private placement may well have been tense and intimidating and, to Ms. and her representatives, the result may have "seemed to [have been] a foregone conclusion," (L.Op.Br, p.7), but those factors are insufficient to establish that she did not have a meaningful opportunity to participate in the IEP process. Nor did Ms. point to any evidence that she or her representatives were prevented from being part of the IEP team or advancing their views on placement and on what they believed to be the unique needs of . They participated in the meetings and discussions in a meaningful fashion and had opportunity to have input into the determinations of the IEP team.

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

The educational progress of under her IEPs, given the significant limitations on learning imposed through her disabilities, was more than minimal and establishes the appropriateness of the program. The 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).

's third grade regular education teacher testified that she made progress in all educational areas

and that the proposed IEP was appropriate. Her special education teacher also stated that the proposed IEP was appropriate and could make educational progress under it. Her speech pathologist for third grade testified she advanced in her speech and language skills during third grade and that the proposed IEP was designed to enable her to continue to make significant progress in those skills. Based on her review of the documents, participation in IEPs, and personal interactions with , the special education director for PS supported these conclusions.

These four PS educators had extensive experience in their fields with post-baccalaureate degrees in special education and related areas. As a group they possessed in-depth knowledge of 's educational needs and consistent experience with her throughout her third grade year.

The testimony from Ms. 's witnesses was less relevant to consideration of the program offered by PS. The private speech pathologist did not contradict the ultimate conclusions of the PS' speech pathologist. The educational consultant had limited knowledge of the school district's program and had seen only once in class. She took the position that needed an intensive-language based program which she testified PS did not have.

The director of special education, however, testified that PS had such a program for and described it during her testimony. Neither the consultant nor Ms. proposed a program for PS 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 .

In her Request for a Due Process Hearing, Ms. described the nature of her complaint as follows: "In 2006, I requested that be placed in a program with similar language-impaired students. I was advised that [CS had] no such program. I therefore requested that [PS] pay for 's placement in a private school." Ms. learned that there once was a program, but it ended in 2003. The uncontradicted testimony of two PS witnesses was that the program would have been inappropriate for .

Ms. points to no legal authority which requires the school system to set up a special program for in which she is educated with similarly language-impaired students. Nor did she submit any case precedent that LRE principles would be violated because her peer groups, both in the general and in the special education settings, were not similarly situated students. In my view, any such requirements on a school system would go beyond the mandate of IDEA.

Under a variety of measures, I find that was making educational progress at . In addition to the observations of the witnesses, the results of various tests discussed in the Findings of Fact section demonstrate improvement in her performance. Ms. discounts claims of progress in third grade by attributing such achievement to the assistance provided by the private therapist. (L.Rep.Br, p.7). It is, however, impossible to determine to what extent the outside instruction is responsible for improvement. Since the programs were implemented at the same time, 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.

I accept the thrust of Ms. 's explanation that her favorable remarks about the teachers at and 's progress over the years were designed to urge them to do better and not jeopardize her family's relationship with the school. Nevertheless, there is no doubt 's final year at was better than the prior one. Nor can I completely discount PS' argument based on the testimony and documentary evidence that Ms. recognized some educational progress in the third grade but that she was seeking even greater progress. (A.Op.Br, pp. 17-18; A.Rep.Br, p.2). In any event, Ms. 's beliefs and written communications are not dispositive as to whether had made educational progress in third grade and whether a similar IEP would have been reasonably calculated to provide educational benefits the following year.

The testimony of the expert witnesses presented sharply conflicting conclusions based on their readings of the test results regarding what educational progress, if any, had been making during the last two years at . I do not have to decide the extent of that progress or the validity of differing evaluations because evidence of success at a private school is of no real relevance to the appropriateness of an IEP. *Lewis v. School Board,* 808 F. Supp. 523, 527 (E.D. Va. 1992). The issue is not whether the private school is better, or whether the student is progressing at a greater rate than at the public school. *A.B., supra,* at 326-327; *Lewis v. Loudoun County School Board,* 808 F. Supp. 523, 527-528 (E.D. Va. 1995).

The measure and adequacy of an IEP can only be determined as of the time it is offered, not judged in hindsight.

Ms. testified that is more confident and happier with greater self esteem and more friends at than she was at . Nevertheless, that evidence would not be relevant to the appropriateness of the IEP, and, regardless, PS is correct in its contention that social and emotional issues were not the basis for her eligibility for special education and such goals were not included in the IEP. (A.Op.Br, p.20).

Both parties agree that, to the extent appropriate, should be educated in the LRE. IDEA stipulates that services should be furnished to disabled students if at all possible in the public schools. 20 U.S.C. §1412(5). PS maintains that would be in the public schools since non-disabled students are not at , its location is further from 's home, private placement is inherently more restrictive, and a portion of 's classes, with the assistance of special education personnel, are with non-disabled children. (A.Op.Br, pp.7-8,11; A.Rep.Br, p.11). On the other hand, Ms. maintains that the students in the general education classes are too advanced and the students in the special education classroom are not advanced enough. (L.Op.Br, pp.7-10; L.Rep.Br, pp. 9-10). should not be mainstreamed if doing so interferes with her ability to receive an appropriate education. LRE principles, she contends, are not really at issue where the school system has not provided FAPE. (L.Rep.Br, p.10).

I find that the school system has satisfied the standards for LRE. The propriety of including in certain classes in the regular curriculum was illustrated by the testimony of her teachers who described her

educational progress despite the fact that she was not able to learn at the same pace as her classmates. Given the mandate of IDEA, she was obtaining benefit from interacting with her non-disabled peers in furtherance of LRE objectives.

Based on the evidence in the record, it is apparent that received educational benefits far more than minimal while enrolled at : she achieved progress in her studies; she received services adequate to make meaningful progress on her goals and objectives in her IEPs, to which her parent acquiesced; the instruction was coordinated; there was balance between special and regular education; and the standards of LRE were met as part of the appropriate educational program offered her.

Given the appropriateness of the IEP offered by PS, it is not necessary to evaluate the appropriateness of the private placement or the additional services received outside the school system. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).

I recognize that Ms. has demonstrated extraordinary devotion to her daughter and has sought to act in her best interests with great concern and dedication while attended . Her frustration with educators who believe that is mentally retarded and who do not share her views regarding 's potential is certainly understandable.

Over the years Ms. worked conscientiously and respectfully with educators. Her strong commitment to public education and PS was quite evident. I believe that PS could have been more helpful in exploring educational options for and sensitive to Ms. 's concerns. Nevertheless, under the low threshold of *Rowley*, I am

constrained to find that PS offered FAPE to and that the June 19, 2006 IEP was reasonably calculated to offer her educational benefits.

V. ISSUES

1. Whether procedural defects, if any, in the development of the IEP denied the opportunity of the parent to meaningful participation in the IEP process and thereby denied her child FAPE.

2. Assuming the IEP is not invalidated on procedural grounds, whether the IEP was reasonably calculated to enable the student to receive educational benefits under IDEA.

VI. CONCLUSIONS OF LAW AND FINAL ORDER

1. is a student with the disability of multiple disabilities under 34 C.F.R. §300.8 (2006) and qualifies for services under IDEA.

2. The parent was not denied an opportunity to meaningfully participate in the development of the June 19, 2006 IEP and there were no serious procedural violations to invalidate the IEP.

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

4. Public Schools offered a FAPE under IDEA to for the 2006-2007 school year in that the June 19, 2006 IEP was appropriate and placement in its public schools was reasonably calculated to enable her to progress and receive the level of educational benefits required by IDEA.

5. This decision is final and binding unless either party appeals in a federal District Court within ninety calendar days of the date of this decision, or in a state Circuit Court within one year of the date of this decision.

Date: 7/14/08

Alan Dockterman
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have, this 14th day of July, 2008, caused this Decision to be sent via first-class mail, postage prepaid, and by e-mail to Robert Perkins, Esq., counsel for Ms. , P.O. Box 2068, , VA 22202, to , Esq. 609 no. Wakefield St., , VA 22203; and to John F. Cafferky, Esq. counsel for Public Schools, , Suite , , VA ; and sent via first-class mail, postage prepaid, to Dr. . , Director, Special Education, Public Schools, No. , , 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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