

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

FINAL DECISION – (CORRECTED FOR CLERICAL ERRORS)

PUBLIC SCHOOLS
School Division

Name of Parent(s)

Name of Child

FRANK A. WRIGHT, JR. ESQ.
ERIC E. HARRISON, ESQ.
A. DAVID HAWKINS, ESQ.
Counsel Representing LEA

HENRY G. BOSTWICK, II, ESQ.
Counsel Representing Parent(s)/Child

LORIN A. COSTANZO
Hearing Officer

Party Initiating Hearing

PRELIMINARY MATTERS:

On August 20, 2008 _____ Public Schools received a *Request for Due Process Hearing* from _____, parent of _____. Ms. _____ presented, as a proposed resolution, that her son be placed at _____ School.

I was appointed hearing officer in this matter from a list supplied by the Supreme Court of the Commonwealth of Virginia.

Motion to amend: On September 2, 2008, counsel for _____ ("Parent") filed a *Motion to Amend Original Due Process Hearing Request*. This *Motion* was addressed at the pre-hearing telephone conference of September 3, 2008. Counsel for _____ Public Schools did not object an amendment and Parent was given permission by the hearing officer, until 5:00 P.M. on 9/9/08, to file a written Amended Due Process Hearing Request. On September 9, 2008, an Amended Due Process Hearing Request was timely filed.

Recommended timeline: Upon the filing of the amended due process hearing complaint the timeline in this cause recommenced. The recommenced timeline, in part, is as follows:

September 09, 2008	Amended Due Process Hearing Complaint filed - timeline recommences this date.
September 19, 2008	Response due.

September 23, 2008	Resolution meeting held this date.
September 24, 2008	Last day to file Notice of Insufficiency or complaint deemed sufficient.
September 24, 2008	Resolution meeting required to be convened by this date.
October 09, 2008	30 day resolution period ends
October 10, 2008	First day of the 45 day period for hearing and decision.
October 16, 2008	Exchange Date for list of witnesses and documents to be admitted.
October 23, 2008	Due Process Hearing (day one).
October 24, 2008	Due Process Hearing (day two).
October 25, 2008	Due Process Hearing (day three).
November 23, 2008	Final decision due date.

Exchange: The parties exchanged a list of witnesses and a copy of documents to be admitted (and provided a copy of each to the hearing officer) by October 16, 2008, as the hearing officer directed.

Hearing: The due process hearing was held over a three day period, October 23, 2008, October 24, 2008, and October 25, 2008 at the Conference Room, School Board Building _____, _____, Virginia. At the request of the Parent, the due process hearing was *open* to the public and was attended by individuals. As requested by counsel for the parties, oral opening statements were made and written closing arguments were submitted.

Issue withdrawn: Parent's counsel withdrew for determination at due process hearing the issue of whether the LEA has a duty to disclose that a Parent may object to part(s) of an IEP while agreeing to other part(s). Counsel for the LEA did not object to the withdrawal of this issue.

2 year limitation:

20 U.S.C. § 1415(f)(3)(C) provides, "a parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint ...".

20 U.S.C. § 1415(b)(6)(B) provides for an opportunity for any party to present a complaint "which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint..."

The above 2 year limitation was raised and addressed at a pre-hearing conference. The parties were offered by the hearing officer additional opportunity to present their respective positions and authority, in writing, per a timeline agreed to. Subsequently, the parties agreed to cancel the submission date. The parties agreed a.) that the above 2 year limitation is applicable to any issues raised for determination and b.) that the issues to be determined in this cause shall be only those issues that shall occur not more than two years before the date the Request for Due Process/Complaint was filed setting forth the issues for determination.

Objection to subpoenas: Two subpoenas for production were requested by counsel for the LEA and objected to by the counsel for the Parent. Pre-hearing conference was held discussing this objection and Parent's counsel's request that the subpoenas be issued with insertion of an amendment (as set forth in an e-mail tendered and to be made a part of the hearing record). The hearing officer, over objection of the Parent's counsel, indicated he would sign the proposed subpoenas without the requested amendment upon a change of the dates for response thereon by counsel for the LEA to October 3, 2008.

Assist Counsel at hearing: Following her testimony, Parent's counsel requested to have Ms. _____ assist him at hearing. Over objection of the counsel for the School, the hearing officer determined that Ms. _____ may assist counsel for Parent. However, she could not be further called as a witness, for any purpose, by counsel for the Parent if she so remained in the hearing room and assisted counsel for the Parent. Additionally, as counsel for the School had designated her on his witness list, counsel for the School could call her as a witness out of sequence, or at a later time, if he so desired.

Witnesses, counsel, and parties: The following were witnesses, counsel, and parties at the due process hearing:

1. Parent:
Counsel for Parent/Child: Henry G. Bostwick, II, Esq.,
Witnesses called by counsel for Parent: _____

2. Counsel for School: A. David Hawkins, Esq., Frank A. Wright, Jr. Esq., and
Eric E. Harrison, Esq.
Party Representative: _____, party representative.
Witnesses called by counsel for School: _____

3. Rebuttal Witness called by counsel for Parent: _____

Transcript: The transcript of the hearing consists of four volumes and is referred to as "Tr. __, pg. __" with the volume number inserted at the first "__" and the page number inserted at the second "__".

Exhibits: The exhibits of the parties were admitted *en masse*.

1. The exhibits of Parent consist of exhibits numbered 1 to 60. Exhibits 59 and 60 were admitted at hearing by agreement of counsel for each party.

2. The exhibits of the School consist of one binder containing 32 numbered exhibit tabs and with the pages therein numbered 1 to 525. School exhibits contain one 8 x 12 envelope marked "confidential" (with documents therein) and one CD-R.

3. Three Exhibits were additionally admitted by agreement at the due process hearing and were designated HO #1, HO #2, and HO #3.

4. Parents' Exhibits are designated as "P. Ex. __" with the exhibit number inserted at "__". School's Exhibits are designated as "S. Ex. pg. __" with the page number inserted at "__".

ISSUES and PROPOSED RESOLUTION:

Issues for determination at the due process hearing are:

1. WHETHER _____ PUBLIC SCHOOLS FAILED TO IDENTIFY AND EVALUATE _____ AS A CHILD WITH A DISABILITY?
2. WHETHER _____ PUBLIC SCHOOLS FAILED TO PROVIDE AN APPROPRIATE EDUCATIONAL PLACEMENT BY REFUSING TO PROVIDE HIM SUFFICIENT SPECIAL EDUCATION SERVICES?
3. WHETHER _____ PUBLIC SCHOOLS FAILED TO CONSIDER ALTERNATIVE PLACEMENT OPTIONS IN DETERMINING LRE IN THE IEP OF 4/29/08, 5/3/07, AND 12/14/07?
4. WHETHER _____ PUBLIC SCHOOLS FAILED TO CONSIDER PARENT'S CONCERNS, INCLUDING INADEQUATE PROGRESS, WHEN DRAFTING THE IEP OF 4/29/08, 5/3/07, AND 12/14/07?

Additional Findings Required under the Virginia Regulations:

- a. Whether the requirements of notice to the parent(s) were satisfied?
- b. Whether the Child has a disability?
- c. Whether the Child needs special education and related services? *and*
- d. Whether the LEA is providing a FAPE?

Parent proposed the following resolution in her Amended Request for Due Process Hearing:

- a. Placement of _____ at _____ School, at the expense of _____

- (including, but not limited to, transportation expenses).
- b. Re-evaluation of _____ .
 - c. Development of an IEP which conforms to the IDEA, federal and state law.
 - d. Compensatory educational services.
 - e. Award of reasonable attorney's fees to Parent.

FINDINGS OF FACT:

01. _____ ("_____") is a 9 year old male born March 13, 1999 and is the son of _____ ("Parent"). (S. Ex. pg. 3-4)

02. _____ Schools referred _____ for Psychological Evaluation (assessment date: 5/21/2004). In the evaluation:

_____ was administered the Differentially Abilities Scale (DAS) to assess his overall level of cognitive development and according to the results of this measure his overall level of developed ability was in the deficient range (General Conceptual Ability = 59, 95% Confidence Interval=52-66). However the variability among his assessed skills lessens the ability of this overall estimate to accurately represent his present cognitive development.

_____ ' verbal skills (Verbal Cluster Standard Score = 73, 95% Confidence Interval = 65-85) appear significantly better developed than his non verbal skills (Non-verbal Cluster Standard Scores = 56, 95% Confidence Interval=49-68).

When compared to his other skills, _____ appears to be particularly adept at tasks involving concept formation without verbalization.

_____ ' overall level of development was in the deficient range; however the significant variability among his assessed skills was noted to lessen the predictability of this overall summary. His verbal skills appeared significantly better developed than his non-verbal skills with specific strength noted in his concept formation. Adaptive behavioral skills were found to be in the delayed range overall. (P. Ex. 49)

03. On June 22, 2004, while _____ was enrolled in _____ Public Schools, he was determined to be eligible for special education and related services as Developmentally Delayed. (P. Ex. 49; S. Ex. pg. 309.)

04. On 7/2/04, at _____ Schools, an IEP meeting was held. Parent was present at such meeting and signed the IEP indicating her presence/participation. Parent signed the IEP indicating she gave permission for _____ to be enrolled in the program described in the IEP and that she had been informed of procedural safeguards. (P. Ex. 49)

05. On 8/30/04 _____ was enrolled in the _____ Public Schools by Parent. _____ has attended _____ within the _____ Public Schools from this date until his removal by Parent and enrollment in _____ School after the 2007-2008 school year. (P. Ex. 1, S. Ex. pg. 59, 408)

06. In the fall of 2004 _____ was enrolled in _____ Public Schools ("_____") as a kindergarten student. He had been enrolled in the _____ Schools attending Tomahawk Elementary School, _____, VA, in the summer of 2004. (S. Ex. pg. 58-59, 256)

07. _____ proposed to accept the IEP for _____ from _____ Schools for 30 days with the IEP team to be convened by 9/26/04. Parent gave her permission for this on 8/26/04. (P. Ex. 1)

08. On 9/24/04 an IEP meeting was convened by _____ Public Schools. _____ had the identified disability of Developmentally Delayed. Accommodations and modifications include: close proximity to the teacher-verbal and visual cues to call attention to task-directions repeated and clarified-quiet area for calming down, as needed. Services includes resourceDD-60minutes per day, inclusion, 258 minutes per day, and speech and language-60 minutes per week. Parent signed indicating she received a copy of her rights and giving permission to implement the IEP on 9/24/04. (P. Ex. 2)

09. The IEP of 9/24/04 noted _____ is functioning in the Deficient range in cognitive development. Consideration was given to self contained placement but it was felt that he could make more progress having peer role models and the support of special education staff in the classroom. (P. Ex. 2)

10. _____ attended kindergarten in the _____ Public Schools in the 2004-2005 school year. He repeated kindergarten in the _____ Public Schools in the 2005-2006 school year. He has been promoted in each successive school year to the next grade. (P. Ex. 10)

11. IEP meetings were conducted: 12/08/04 (P. Ex. 3)
2/01/05 (P. Ex. 4)
5/9/05 (P. Ex. 5)
8/25/05 (P. Ex. 6)
5/8/06 (P. Ex. 8)

Parent signed the IEPs indicating she was provided a copy of the procedural safeguards and that she gave permission to implement the IEP and the placement decision. She attended all but the 2/1/05 IEP meetings.

Parent participated in the 12/8/04 IEP meeting where it was noted _____ was having difficulty with fine motor skills. He was seen at an OT screening in October of 2004 and a full occupational therapy evaluation was recommended. (P. Ex. 3)

Parent did not attend the IEP meeting of 2/1/05 due to work problems. The Occupational Therapy Evaluation (Date: 1-12-05) was discussed. _____ exhibited impaired fine motor and visual motor skills. A self contained placement was considered but it was felt he could make more progress having peer role models and having support in the classroom and his needs could be met in resource and in the inclusion/general education classroom. (P. Ex. 4.)

Parent attended the IEP meeting of 5/9/05 which provided for speech and language of 30 min. 3 times a week, occupational therapy for 30 min. once a week, and DD classroom services 288 minutes a day. He had inclusion with a Kindergarten class for music, PE, Library, and art. (P. Ex. 5)

Parent attended the IEP meeting of 8/25/05 which essentially continued services for speech and language of 30 min. 3 times a week, occupational therapy for 30 min. once a week, and DD classroom services 288 minutes a day. He had inclusion with a Kindergarten class for music, PE, Library, and art. (P. Ex. 6)

The 5/8/06 IEP was attended by Parent and provided for speech and language of 30 minutes twice a week, occupational therapy for 30 min. once a month, resource 60 minutes a day, support for language arts 30 minutes a day, and inclusion 120 minutes a day. (P. Ex. 8)

12. An IEP meeting was conducted on 5/3/07 with Parent participating and signing indicating her permission to implement the IEP and placement decision. Her signature indicated also that she had been provided a copy of the procedural safeguards and had received a copy of her rights as a parent of a child eligible for special education services. The IEP provided for 30 minutes a week of speech and language services, 2.5 hours daily of support for content areas, and 30 minutes resource services plus accommodations and modifications including adult proximity, present information visually and or hands on when possible, provide copy of board work at his desk, reduce length of assignments, reduce number of problems, small group reinforcement for new skills broken down into small steps, use a number line in math, use alphabet strip that has pictures and letters, use drill and repetition, use highly structured programmed reading material that gives multiple exposures to each new work, and math aids. (S. Ex. 178-208)

13. An IEP meeting was conducted on 12/14/07 with Parent participating and signing indicating her permission to implement the IEP and placement decision, that she had been provided a copy of the

procedural safeguards, and had received a copy of her rights as a parent of a child eligible for special education services.

In the 12/14/07 IEP the IEP team increases resource support services from 30 minutes per day provided for in the 5/8/07IEP (S. Ex. Pg. 167, 203) to 90 minutes. This was small group instruction outside the general education classroom. Added to previous accommodations and modifications were oral responses to test - group size - environmental modifications - test in small group, in short periods, cut down on visual field, repeat verbal prompts, individual administration. (S. Ex. pg. 165-167)

14. On December 13, 2006, Parent, received a "Reevaluation Notification/Consent" indicating _____ needed a re-evaluation. Enclosed with the letter was a copy of her rights as a parent. On 12/13/06 Parent signed indicating she gave consent to a re-evaluation of _____. (S. Ex. 213-214)

15. A re-evaluation was required as _____ was aging out of "Developmental Delay". A review of medical records was recommended with new assessments in speech, education occupational therapy, psychological, and sociocultural were required for the reevaluation. (S. Ex. 215, 226)

16. A Psychological Evaluation (3/12/07 report date) was conducted concerning _____. The Evaluation indicated his academic skills remain delayed but he made satisfactory progress in the related arts; Music, Health, Art, and Physical Education.

_____ completed the KABC-II (Kaufman Assessment Battery for Children, Second Edition) to assess his cognitive and processing abilities. General functioning is within the deficient range. Short-term memory, visual processing, and ability to problem solve for novel or unfamiliar tasks are all within the deficient range. _____ demonstrated below average performance on measures of acquired knowledge. His performance on measures of long-term storage and retrieval was within the lower limits of the average range. (P. Ex. 48; S. Ex. 256-263)

17. The March 12, 2007 Psychological Evaluation indicated that _____ functioned in the low to very low range for children of his age. His general cognitive and processing abilities, as measured by the KABC-II and CAS, respectively, were deficient. He exhibited some varied abilities that reflect areas of relative strength. He responds well to repeated exposure to information, and his long-term retrieval abilities are well-developed. Teacher and parent ratings on the BRIEF indicate he continued to be impacted by his inattention in both home and school settings. Ability to utilize working memory was a particular area of weakness. Information provided on the ABAS-II indicates adaptive skills are delayed for his age. Conceptual skills are extremely low across settings. (P. Ex. 48; S. Ex. pg. 256 -263)

18. On March 23, 2007 the eligibility committee found _____ to be eligible for special education and related services with the identified educational disability of "Other Health Impairment" ("O.H.I.").

Recommended related services were "Speech and Language". (S. Ex. pg. 227)

19. _____ had a medical diagnosis of Inattentive type ADHD which was provided by Dr. B. Malcom, MD. The eligibility committee took this into consideration. (S. Ex. pg. 227 and 269)

20. The March 23, 2007 eligibility committee considered a classification of Mental Retardation but rejected classification of Mental Retardation. The eligibility committee found, "Scatter in cognitive abilities, scatter in adaptive behavior, global delays in achievement, language, and adaptive skills; Mental retardation not seen because ability scores were scattered (knowledge 91, learning, long-term memory 86). (S. Ex. pg. 228)

21. Parent consented to and signed on 3/27/07 the eligibility meeting minutes determining _____ to be eligible for special education services with the educational disability of "Other Health Impairment" and which noted, after consideration, the committee did not find mental retardation. (S. Ex. pg. 227-228)

22. On April 29, 2008, an IEP meeting was held and an IEP was developed for the 2008-2009 school year. Parent participated in development of the IEP and signed indicating she gave permission to implement the IEP and the placement decision. By her signature Parent also acknowledged that she read the Prior Notice of Review and Placement Decision before giving permission to implement the IEP and the placement decision and that she has received a copy of her rights as a parent of a child eligible for special education services. (S. Ex. pg 26, 42.)

23. At the IEP meeting of 4/29/08 placement continuum option was determined to be "Public Day School". Services provided were:

Related:

speech and language - 30 min., 2 times weekly

Special Education:

supplemental reading - 1 hour, 5 times weekly

support for math - .5 hr., 5 times weekly

support for social studies - 15 min. 5 times weekly

support for writing - 15 min, 5 times weekly

support for science - 15 min, 5 times weekly

support for reading - .5hr., 5 times weekly

About three hours of specialized instruction per day were provided. SOL Testing Accommodations were provided and the IEP provided for the following accommodations/modifications in the classroom as needed: (S. Ex. pg 26-40 and 49)

allowing extra time to respond
 allow student to give oral responses
 check work frequently to ensure understanding
 dictation to a scribe
 extra time in student effort is shown
 give short, concise directions
 homework assignment sheet/agenda
 peer tutor/helper
 preferential seating
 present information auditorally, present information visually
 provide a copy of the notes/study guides
 provide individual assistance
 reading test items for History, Math, Science and on a Reading or English text
 reduce length of assignments
 use a number line in math
 use concrete manipulatives
 use drill and repetition

24. On May 27, 2008, _____ was offered summer school for the summer of 2008. However, Ms. _____ declined. Later the School again proposed providing reading instruction during the summer school day in an individual instructional format and it was declined. (S. Ex. pg. 52, 54.)

25. On June 17, 2008, Parent, by letter, requested an IEP meeting to determine a new placement for _____ at the _____ School. She further indicated she has invited _____, Head of School and _____ Thomas, assistant Head of School of _____ to attend the meeting. (S. Ex. pg. 47, 49.)

26. On June 23, 2008 _____, Principal of _____, acknowledged receipt of the letter from Parent of 6/17/08 requesting an IEP meeting and agreed to set an IEP meeting after the July 4th holiday. A copy of parental rights was attached. (S. Ex. pg. 49)

27. On 7/10/08 an IEP (addendum) meeting was convened which reviewed the IEP for the 2008-2009 school year which was developed by the IEP team in April of 2008. Parent requested the IEP provide for a private day placement for _____ at _____ School. Parent's concerns included, summer reading instruction, private day placement at _____ School, and an in-school/after school reading assistant. These concerns considered by the IEP team. (S. Ex. pg. 13 & 18.)

28. In the IEP meeting of July 10, 2008:

- a. Ms. _____ of _____ School attended and explained the program at _____ School.
- b. _____ was offered summer school again but this was declined by Ms. _____.
- c. Least Restrictive Environment ("LRE") was discussed and considered as was the amount of individual instruction _____ received in academic subjects. It was estimated that he received individual assistance during 75% of his academic time.
- d. Alternative instructional methods were discussed as possibilities for future programming.
- e. During-school and after-school individual tutoring in reading was discussed. Parent supports the school position that during-school individual reading instruction would meet _____' need.
- f. A time study was proposed to document the amount of individual assistance and instruction for _____.
- g. Consultations with the _____ literacy development specialist on effective supplemental

reading programs were proposed.

- h. Curriculum modifications were proposed and it was proposed that the team consider completing the triennial comprehensive evaluation earlier than currently scheduled to identify service needs. (S. Ex. pg. 12-17)

29. P.A.L.S. test scores from the Fall 2007 to the Spring 2008 were reviewed by the IEP team at the IEP of 7/10/08. Progress was noted (spelling from 0 to 7, accuracy in reading a Preprimer passage, Concept of Word from 0 to 10, and progress in letter sounds and blending). (S. Ex. pg. 13)

30. After discussion, the IEP of 7/10/08 refused to implement the private day school placement for _____ at _____ School proposed by Parent. Least Restrictive Environment (LRE) was a consideration in the IEP team not concurring with Parent's request for a placement at _____ School. (S. Ex. pg. 54-55; P. Ex. 18; Tr. II, pg. 276)

31. Parent actively participated in 7/10/08 IEP meeting. She did not give permission to implement this IEP and the placement decision. (P. Ex. 18; S. Ex. pg. 12 & 14)

32. On 8/17/08 Parent signed a Request for Due Process Hearing indicating, "I would like for my son to be sent to an alternative school of learning which is _____ ...". (S. Ex. pg. 3-4)

33. _____ School's Intake Record indicates a date of enrollment for _____ of 8/21/08. (S. Ex. pg. 407)

34. *Application for Admission* to _____ School was signed by Parent, _____, on May 19, 2008 and the "Date Application Received" was indicated in handwriting as "5/21/08" with a check mark by "Application Fee" and the handwritten note of ck# 103. (S. Ex. pg. 407, 408-412)

35. _____ School is a private school located in _____, Virginia and is exclusively for disabled children. (Tr. I, pg. 253) It is licensed by the Commonwealth of Virginia as a special education private day school (Tr. II, pg. 15; Tr. III 92)

36. _____ attends _____ School since the beginning of the 2008-2009 school year. At _____ School _____ was transitioned into a lower level of instruction than the level of instruction at _____ School he initially started. (Tr. I, pg. 243)

37. At _____ School _____ receives services with a teacher and at times with high school intern(s). The high school intern(s) are not formally trained but are provided with information as to what to do and are monitored. (Tr. I, pg. 242)

38. _____ was in an inclusion classroom at _____ Public Schools. (Tr. I, pg. 252)

39. The only psychological testing data that _____ School has relied on is the psychological testing data provided by _____ Public Schools. (Tr. I, pg. 249)

40. _____ was diagnosed with ADHD, inattentive type. (Tr. II, pg. 197)
41. P.A.L.S. ("Phonological Awareness Literacy Screening") is a screening instrument _____ has taken and which enables progress to be gauged. It is taken by all students in _____ unless excluded by their respective IEP. (Tr. IV, pg. 197-198)
42. P.A.L.S. is a screening that's used as a way to guide reading intervention. P.A.L.S. benchmarks are established at each grade level and at each administration point in the year. The benchmarks are the expectations for the non-disabled student in the general curriculum. (Tr. II, pg. 250-251)
43. Performance across two P.A.L.S. administrations for _____ in the Fall of 2007 and in the Spring of 2008 indicated:

total spelling score went from	0 to 7.
preprimer word list went from	5 to 11.
COW (Concept of Words) went from	0 to 10.
alphabet recognition went from	25 to 26.
letter sounds went from	12 to 21.
Increase in the level B score.	
blending went from	1 to 20.
sound to letter went from	20-34.
Increase in the level C score.	

(Tr. II, pg. 327-330; S. Ex. pg. 102-103)

44. The Commonwealth of Virginia has general education standards of learning and the aligned standards of learning. The aligned standards of learning focus on a functional living curriculum. The S.O.L. curriculum focuses on general education content. (Tr. II, pg. 267-268)
45. Students have access to general curriculum content unless it has been determined they are candidates for the aligned standards of learning or the alternative assessment program. (Tr. II, pg. 268)
46. Removing _____ from the S.O.L. tract would place him in a less rigorous program that would not be aligned with grade level curriculum but aligned with skills for functional daily living expressions of skills. (Tr. II, pg. 281-282)
47. Removing a student from grade-level content, the SOL curriculum tract, into alternative tracts is a decision with significant ramifications that could impact a student's ability to attend college. (Tr. III, pg.99)
48. The first time a student accesses the S.O.L. assessments is in the 3rd grade. The 12/04/07 IEP team expressed the desire to maintain _____ eligible for the third year S.O.L. and for him to have an opportunity pass it. Grade three is cumulative content and assesses matters in science, social studies, math, and reading skills that would have been present in those curriculums in previous years. (Tr. II, pg. 268-269)
49. The 4/29/08 IEP increases accommodations/modifications from the 12/14/07 IEP. (Tr. II, pg. 247)

50. Ms. _____ attended the IEP Meeting of 7/10/08 and provided information concerning design of the _____ School program. She did not present any alternative placement besides _____ School and did not suggest any program modifications or accommodations. (Tr. II, pg. 274-275)

51. At the 7/10/08 IEP meeting Mrs. _____ proposed a consultation with the literacy development specialist, consideration of curriculum modifications, and completing the triennial comprehensive evaluation earlier than currently scheduled to identify service needs. Also, the family asked about an after school reading assistant. This was discussed and it was agreed that _____ needed to be a child and for him to receive the intensity of services in the I.E.P. then to continue after school might be a bit much for him to manage. The parents supported this position. (Tr. II, pg. 277, 279; P. Ex. 18)

52. At the 7/10/08 IEP meeting neither Parent nor anyone else indicated that _____ was going to be enrolled at _____ School, that he had applied to _____ School, or that he had been accepted at _____ School. (Tr. II, pg. 282)

BURDEN OF PROOF:

The hearing officer is charged with making no presumptions in the case and basing findings of fact and decisions solely upon the preponderance of the evidence presented at the hearing and applicable state and federal law and regulations. (8 VAC 20-80-76(J)(15))

In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005) the United States Supreme Court held that the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Id.*, 546 U.S. at 62, 126 S.Ct. at 537. Parent in this case is seeking relief and Parent bears the burden of proof in this cause.

DISCUSSION AND CONCLUSIONS:

IDEA was enacted, in part, "to ensure that all children with disabilities have available to them a free and appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A).

A "free appropriate public education" (FAPE) is defined as "special education and related services that:

- A.) have been provided at public expense, under public supervision and direction, and without charge;
- B.) meet the standards of the State Educational Agency;

- C.) include an appropriate preschool, elementary, or secondary school education in the State involved; and,
- D.) are provided in conformity with the individualized educational program required under section 614(d)." 20 U.S.C. § 1401(9).

A FAPE "consists of educational 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." Board of Educ. v. Rowley, 458 U.S. 176, 188-189 (1982).

In *Rowley*, the Supreme Court provided:

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child ... We therefore conclude that the basic "floor of opportunity" provided by the act consists of access to specialized instruction and related services which are individually designed to give education benefit to the handicapped child. Rowley, 458 U.S. at 200, 201.

Rowley provides that the issue is whether the IEP is reasonably calculated to enable the child to receive educational benefit, not whether it will enable the student to maximize his or her potential. *Id.* at 177. Under *Rowley* the requirements of the IDEA are met if the School complies with the IDEA's procedural requirements and if the IEP is reasonably calculated to enable the child to receive educational benefit.

The appropriate education required by the IDEA should not be confused with the best possible education And once a FAPE is offered, the school district need not offer additional educational services. That is, while a state must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child, the act does not require the furnishing of every special service necessary to maximize each handicapped child's potential. MM ex rel. DM v. School Dist., 303 F.3d 523, 526-527 (4th Cir. 202) The IDEA does not require that the school system provide the child with the best education possible. The IDEA requires an IEP to provide a *basic floor of opportunity* that access to special education and related services provides. Tice v. Botetourt County Sch. Bd., 980 F.2d 1200, 1207 (4th Cir. 1990)

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 Bd. of Educ., 774 F.2d. 629,636 (4th Cir. 1985)

A FAPE is implemented through an IEP, which is designed by a team consisting of school district educators and administrators, educational experts, and the child's Parent(s). IEPs must contain

statements concerning a disabled child's level of academic achievement and functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress. M.M. ex rel. D.M. v. Sch. Dist. of Greenville County, 303 F. 3d 523, 527 (4th Cir. 2002); see also 20 U.S.C. § 1414 (d)(1)(A).

If an IEP fails to give a disabled child a free appropriate public education, parents have a right to reimbursement for private school tuition. Burlington v. Dept of Educ., 471 U.S. 359, 370, 105 S.Ct. 1996 (1985). However, a parent who chooses to educate her child in a placement other than that offered by a public school does so at their own financial risk in the event that the school's offered placement is determined to be appropriate. ID. at 370-371.

Least Restrictive Environment ("LRE") mandates that, "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412(5)(A)

Clearly, "this provision sets forth a 'strong congressional preference' for integrating children with disabilities in classrooms." Oberti v. Board of Educ., 995 F.2d 1204, 1213 (3rd Cir. 1993) quoting Devries v. Fairfax Co. Sch. Board, 882 F.2d 876, 878 (4th Cir. 1989). A school may not exclude a disabled child from a regular classroom setting simply because a disabled child will learn differently than other students. Oberti, 995 F.2d at 1217.

IDEA's mainstreaming provisions establish a presumption and not an inflexible mandate. 20 U.S.C. §1412(5)(B) indicates mainstreaming is not appropriate "when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily".

The court has held that mainstreaming is not required where (1) the disabled child would not receive any educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or, (3) the disabled child is a disruptive force in the regular classroom setting. DeVries v. Fairfax County School Bd., 882 F.2d 876, (4th Cir. 1989)

20 U.S.C. § 1412 (a)(10)(C)(ii) provides that, "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll

the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment."

Furthermore, reimbursement may be reduced or denied if at the most recent IEP meeting parent attended prior to the removal parent a.) did not inform the IEP team that parent was rejecting the placement proposed and informed the team of parent's intent to enroll in a private school at public expense or b.) 10 business days prior to the removal did not give a written notice of same. 20 U.S.C. 1412 (a)(10)(C)(iii)

8 VAC 20-80-66 (B.) does not require the local school division to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the local school division made a free appropriate public education available to the child.

The IDEA provides for a party to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child and which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint.¹

Introduction:

Parent has presented a number of issues for determination related to her concerns over the appropriateness of her son's education at _____. At Parent's request an IEP meeting was held on 7/10/08 in which she presented her desire to _____ for the IEP team to change her son's placement to _____ School. However, the IEP team refused her request for a change of placement for _____ to _____.

This due process hearing addresses these issues and parent's desire for reimbursement. She bears the burden of proof in this cause.

IEP and Eligibility Meetings:

The fact that _____ has a disability is not in dispute. Parent, by counsel, has raised issue in their *Amended Due Process Hearing Request* with the identification and evaluation of _____ and

¹ 20 U.S.C. § 1415 (b)(6)(A) and 20 U.S.C. § 1415 (b)(6)(B).

whether he was properly and correctly identified as a child with a disability as required by the IDEA and by Virginia Law.

On June 22, 2004, while _____ was in _____ Public Schools, he was determined eligible for special education and related services as *Developmentally Delayed*.² On 8/30/04 Parent transferred _____ to _____ in the _____ Public Schools.

_____ Public Schools reviewed _____' eligibility summary dated 6/22/04 and his _____ IEP which was effective from 8/30/04 to 6/10/05. The School proposed to accept the IEP from the previous school for 30 days with the IEP team to be convened by 9/26/04. Parent gave her permission for this on 8/26/04.³

_____ conducted a number of IEP meetings with Parent actively participating in the IEP process. On 9/24/04 an IEP meeting was convened by _____ Public Schools. _____ had the identified disability of Developmentally Delayed. Parent signed giving permission to implement the IEP on 9/24/04. The IEP noted that _____ does not recognize his name, name the alphabet (in song), tell his age or address, track reading with his finger, or recognize any letters or letter sounds. He does not count to 10.⁴

On 12/8/04 parent participated in an IEP meeting and signed the IEP of this date. He was identified as Developmentally Delayed. It was noted there were problems with motor planning and follow through and _____ was having difficulty with fine motor skills. He was seen at an OT screening in October of 2004 and a full occupational therapy evaluation was recommended.⁵

On 1/23/05 Parent indicated work problems and that she could not get off from work to attend an IEP meeting scheduled for 2/01/05 to review instructional needs and discuss an occupational therapy evaluation and plan. Occupational Therapy Evaluation (Date: 1-12-05) was presented and considered. Concern was expressed by the IEP team that _____ exhibits impaired fine motor and visual motor skills. Placement continuum options of special classes were considered. It was noted _____ was functioning in the deficient range in cognitive development and self contained placement was considered but it was felt he could make more progress having peer role models and support of special education staff in the classroom. It was also noted that his needs can be met in resource and in the inclusion/general education classroom. Parent signed the IEP on 2/3/05 and gave permission for

² S. Ex. pg. 309.

³ P. Ex. 1.

⁴ P. Ex. 2.

⁵ P. Ex. 3.

implementation of this IEP and placement decision. Parent's signature also indicated she had been given a copy of the procedural safeguards and information on assessment participation for students with disabilities.⁶

Parent participated in, and signed giving her permission to implement IEPs of 5/9/05, 8/25/05, and 5/8/06. These IEPs indicated the disability of "Developmental Delay". The 5/9/05 IEP indicated _____ is in Kindergarten in the inclusion Kindergarten class. He recognizes colors and can identify a few of the color words. He can write his first name from memory and copies his last name and can name some of the letters in his 1st name. He can copy words and sentences presented one word at a time. He can identify 4 shapes and count objects to 10.

The 8/25/05 IEP noted that the IEP team had reconsidered _____' placement in the self contained classroom and believed it in his best interest that he be in the inclusion classroom. It was further noted that _____ has made some developmental progress which should benefit him in achieving kindergarten skills.

The 5/8/06 IEP indicated _____ had participated in an inclusion Kindergarten class and was repeating Kindergarten. He takes medication for ADHD. He enjoys his peers and interacts appropriately during free play. He reads the 8 basic color words, can identify 18 capital letters, 19 lower case letters and 13 sounds. He was noted not to like to be verbal and had a great deal of difficulty with frustration level. He does not identify all letters and sounds and has difficulty time sequencing events or retelling a story.⁷

On December 13, 2006, Parent, was notified by _____ that _____ needed a re-evaluation and she consented to this. The re-evaluation was required as _____ was aging out of Developmental Delay. A review of medical records was recommended with new assessments in speech, education occupational therapy, psychological, and sociocultural were required for the re-evaluation.⁸ _____ was also referred for psychological evaluation as part of his triennial re-evaluation to determine continued eligibility for special education services.⁹

On March 23, 2007 the eligibility committee determined that _____ was eligible for

⁶ P. Ex. 4.

⁷ P. Ex. 5, 6, and 8.

⁸ S. Ex. pg. 226.

⁹ S. Ex. pg. 256-263.

special education services with the identified educational disability of "Other Health Impairment". Parent signed the Meeting Minutes, indicating her consent on 3/23/07.¹⁰

Continued eligibility under the classification of "Other Health Impairment" was found due to the significant impact of ADHD on school performance. The classification of Mental Retardation was considered and rejected and it was specifically indicated that, "Overall cognitive function within deficient range, but scattered skills in cognitive and adaptive abilities contraindicate M.R. classification at this time."¹¹ _____ has maintained the Classification of "Other Health Impairment" since this March 23, 2007 eligibility committee determination and has remained eligible for special education and related services as a child with a disability.

The April 29, 2008 IEP (for school year 2008-2009) increased the level of services over the previous IEP of December 14, 2007. The IEP provided for SOL testing accommodations and for the following accommodations/modifications in the classroom on an "as needed" basis:

- allowing extra time to respond
- allow student to give oral responses
- check work frequently to ensure understanding
- dictation to a scribe
- extra time in student effort is shown
- give short, concise directions
- homework assignment sheet/agenda
- peer tutor/helper
- preferential seating
- present information auditorally, present information visually
- provide a copy of the notes/study guides
- provide individual assistance
- reading test items for History, Math, Science and on a Reading or English text
- reduce length of assignments
- use a number line in math
- use concrete manipulatives
- use drill and repetition¹²

Additionally _____ was to receive the following services from 8/25/08– 6/10/09:

Related	Speech and Language	30 min/2 times weekly
Special Education		
	Supplementary Reading	1hr/5 times weekly
	Support for Math	.5 hrs/5 times weekly
	Support for Social Studies	15 min/5 times weekly
	Support for Writing	15 min/5 times weekly
	Support for Science	15 min/5 times weekly
	Support for Reading	.5 hours/ 5 times weekly ¹³

The 7/10/08 IEP addendum meeting was called at the request of Parent. The meeting discussed Parent's desire that _____ be placed at _____ School. The IEP for the 2008-2009 school

¹⁰ S. Ex. pg. 227-228.

¹¹ S. Ex. pg. 231.

¹² S. Ex. pg 26-40.

year developed in the spring of 2008 was discussed. Proposals made at the meeting include a summer program, a time study, a consultation with the literacy development specialist, curriculum modification, and an early comprehensive evaluation. The placement at _____ School was denied.

Identification:

During the entire time that _____ was enrolled at _____ Public Schools he was eligible for and received special education and related services and was identified as a child with a disability.

Parent has contended that _____ failed to properly and correctly identify and evaluate _____ as a child with a disability as required by the IDEA and Virginia law. Concern was raised as to _____ possibly having a Specific Learning Disability ("S.L.D.") and/or to his being Mentally Retarded ("M.R."). However testimony of Ms. _____, school psychologist, indicated that _____ did not meet the definition of Mentally Retarded.¹⁴ She was a school psychologist with over fifteen years experience, had reviewed _____' record, educational profile, and the educational program offered him.

The Psychological Evaluation indicates _____ does have a disability. He functions in the low to very low range for children of his age and his general cognitive and processing abilities are deficient. He does have some varied abilities that reflect areas of relative strength.

The eligibility committee concluded there was not evidence of Mental Retardation. Ms. _____ indicated there was not sufficient evidence of adaptive behavior deficits to justify the classification of mental retardation. She testified this was a correct conclusion based upon procedural expectations as well as the A.A.M.R. definition of mental retardation.¹⁵ It is further noted that Ms. _____ is the only witness presented who was a psychologist. _____ School relied upon this same psychological evaluation.¹⁶

The _____ eligibility meeting minutes indicated that mental retardation was considered but was not found and stated that "mental retardation not seen because ability scores were scattered (knowledge 81, learning, long-term memory 86).¹⁷

¹³ S. Ex. pg. 31.

¹⁴ Tr. II, pg. 222-226.

¹⁵ Tr. II, pg. 221-223.

¹⁶ Tr. II, 123-124..

¹⁷ S. Ex. pg. 228.

_____ was classified as O.H.I. The O.H.I. classification was based on the diagnosis of ADHD in conjunction with the information in the psychological report. BCPC requires a psychological profile consistent with the executive functioning deficits and a medical documentation of that disability.¹⁸

Designating O.H.I. or M.R. or S.L.D. for a child was addressed in testimony. Services received would not necessarily have changed had _____ been designated M.R./S.L.D. (as opposed to O.H.I.) as an IEP is based on the individual student's needs. Furthermore, there is no separate program for O.H.I. as opposed to M.R. What designates the program of services for a child are the child's strengths, weaknesses, and educational performance. Services are designated based on the student needs at each grade level.

_____ has had a progression of IEPs over time. The level of services have been reviewed and generally the level of individualized services have increased and the level of supplemental services increased. His services were established based on his needs not on his designation.¹⁹

There is insufficient evidence presented to find that _____ was improperly evaluated, identified, or classified.

Appropriate Placement and FAPE:

The IEP of 4/29/08, 5/3/07, and 12/14/07 all indicate that Parent did participate in the IEP, was a member of the IEP team, and did approve the IEP and its placement decision. The IEPs provide for adjustments to the services, accommodations, and modifications for _____ and his determined needs. _____ was to access general education, special education, and education related settings with the specified accommodations/modifications provided for in the IEP and placement options were considered in light of the least restrictive alternative.

Ms. _____, M.F.A. in Fiction, M. Ed. Adult Education and Reading, B.A. English, Postgraduate Professional License - English, Reading Specialist, Speech Communication, Theatre Arts Pre K-12, is the head of _____ School.²⁰ She sits on the admissions committee of _____ School. She is not, as she pointed out, a psychologist.²¹

She testified she felt that _____' latest IEP was inappropriate, but did not indicate the accommodations or modifications were improper. She stated that _____ was not making enough

¹⁸ Tr. II, pg. 196-197.

¹⁹ Tr. II, pg. 223-225.

²⁰ HO#2.

²¹ Tr. II, pg. 111.

progress. She pointed to not meeting his P.A.L. S. benchmarks and indicated that _____ not meeting his P.A.L.S. benchmarks would be a big red flag for trouble learning to read.²²

Ms. _____ had not observe _____ in the educational environment at _____, did not observe any of his teachers doing teaching, and did not observe any of the modifications they made in practice.

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In her testimony concerning a document, when referring to P. Ex. 31, she testified at one point she was not sure if _____ was in the first grade a second time.²⁴ Also, when testifying concerning Parent's Exhibit 33, (entitled "Kindergarten English Standards of Learning Achievement Record") she testified as to what this document revealed and referenced _____' score however, when asked about the printed "K.5b" under the heading column of "SOL" designated on the form and what it meant she indicated the K meant Kindergarten and the 5 meant fifth month but stated she was not really sure what the "b" stands for on the form.²⁵

She moved to P. Exhibit 31 to discuss the "First Grade English Standards of Learning Achievement Record" and there appeared to be some confusion. Scores of a "1" ("Inadequate or No Understanding of the Standard") were discussed. In reply to the question, "What is the score for each of the areas assessed on this document?" She indicated, "Inadequate". In reply to, "So they're all listed as a one?" The reply was "Uh-huh". It was subsequently clarified reference was to the front page of this document at the time. There was a back side page and the back page of this form indicated five areas in which a "2" ("Partially Meets the Standard") was scored.²⁶

She indicated P.A.L.S. testing is taken by all students, disabled and non-disabled, and the benchmarks are based on an average student.²⁷ She testified she felt that as to the English Standards of Learning Achievement record between K and Grade 1 he was not making progress. She further indicates her concern that the SOL benchmarks were not met and this indicated a lack of progress.

Ms. _____ indicated that the only testing of cognitive ability looked at is the _____ evaluation.

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²² Tr. II, pg. 20.

²³ Tr. II, pg. 134.

²⁴ Tr. II, pg. 40.

²⁵ Tr. II, pg. 36.

²⁶ Tr. II, pg. 39-40.

²⁷ Tr. II, pg. 143.

²⁸ Tr. II, pg. 123.

When asked if she had been able to note any relationship between medication and behavior based on her personal observation she was not aware of when _____ was or was not on medication.²⁹ (Tr. II, pg. 153)

As to _____' admission at _____ School Ms. _____ indicated the application was accepted June 10, 2008, but acceptance was not enrollment. She indicated _____ School never signed a contract with Parent. She testified Parent gave _____ a letter permitting them to educate _____ and she could not really remember when Parent gave the business manager that letter.³⁰

_____, a teacher at _____ School, testified that she reviewed _____' current IEP has looked at other IEPs in _____' folder but does not know them thoroughly. She had not talked with his teachers at _____ Public Schools and not observed the methods employed by his teachers.³¹ In her opinion being educated with non-disabled peers at _____ has not been a good thing for _____ because, as she testified, she sees the children at _____ School are more compassionate with each other. However, she also testified she had not observed the students at _____ Public Schools.³² (Tr. I, pg. 265-266) She also indicated that there are benefits to educating a disabled child in the least restrictive environment and it benefits the disabled child to have contact with non-disabled peers. As the child's educational setting becomes more restrictive, he loses that contact with non-disabled peers.³³

_____ is the second and third grade teacher at _____ and she has worked with _____ since 8/25/08. She has not observed nor talked with _____' prior school (_____).³⁴

For the first couple of weeks at _____ was not on medication. With the start of medication she saw a change in his behavior. She testified that for the first couple of weeks at _____ was not on medication and so it was hard to get him focused and he was impulsive. She also indicated that it was difficult to assess where he really was academically at the time she filed the interim report on 9/16/08 but he was not medicated at that time. She described him as being less impulsive and able to think through his decisions a little better on medication than when he was not on medication.³⁵

She also testified that no other psychological tests besides the one done by _____ were considered.

²⁹ Tr. II, pg. 153.

³⁰ Tr. II, pg. 151.

³¹ Tr. I, pg. 254-256)

³² Tr. I, pg. 265-266.

³³ Tr. I, pg. 252.

³⁴ Tr. I, pg. 280.

_____ provided a number of witnesses who testified it was their belief that the educational program developed for _____ was appropriate and that _____ made educational progress commensurate with his abilities. These witnesses include:

a.) Ms. _____, a Special Education Teacher with sixteen years of experience, had experience with over 200 students with ADHD and between 30 to 50 students with low cognitive abilities. She taught _____ in the second grade, had reviewed his records, was familiar with his educational profile, and was familiar with the program offered him by _____. She was his teacher for the 2007-2008 school year. She testified _____' educational program was appropriate and he had made progress commensurate with his ability while at _____ Public Schools.³⁶

b.) Dr. _____, principal at _____ Elementary, holds a doctorate degree, has taught for six years and been a principal for approximately ten years. He has experience working with students with ADHD and with students with low cognitive ability. Dr. _____ testified he has reviewed _____' educational records, is familiar with his educational profile, has observed _____, and has observed and spoken with the employees who worked with _____.³⁷

He is familiar with _____ and has observed _____. He has discussed _____ with Parent, and on a number of occasions observed _____, _____ e, _____, and _____ working with _____. Dr. _____ testified that he believed the educational program offered was appropriate to _____' educational profile and that he made progress commensurate with his ability while at _____ Public Schools.³⁸

Dr. _____ was familiar with the IEP for the 2007-2008 school year and with the required modifications and accommodations. He also participated on the IEP team for _____. Upon multiple observations with teachers he found the required modifications and accommodations to have been provided. Over time the IEP team increased the level of supplemental or direct small group instruction.

For the summer of 2008 the School offered summer remediation consisting of a small group program in a classroom of about eight to ten students in which math and reading would be addressed. This was offered to afford additional opportunity to learn and to maintain what was learned during the school year. Ms. _____ declined this.

³⁵ Tr. I, pg. 290-192.

³⁶ Tr. IV, pg. 5-11.

³⁷ Tr. IV, pg. 137-139.

³⁸ Tr. IV, pg. 139, 153.

He testified he personally observed _____ making progress commensurate with abilities and cited examples including sight word knowledge, increased letter sound knowledge, emerging reading skills, increase in his ability to use a number line. Over the three years he worked with _____ he saw an increased ability to pay attention, to be part of a group, and while he still did benefit from small group and individual attention, he was able to attend in a large group at a much greater rate than he had. He saw that not just in the classroom but in the library, and in art and music classes, and other things.³⁹

c. _____, school psychologist for over fifteen years, indicated she has reviewed _____' record and was familiar with his educational profile and the educational program offered him. She had opportunity to observe in _____' school and testified she had never observed _____ at _____.⁴⁰ Ms. _____ testified on the basis of her investigation that: a.) the educational program offered _____ was appropriate to his education profile, b.) he did make progress commensurate with his ability, and c.) his rate of learning was consistent with what would be expected for a learner of his learning needs.⁴¹

_____ was diagnosed by Dr. _____, M.D. with ADHD inattentive type and Ms. _____ has given _____ standardized testing to evaluate the effect of his ADHD.

While Parent has raised concern over the designation of Mental Retardation and not O.H.I. being appropriate. Testimony indicated that the services received would not necessarily have changed had _____ been designated M.R. as opposed to O.H.I. as an IEP is based on individual student needs. There is no separate program for O.H.I. as opposed to M.R. What designates the program of services are strengths, weaknesses, and educational performance. Services are designated based on student need at each grade level.⁴²

Concern was additionally raised in testimony as to _____ possibly having a Specific Learning Disability ("S.L.D.") related to his being Mentally Retarded ("M.R."). However testimony of Ms. _____ indicated that _____ did not meet the definition of Mentally Retarded.⁴³

d. _____, Special Education Teacher at _____ worked with _____ in Kindergarten (both years) and first grade. Ms. _____ has a bachelor's degree in special education and early childhood education with special education endorsement in mental retardation and learning disabilities

³⁹ Tr. IV, pg. 153-154.

⁴⁰ Tr. III, pg. 63.

⁴¹ Tr. II, pg. 194-196

⁴² Tr. II, pg. 223-225.

and has about thirty years experience as a special education teacher. She reviewed the record pertaining to _____ and is familiar with his educational profile and the educational program offered to _____ by _____. She also testified the education program offered was appropriate and that _____ made progress commensurate with his ability.⁴⁴

Ms. _____ pointed to examples of her personal observations. When _____ entered in kindergarten he:

- could not recognize his own name in writing
- could not write his name
- could not recognize any letters or sounds
- could not copy or trace
- when coloring he would move his hand in one little spot but never out to the edges
- would not have spoken a word the entire day, if it had been allowed.

At the end of the first grade he:

- was writing his first and last name
- was recognizing all of the letters
- was recognizing all initial sounds and was doing a good job with final sounds
- sometimes got vowel sounds, but not always.
- could work with emergent reading material successfully
- was developing concept of words
- recognized numbers one through ten
- was able to count up to 39
- could do some one-on-one correspondence with counting and adding
- was able to use the number line successfully to add and subtract numbers 1 through 20.⁴⁵

She testified further that _____ made significant gains in the general education population and benefited from being around his non-disabled peers. He started out not being verbal and sometimes so over stimulated by what was going on that he would have to completely turn his back on instruction. At the end of the three-year period he was very social, had good friends, and was able to participate in the day-to-day activities of the regular classroom.

e. _____, masters in reading, is a reading specialist at _____, with over 28 years of experience in education and three years as a reading specialist. She has reviewed _____' educational record, and is familiar with his educational profile and the educational program offered to him. She testified the educational program offered to _____ was appropriate to his ability.⁴⁶

⁴³ Tr. II, pg. 222-226.

⁴⁴ Tr. IV, pg 208-212

⁴⁵ Tr. IV. 223225.

⁴⁶ Tr. IV. pg 189-190.

Ms. _____ assessed _____ and did an assessment with him in April of 2008 and had observed him. She observed _____ four days a week for a year and was aware of his cognitive deficit, difficulty with memory and sequential order, and his ADHD.⁴⁷

The core reading program offered at _____ is "Houghton Mifflin" which is oriented to the general population. She was familiar with and testified that the accommodations and modifications in the December 14, 2007 IEP were appropriate for a child with his abilities that would allow for progress commensurate with ability in the Houghton Mifflin Program.⁴⁸

_____ ' functional reading level is a pre-primmer. He has taken the P.A.L.S. Ms. _____ is qualified to evaluate P.A.L.S. scores and did review his P.A.L.S. (Phonological Awareness Literacy Screening) data.⁴⁹ P.A.L.S. is a screening instrument which enables progress to be gauged. It is taken by all students in _____ (unless excluded by their IEP). _____ ' IEP does not exclude P.A.L.S.

_____ took the P.A.L.S. and did not meet benchmarks. However, she testified that the fact that _____ didn't meet the benchmarks does not mean he is not progressing. She reviewed his actual P.A.L.S. tests for the Fall 2007, Jan. 2008, and Spring 2008. In the Fall test he only attempted seven words, in Jan. and Spring he attempted all 24. She pointed out that progress is indicated in the number of correct initial sounds on the tests and testified her review of documentation indicates he was making progress commensurate with the rate of ability.⁵⁰ She testified that _____ did not meet SOL benchmarks or PALS benchmarks. But this did not mean he is not progressing in a manner commensurate with his ability.

f. _____, second grade teacher at _____, Masters with 14 years experience, taught _____ and was part of his IEP teams during 07-08 school year. Her class was 18 students, 4 of which were special education students. She worked in the class with a paraprofessional.

She testified she observed _____ to have a good relationship with his non-disabled peers and observed him personally progress and benefit from being in the grade level curriculum. At the beginning of the year he was able to use manipulative beads and do simple addition like two plus one. At the end of the year he was able to add double digits numbers using a number line. He was learning a lot of sight words.⁵¹

⁴⁷ Tr. IV. pg. 192.

⁴⁸ Tr. IV. pg. 195.

⁴⁹ Tr. IV. pg. 190.

⁵⁰ Tr. IV, pg. 207.

⁵¹ Tr. IV. pg 247-249.

g. _____, was a first grade teacher who worked with _____ in the first grade. She too testified he made progress at a rate commensurate with his ability.⁵²

He was afforded access to specialized instruction and related services which were individually designed and reasonably calculated to confer educational benefit. He made progress commensurate with his ability.

Services provided:

The April 29, 2008 IEP (for school year 2008-2009) increased the level of services over the previous IEP of December 14, 2007. The IEP provided for SOL testing accommodations and for the following accommodations/modifications in the classroom on an "as needed" basis:

- allowing extra time to respond
- allow student to give oral responses
- check work frequently to ensure understanding
- dictation to a scribe
- extra time in student effort is shown
- give short, concise directions
- homework assignment sheet/agenda
- peer tutor/helper
- preferential seating
- present information auditorally, present information visually
- provide a copy of the notes/study guides
- provide individual assistance
- reading test items for History, Math, Science and on a Reading or English text
- reduce length of assignments
- use a number line in math
- use concrete manipulatives
- use drill and repetition⁵³

Additionally _____ was to receive the following services from 8/25/08– 6/10/09:

Related	Speech and Language	30 min/2 times weekly
Special Education		
	Supplementary Reading	1hr/5 times weekly
	Support for Math	.5 hrs/5 times weekly
	Support for Social Studies	15 min/5 times weekly
	Support for Writing	15 min/5 times weekly
	Support for Science	15 min/5 times weekly
	Support for Reading	.5 hours/ 5 times weekly ⁵⁴

The 7/10/08 meeting, an IEP addendum, discussed Parent's requested placement of _____ School and reviewed the IEP for the 2008-2009 school year (developed in the spring of 2008). A summer program, a time study, a consultation with the literacy development specialist, curriculum

⁵² Tr. IV. pg. 253.

⁵³ S. Ex. pg 26-40.

⁵⁴ S. Ex. pg. 31.

modification, and an early comprehensive evaluation to identify service needs were proposed. The parental request for a private day school, _____ School, for _____ was ultimately denied.

_____ attempted to present curriculum with significant accommodations and modifications. Programs offered _____ include the Edmark Reading Program and the Wilson Reading Program. Ms. _____ used the Edmark reading program with _____ in the 2006-2007 school year. This is a program of reading instruction designed for students with disabilities. The basic principals are very behavioral and provide for a great deal of repetition. It is a multi-sensory model and is individualized.

The Wilson Reading Program was offered also. This program is based on the "Orton-Gillingham Reading Philosophy" which is a multi-sensory philosophy and a supplemental reading program for students with reading deficits. It is a highly organized program, incremental, and it builds in successive and sequential steps from foundation skills to the more complex.

Math instruction was supplemented using touch math, a method of facilitating math computation for students whose working memory may prevent them from being able to quickly compute.

Ms. _____ testified that these are appropriate for _____.⁵⁵ _____ taught _____ and utilized the Wilson Reading Program with him. This program was systematic and routine and _____ needed routine in this area. Ms. _____ saw progress with the Wilson Reading Program including that he increased his sight words.⁵⁶ She testified that _____ progressed and pointed to examples in areas of math, sight words, and coping skills. In math he went from being unable to add to adding two digits with regrouping and without regrouping and subtracting two digits using manipulatives. Coping with stress by sucking his thumb and crying profusely for time on end became less and eventually it was easier for him to get over it and move on. His sight words increased to 35 (being significantly lower when he came to her class). He could read fluently the little books she used in class, but not consistently. With the reading A to Z pamphlet books she used that coincided with the initial final consonant sounds being used in the reading program she noted he was able, after practice, to read the sentences to her.⁵⁷

⁵⁵ Tr. II, pg. 295, 297.

⁵⁶ Tr. IV, pg. 25-27

⁵⁷ Tr. IV, pg. 61-63.

Ms. _____ observed that Parent worked very hard with _____ on homework. Parent expressed concern to her that _____ was not making progress at the same rate the other children were. This was a subject of a number of conversations with Parent.⁵⁸

Most of the time tests were administered to _____ with him being taken out of the room and the test administered one-on-one. When he was in her room in a small group he was placed at a desk away from the others and isolated. She also indicated the folders that are put up to simulate a study carol were then used.⁵⁹

Ms. _____ had reviewed the progress report for _____ at _____ School and testified that the rate of progress was the same as with _____. She indicated most of the things indicated as being mastered were mastered at _____ when he left.⁶⁰

The Wilson reading program is a supplemental reading program for students with reading deficits and not a program that would be provided for students in the general education program if they were progressing to curriculum standards. It is based on the Orton Gillingham philosophy and is a highly organized multi-sensory approach.⁶¹

The evidence indicates that _____ offered _____ personalized instruction with sufficient support services to permit him to benefit educationally from that instruction. _____ has received educational benefit and has received a free appropriate public education from _____. The IEP of 7/10/08 (addendum to 4/29/08 IEP) offers to _____ a FAPE.

_____ Public Schools did not fail to provide an appropriate educational placement to _____ by refusing to provide him sufficient special education services. The education services provided him enabled him to make progress commensurate with his abilities. Furthermore, the progress he has made is not merely trivial or *de minimus*. The IDEA's procedural requirements were met and the IEP is reasonably calculated to enable the child to receive educational benefit.

_____ has faced and continues to face a number of challenges, academically and otherwise. ADHD, his cognitive abilities and coping skills are contended with. _____ did not achieve on the same level as his non-disabled peers but he has made progress. Standardized testing as P.A.L.S., S.O.L. and the benchmarks on such tests were established for the general student population. Not meeting those benchmarks is not sufficient evidence, in and of itself, of a failure to make progress or not

⁵⁸ Tr. IV. pg. 63.

⁵⁹ Tr. IV pg. 67.

⁶⁰ Tr. IV. 70-71.

⁶¹ Tr. II, pg. 295-296.

receiving educational benefit. The evidence indicates that the education program offered was appropriate and that _____ made progress commensurate with his ability. Parent has not shown evidence of a lack of progress commensurate with his abilities.

Alternate Placement Options and LRE:

20 U.S.C. §1412(5)(A) provides that to the maximum extent appropriate, children with disabilities are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Clearly, "this provision sets forth a 'strong congressional preference' for integrating children with disabilities in classrooms." Oberti v. Board of Educ., 995 F.2d 1204, 1213 (3rd Cir. 1993) quoting Devries v. Fairfax Co. Sch. Board, 882 F.2d 876, 878 (4th Cir. 1989).

Placement decisions are not to be based solely on factors such as blanket rules regarding the category or severity of disability. Significant consideration is given to the student's individual needs and whether the student's IEP can be implemented satisfactorily in the regular classroom with supplementary aids and services.

The IEP of 4/29/08, 5/3/07, and 12/14/07 all indicate that Parent did participate in the IEP, was a member of the IEP team, and did approve the IEP and its placement decision. All three IEPs discuss and make adjustments to services, accommodations, and modifications which were individualized for _____ and his determined needs. Each IEP provided that _____ was to be provided access to general education, special education, other school services and activities including non-academic activities and extracurricular activities, and education related settings with the specified accommodations/modifications provided for in the IEP.

Placement options were considered in determining the least restrictive option. The IEP team made determinations of placement options and appropriate accommodations and/or modifications to allow placement for _____ in the least restrictive option that was appropriate for him.

The 5/3/07 IEP noted, "_____ has weakness in all academic areas. He struggles to attend to instruction. He will require an alternate reading program from the regular classroom that can be provided in the resource room setting. He will need support and assistance in all other academic areas which can be provided in the regular classroom."

The 12/14/07 IEP noted, "_____ has weakness in all academic areas. He struggles to attend to instruction. He will require an alternate reading program from the regular classroom that can be provided in the resource room setting. He will need support and assistance in all other academic areas which can be provided in both the regular classroom and resource setting."

The 4/29/08 IEP noted, "_____ struggles with weakness in all academic and social areas. He has an extreme inattention problem. He will require intensive help in the area of reading that can be provided in the resource room. He will need additional support in all other areas."

The evidence indicates (as previously discussed) that _____ received benefit from being with his non-disabled peers. He showed less and less outburst frequency and was able to attend large groups at a much greater rate in the second grade than in the first grade and in kindergarten. _____ was noted to have an increase in ability to pay attention, to be a part of a group. While he still benefited from small group and individual attention, he was able to attend in large group at a much greater rate. This was observed not just in the classroom but in the library and in art and music classes. Dr. _____ saw that some of the emotional frustration that _____ had sometimes became a little less frequent and the duration and intensity lessened a little bit so he was able to get back on track a little more frequently.⁶²

The evidence in this cause indicates that _____ Public Schools did properly consider alternative placement options in determining the IEP of 4/26/08, 5/3/07, and 12/14/07. These options and LRE were considered throughout the IEP process and were taken into proper consideration by the IEP team.

_____ made progress consistent with his disabilities while being exposed to the general education curriculum with modifications and accommodations. The continuum of placements was considered and the consequence of any alternative placement was a consideration throughout the IEP process. LRE was and remains an important consideration.

Consideration of Parental Concerns:

_____ ' family have been actively involved with and concerned about _____ and his education. _____ 's Parent, _____ actively participated in the IEP's and in _____ ' education. Parent was given notice of the meetings, attended and actively and meaningfully participated in the IEP meetings as a team member (except the one IEP meeting of 2/1/05 when she could not get off from work). She signed each of the IEPs, excepting the 7/10/08 IEP, indicating her consent to implementing the IEP and

⁶² Tr. IV, pg. 154.

the placement decision. Notices and copies of procedural safeguards were provided her and her signature acknowledged receipt of same on the IEPs she signed and/or on the Meeting Notice.

12/14/07 IEP... The IEP noted that, "Met with mother to increase services to better meet his significant learning needs." The IEP refers to the Parent Input Form for parent concerns. It was further noted in the Prior Notice that input from the teachers and from the parent were considered. Parental input was noted within the IEP with the "Parent Input Form".

12/14/07 IEP ... In December of 2007 Parent requested and received an IEP meeting. Parental input was noted within the IEP with the "Parent Input Form". This form indicated parent's concern with the fact he struggles with school work, gives up when it's hard for him to do something, and you have to repeat things to him if it's not something he wants to do. She indicates she has found it effective working one on one with him.⁶³

5/3/07 IEP ... Parental input was noted within the IEP with the "Parent Input Form". This form indicated parent's concern with _____ struggling with school work, his giving up when it is too hard for him, and the need to repeat things to him if it is not something he wants to do. She also indicates she finds working one on one to be effective with him.⁶⁴

The May 3, 2007 IEP team indicated that _____ was not performing to grade level standards as they would relate to non-disabled peers. Parent raised concerns over the lack of progress she believed her son was making. In response the Level of accommodations, level of modifications, and level of services provided were increased in the May 3, 2007 IEP.⁶⁵

The 7/10/08 IEP meeting was called at the request of Parent who wanted to express her concerns and did so at the meeting.

_____ has on numerous occasions discussed _____ and the concerns of Parent. Progress was the topic of a number of conversations and meetings (as discussed herein) including the IEP meetings of 4/29/08, 5/3/07, and 12/4/07. _____ did not necessarily always agree with Parent, but did take into consideration her requests and desires

Conclusion:

⁶³ S. Ex. pg. 186.

⁶⁴ S. Ex. pg. 186.

Based upon consideration of the above and upon consideration of all of the evidence presented, applicable statutes, regulations, case law, and the arguments presented by the parties, the Hearing Officer makes the following conclusions of law:

- A. The burden of proof is a material consideration in this cause. Parent bears the burden of proof in this cause and has not sustained her burden of proof.
- B. 1. _____ Public Schools did not fail to identify and evaluate _____ as a child with a disability and did not fail to properly and correctly identify and evaluate him as a child with a disability as required by IDEA and Virginia Law.
2. _____ Public Schools did not fail to provide an appropriate educational placement by refusing to provide him sufficient special education services.
3. _____ Public Schools did not fail to consider alternative placement options in determining LRE in the IEP of 4/29/08, 5/3/07, and 12/14/07.
4. _____ Public Schools did not fail to consider parent's concerns, including inadequate progress, when drafting the IEP of 4/29/08, 5/3/07, and 12/14/07.
- C. _____ Public Schools has made a free appropriate public education available to _____.
- D. As _____ Public Schools has made a free appropriate public education available to _____, _____ Public Schools is not required to pay for the cost of the private school placement at _____ School made by the Parent. In light of this finding, no further determination is necessary on the issues relating to the requirements of Parent informing the IEP team and/or the 10 day written notice of intent to enroll in a private school at public expense.
- E. 1. The requirements of notice to the Parent, _____ were satisfied.
2. The Child, _____, has a disability.
3. The Child, _____, needs special education and related services. *and*
4. The LEA, _____ Public Schools is providing a FAPE.

Therefore I find in favor of the _____ Public Schools on all issues involved in this proceeding, and deny the request for the relief sought by the Parent. The prevailing party in this case as to every issue presented is the local educational agency, _____ Public Schools.

APPEAL:

⁶⁵ S. Ex. pg. 290 and 201-202.

1. Appeal rights: The hearing officer's decision is final and binding unless either party appeals in a Federal District Court within 90 calendar days of the date of the decision, or in a state circuit court within one year of the date of the decision.

2. Implementation Plan: The local educational agency shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision or the withdrawal of a hearing request with the following exception: the appeal or consideration of an appeal of the decision by the local school division and the decision is not an agreement by the hearing officer with the parent or parents of the child that a change in placement is appropriate.

45-DAY DECISION DUE DATE: November 23, 2008.

Entered December 8, 2008 *Nunc Pro Tunc* to November 23, 2008

Lorin A. Costanzo, Hearing Officer
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Copies to:

1. Parent's counsel
2. LEA's counsel
3. SEA
4. SEA Monitor