

NOV 13 2008

Virginia Department of Education**Dispute Resolution &
Administrative Services****Due Process Hearing****Decision**

School Division: Public Schools
LEA Counsel: Wendell M. Waller, Esquire
LEA Representative: Antoine Hickman
Parents: Mr. , . & Mrs. .
Name of Child: , .
Name of Parents' Counsel: Lois Manes, of counsel, did not appear
Name of Parents' Advocate:
Party Initiating Hearing: Public Schools ("LEA")
VDOE Reviewer: Brian K. Miller, Esquire
Hearing Officer: Sarah Smith Freeman, Esquire

In Re: , ("Student") or ("Child")

Public Schools

v.

, . & , Parents on behalf of

Introduction

This matter came for hearing on October 30 & 31, November 1, 3 & 5, 2008 at Virginia before a duly appointed hearing officer. Present in person, in addition to the court reporter, were the mother and father, ("parent" or "parents"), parents' advocate, counsel for the local educational agency ("the LEA counsel"), the LEA Representative and the VDOE Reviewer.

The LEA has requested this due process hearing in order resolve this dispute and to request a written decision in conformity with federal special education law, the Individuals With Disabilities Education Act, ("the IDEA"). 20 U.S.C. 1400 et seq., the regulations at 34 C.F.R., Part B, Section 300 et seq., and the Virginia Special Education Regulations ("the Virginia Regulations") at 8 VAC 20-80 et seq.

Issue Presented:

Is the placement proposed by the LEA for the 2008-2009 school year, the School, a proper placement and the least restrictive environment where this child will receive a FAPE?

Findings of Fact:

1. Student is a year old child whose date of birth is May 4, .
(Due process request)
2. Student enrolled at this LEA on January 2, 2006 and he now attends School Early Childhood Special Education class.
(Due process request)
3. Student's eligibility dated from January 2, 2006 at this LEA under the category of Developmentally Delayed with speech-language therapy as a related service. This program, which Student began in the 2005-2006 school year, is a pre-school program. Student remained in this program for the 2006-07 and the 2007-2008 school years.
(Due process request)
4. Student's current placement in this LEA is in the self-contained, half-day special education class with the use of supplementary aids and supports.
(Due process request)
5. , (" "), Special Education Supervisor for this LEA, testified regarding discussions about Student's classroom performance and about 's interactions with the parent. This witness stated that Student must be enrolled in a self-contained full day program for autistic children primarily because of his behaviors. Student has been observed to hit himself, hit others, tantrums and wanders. Also, Student has a fascination with water. testimony)
6. Student came into the hearing room briefly. Student was well-dressed and polite. Student said or gestured, "Hello." Student acted appropriately during the couple of minutes when he was in the hearing room. Student sat on his mother's lap and he seemed to smile at the crowd of observers in the room. Student did not have any outbursts in the hearing room. (Hearing officer observation)
7. The at School has 6 children in it from ages 5-10 years. There is also a Transitional Kindergarten ("K") special education class which can be a "pull-out" setting for special education students who have appropriate academic skills. This program is less restrictive than the at . (testimony)
8. admitted he is certain that Student's current special education evaluation may be "too old" upon which to create a current baseline of Student's functional abilities in his current educational setting. acknowledged that Student's mother requested that additional academic evaluation be completed before the change of placement because Student's academic prospects may have changed in 3 years.
(testimony)

9. stated that Student is not a candidate for Transitional K because of Student's behavioral issues. Students in Transitional K are fully included in math and reading with a one-on-one aide to assist. acknowledged that Student's parents prefer Transitional K placement. (testimony)

10. acknowledged that Student's FBA and BIP were not fully implemented to address objectionable behaviors prior to the more restrictive placement decision. Student's BIP was completed by June 16, 2008 just prior to the IEP meeting when the IEP team decided upon this placement. (testimony)

11. , (), Early Childhood Special Education teacher, taught student for 2 years. Student's academic performance is "sporadic." Some days Student is more engaged than on other days. In the 2007-08 school year, Student spent 60% of his day sleeping. He "awakened" after the Christmas break when he was given the drug, Melatonin. referred Student to the autism study committee ("Cadre") because of Student's behaviors. described Student's combative outbursts: yelling, dropping to the floor, kicking of the feet and running around. (testimony)

12. requested assistive technology devices to facilitate Student's communication skills. attended additional training on autism. obtained (picture communication cards), a computer touchscreen, a communication builder, a communication master, a visual scheduler on the wall and Ms. took Polaroid shots so Student could see himself doing the activities. Ms. reports that Student derived educational benefit from the PEC's and the touchscreen, only. Student has developed repetition academic skills. He can recite the alphabet and numbers 1-40. Student is only able to process information on a limited basis. Student's fine motor skills are inconsistent in that only sometimes could Student cut with scissors or color shapes. (S-738 to S-754) ('s testimony)

13. Curiously, reports that Student can identify cards and shapes to some extent though is unsure how much Student actually comprehends about these items. One day tested Student's reading skills by pointing to the "sight" cards on the wall, only in a backwards order, to see if Student could read the words. Student could recite all of the words because he had memorized the words but he identified the pictures in a reverse order. doubts that Student has generalized or understood the meaning of sight words presented to him. (Testimony)

14. reports that Student lacks social skills. He does not talk with the other children and he does not interact with them. Sometimes, Student fights with other children. (testimony)

15. By the end of the 2007-2008 school year, Student could express more of what he wanted and "sometimes" he automatically did the activities. (testimony)

16. Student is "fascinated" by water which affects his ability to utilize the bathroom independently because Student plays with items in the toilet after using it.

Student places toys in the sink. Student continually places objects in his mouth and he chews and sucks things such as straws and leaves. It is difficult for teachers to keep Student from injuring himself or ingesting harmful objects because of this behavior. Student must be watched about 60% of the teacher's time in class. Initially, ice was used in order to help Student transition. Water was also used as a reinforcer to control Student's behavior. Student's emotions "escalate" and he will tantrum for about 5 minutes if he wants water and does not get it. (testimony)

17. When Student transitions to resource class or to cafeteria, he sometimes utters loud vocalizations and yells or makes noises. (testimony)

18. At circle time, Student is not an "active participant" in the activities such as naming calendar months or counting the seasons. Initially, Student often wandered during circle time. (testimony)

19. Student does not engage in P.E. which consists primarily of physical exercises conducted in an "open" gym. Student wanders inside the gym. (Testimony)

20. Student engages in Music class when the lesson is a "high interest" activity. Student likes to sing "The Big Bad Wolf" and he will "stay" with the group during this song. (testimony)

21. Student does not engage in parallel play activities with other children. Student is an "onlooker." (testimony)

22. Student often tantrums in the cafeteria. Tantrums are often initiated when Student runs up to an item in which he is interested. Student's tantrums are major outbursts that last for 15 minutes about 3 times per week. Outbursts are described as "prolonged and intense." During a tantrum, Student may run around the cafeteria and he will kick his feet, scream and fall to the floor. (testimony)

23. Student reads quietly in the library and, at the end of the year, Student could sit for longer durations of time. (testimony)

24. With , Student was in a reverse mainstream class meaning that a small portion of the students are regular education students. These students are considered "role models" and it is anticipated that Student will mimic their "good" behavior. Other children in the class were between the ages of 3 & 4 years of age. Last year, Student was 5 years of age. (testimony)

25. These different strategies have been suggested either by or by Student's mother to control Student's classroom behaviors: chew toys, assistive technology, time-out with a timer, straws and "redstrips" to reward, videos of home interaction, videos provided as a reward. Of these suggestions, reported that time-out didn't work because Student enjoyed the isolation. (testimony and P-17 & 18, P-71B)

26. reports that OT was added once weekly for 30 minutes to student's services, however, Student's response is not consistent. (testimony)

27. reports that Student obviously has sensory difficulties. Sometimes he responds to his sister's touch and sometimes he does not. (testimony)

28. Transitional K is conducted in a kindergarten classroom setting with "pull-out" 2 times per day for 45 minute increments. Student's attention span is 20-25 minutes. (testimony)

29. proffers that is a preferable placement for Student because of the focus on behavioral issues associated with this child. Also, Students receive instruction in a small group setting with a small student to teacher ratio. There are less daily transitions for Student to make. (testimony)

30. admitted that at the 2007-08 IEP team meeting for Student, she did not say that behavior impedes academic progress. admitted that Student's problem behaviors were evident in the 2007-08 school year. (testimony, S-396)

31. used her anecdotal notes about Student in order to assist with the development of an FBA for Student. admitted that Student demonstrated educational progress in behavioral goals and he has expanded his ability to pay attention in class. (testimony, S-184, S-186)

32. admitted that Student does not normally show aggression toward other students but that Student's tantrums place him and others around him at risk. (testimony)

33. presented photographs of Student over the course of the 2007-08 academic year. Photos show Student throwing a ball, sorting with the teacher, arranging puzzles with peers and student asleep. There are also photos of Student: in a swing alone, dancing on one foot, exiting from the bottom of a slide, smiling, playing with another child, sitting at a desk, constructing a ramp with another child, receiving a toy in his hand from another child, playing with other children in a small pool of water, playing with toys contained in a small bin with other children and Student alone, bouncing a ball. (S-731, S-732, S-733, S-734, S-735, S-736 & P-7, P-8)

34. On February 11, 2008 Parent e-mailed to the effect that she wanted a meeting of the autism Cadre to discuss Student's "issues" for the current school year and to prepare Student for the upcoming school year. Parent discussed possible "triggers" antecedent to Student's combative behaviors. Subsequent to this e-mail, a series of e-mails transpire between and various school administrative personnel. On February 25, 2008, writes to and as follows: "Dear professionals: I can not allow the welfare of [Student] to be ignored. There is no way that [Student] can progress in the transition-k as

the program was described in the SACs meeting of February 22, 2008- 3 hours in general education classroom, no napping, and more academics in the afternoon. . . . It is significant that the above e-mail was not shared with the Parent though . . . had been regularly e-mailing Parent regarding Student's progress and behavior in class. (P-210 – P-212)

35. . . . admitted that the PLOP identified behavioral concerns for student. She admitted that she did not request the assistance of . . . , who organizes autism professional training for T-TAC, an autism resource group. . . . , who organized the autism Cadre in this LEA, could have been called in to help the teacher devise strategies to manage Student's behaviors. (. . . testimony, P-211, p-204, P-205)

36. . . . testified that she used these behavioral intervention strategies to manage Student's behavior: water as a reinforcer, token economy at circle time and frequent prompting. Student did not respond. . . . explained that she used "her own" behavioral interventions but did not access the BIP because the "IEP had not been accepted." (. . . testimony)

37. . . . , (" . . . "), Early Childhood Special Education teacher, testified regarding her classroom interactions with Student, her classroom observations and her knowledge regarding Student's performance in her class during the 2008-2009 school year. (. . . testimony)

38. . . . stated that Student's behavior is "inappropriate." . . . describes outbursts as screaming, having tantrums, knocking down desks, headbutting. Once, . . . testified, Student knocked down a teacher's assistant. (. . . testimony)

39. Student "responds well" to men, . . . noted. (" . . . ")

40. In Art class, . . . stated, Student paints his head and he puts the paint brush in his mouth. (. . . testimony)

41. In Music class, Student loves to dance but "he has problems with the music teacher. Student doesn't like to wait for the other children to come in. Then, he starts yelling. (. . . testimony)

42. During circle time, Student "looks away." (. . . testimony)

43. On September 11, 2008, Student screamed and threw books on the ground during a "Barney" tape. . . . offered Student water. (. . . testimony)

44. . . . has prepared anecdotal notes dating from September 9, 2008 until October 21, 2008 that are handwritten. Other anecdotal written by . . . are typed. Curiously, both sets of notes cover the same period of time. (Parents stated that they never received the typed anecdotal notes which . . . stated were e-mailed to the parents.) . . . 's typed anecdotal notes describe very serious incidents of daily

misbehavior from September 11, 2008 through September 26, 2008. Typed notes between these dates describe very bad behavioral incidents: yelling, screaming, throwing toys, throwing himself to the floor and kicking, running around, knocking down chairs, disturbing teachers and students who are testing, taking French fries from others, throwing fits at the lunch table and tearing up another student's artwork. These incidents appear to show that Student's behavioral outbursts have escalated though the BIP has now been implemented. (testimony, S-57 thru S-62, P-79 (1-20)

45. Parent's anecdotal notes in the parent-teacher communication notebook do not reflect any knowledge of these events. On September 18, 2008, handwrites to parent, "The past two days have been great for [Student]" with no tantrums noted. On September 16, 2008 the typed teacher notes state that Student almost had to be carried back to class because he had such a bad tantrum. Student then screamed and yelled in class. On September 18, 2008 the typed teacher notes state that Student threw down chairs and toys. He then had a screaming fit "about once every 20 minutes." A teacher's aide note from September 18, 2008 states that "[Student] managed to make it through class without causing a great disruption today." (S-60, P-79(5).

46. proffers dietary interventions to control Student's behavior because believes that autism, Student's medically diagnosed illness, is a gastrointestinal disease. wrote to parent, "My greatest cause in life is autistic children." stated that she understands autism because she has a child who was recently diagnosed with autism. has read up on the illness and she incorporates her autism expertise into her methodology for managing Student in class. believes that dietary supplements will manage Student's behavioral problems. On October 10, 2008, asked parent, "Is [Student] still taking his supplements?" because "I think they really [help] him." (S-58, P-79)

47. Although 's notes reflect many bad behavioral outbursts, there are many notes describing good days and appropriate behaviors: making an apple with paper and glitter, following directions, a "great day," an "awesome" day, "really affectionate," "wants hugs and kisses," sat on the teacher's lap, use of spontaneous language, and said "Look at my snake." (P-79 (1-20)

48. appeared confused about the significance of water as a reinforcer for Student stating, "No, we don't use water as a reinforcer." Alternately, testified, Student is allowed to have water "any time he wants it." (testimony)

49. testified that Student kicks twice a week and he regularly screams in class. (testimony)

50. Though acknowledges that Parent does not believe is utilizing Student's BIP properly, testified that she utilizes reinforcements in class such as praise, stickers and computer time. uses PEC's and oral directions to communicate with Student in class. (testimony)

51. (" ") is Student's music teacher. Student's attention span in her class is between 5 minutes and 20-25 minutes. (testimony)

52. noted that in her class Student likes to turn the lights on and off. Student is disruptive in Music class. He screams, yells and runs around the room. (testimony)

53. does not know that Student has a BIP in place. (testimony)

54. confirmed that uses these interventions to control Student's behavior in Music class: soft toys to hold, redirect Student's focus and touch him. (testimony)

55. (" "), testified as an expert witness, for the parents. has extensive educational background at the Masters level in severe and profound disability. has worked extensively with disabled children, notably at a facility for 9 years. 's focus in training and in therapy is in autism. Currently works as a tutor for autistic children ranging in age from 3 to 11 years. (testimony)

56. conducted an observation of Student at School on October 13, 2008. Though Student did not fully participate in class, noted that there was no "augmentative" communication system in place for Student that was used consistently by the teacher. In this system, pictures are used to help the autistic child convey thoughts and sentences with rough pictures he carries with him. If Student cannot convey his thoughts, he becomes upset and he will "resort" to different behaviors to express himself. (testimony)

57. did not observe any visual charts in Student's classroom during her observation. (testimony)

58. thinks that Student could be successful in the program if visuals are utilized along with a positive reinforcement system and an augmentative communication system. Student could be included with regular education children in cafeteria and P.E. (testimony)

59. believes that Student could be successful in a Transitional K program with the assistance of an aide. The LEA must formulate a system of reinforcements based upon his unique needs for sensory integration. Student must be provided a communication system. suggested positive reinforcements, visual cues, rewards, a communication system and a visual scheduler. All of these tools must be unified by understanding Student's sensory integration system. (testimony)

60. When Student's communication skills are fully developed, testified, it will be easier to predict how to provide educational benefit to this child. Student is not

yet ready for the least restrictive environment because the LEA needs to first try the lesser restrictive alternative. (testimony)

61. Although testified that she realized that the LEA had provided a communication master to Student, he had not been successful in using it. testified that she had never seen a child with autism who could not be taught to use the communication master. Further, she testified, Students of much lower functional ability than Student are able to use the device. (testimony)

62. testified that she saw no visual program being used for Student in his current placement. Because autistic children are visual learners, consistency, testified, is a prerequisite in teaching children with autism. (testimony)

63. Dr. , {“Dr ”) Ed.D., School Superintendent, testified as a hostile witness for the parents. Dr. admitted that he was the recipient of a letter in which parent complained of the behavior of the LEA’s Special Education Director during an IEP meeting. Dr. responded to the parents’ complaint that he has no knowledge of IEP decisions and he does not override decisions of the IEP committee. (Dr testimony, P-125A)

64. , (“ ”), M.S. Ed., Old Dominion University Education Specialist/Autism, Virginia Department of Education, Training and Technical Assistance Center (“T-TAC”), testified for the parents as an expert witness in the training and technical support of school personnel in the implementation of behavioral management for students with autism. organized the LEA’s autism Cadre. contacted , Student’s 2007-08 teacher to inquire whether the teacher needed support for Student’s behavior issues. Ultimately, declined ’ assistance regarding identifying behavior antecedent, “triggers,” to tantrums. (P-204B, P-205A, , testimony)

65. Dr. , M.D., (“Dr. ”), testified on behalf of the parents as an expert witness in the pediatric & academic management of children with autism. Dr. is General Director of this pediatric specialty at Children’s Hospital of the King’s Daughters, Norfolk, Virginia. Dr. regularly lectures on this subject. He is also the parent of a child who has autism. Dr. is Student’s pediatrician. Student originally came in for sleep problems on April 27, 2007 and Dr. diagnosed Student’s autism. Dr. describes Student as a “classic child with autism.” Student’s diagnosis of the autism spectrum disorder is in the moderate to severe category because of Student’s language and behavioral difficulties. (Dr. testimony)

66. Dr. testified that children with autism have “meltdowns” when they experience a “sensory overload” which even a light flicker may trigger. Every child with autism must have a behavior plan. Being an autistic child is sort of like “being in a foreign country. You get frustrated, then there is a meltdown.” (Dr. testimony)

67. Many children with autism like water and tend to put things in their mouths, Dr. testified. Autistic children don't like to keep their shoes on because, "It feels better without shoes," Dr. stated, "Having your shoes on is a learned phenomenon." Tantrums, falling on the floor, throwing things and spitting are all the norm for an autistic child. To correct an autistic child, pictures must be used because autistic children are visual learners. (Dr. testimony)

68. The key to behavior modification, Dr. testified, is to find the reason why it started – not just to stop it, Dr. stated. Some reinforcers that are useful in the behavior modification of an autistic child, the weighted vest and the application of deep pressure, can easily be accomplished, Dr. testified. (Dr. testimony)

69. Dr. has seen Student 5 times for about 30-45 minutes since April 24, 2007. Student's verbal ability, social skills and language skills are "pretty delayed." Dr. estimates Student's age equivalent in these areas to be between 15 to 18 months and he does not advise placing Student in a class with a child up to 10 years of age. Dr. recommends a self-contained class with a one-on-one aide until he develops non-verbal behaviors. Later, if behaviors improve, Student may be mainstreamed for Art and Music. Dr. acknowledges however, that he has never observed Student in a class setting. (Dr. testimony)

70. , (" "), Extended School Year teacher during July, 2008, testified regarding her interactions with Student and his academic performance with her during the summer, 2008. Student required that a one-on-one assistant always be with Student because he was able to "manipulate" his teachers to get out of an area. Student threw a tantrum if he wanted a toy or some item "in the bag." He liked to "throw things." Student likes "velocity." Student likes to throw balls "straight up in the air." Student also liked to throw books, toys, cars, and other items down the slide. If Student wanted a toy or water, he threw a tantrum. After the tantrum, Student would "calm himself down, lay on a pillow and read a book. (testimony)

71. , licensed as a highly qualified special education teacher since May, 2008, stated that she utilized picture charts, stickers, more play time and another student to serve as a role model for Student's transitions. Student had limited success with academics (handwriting) and social skills (going to the bathroom). (testimony)

72. , (" "), Student's T-Ball Coach during the summer, 2008, testified on behalf of the parents. coaches a league for children with disabilities from ages 5 to 18 years. described Student as well-behaved and not aggressive to his peers. "He acts good with them," testified. Student didn't want to play at first, he wanted to run. Student is now an active participant in the game. Student's mother assists in the outfield has observed Student once or twice weekly since the Spring, 2008 thru July, 2008. has not observed Student to wander off, mishandle

equipment, hit anyone with a bat or other item, kick anyone, spit at anyone and, to a degree, Student follows instructions. (testimony)

73. Once encountered Student and his family at a local community “TGIF” event. Student sat quietly, “sucking on a sucker,” with his family. Student held a soft rubber toy in his hand. There were 300-400 people present at the social event. (testimony)

74. , (“ ”), Occupational Therapist, testified on behalf of the LEA. has a Masters level degree in Occupational Therapy. has provided occupational therapeutic services to Student since November, 2006. assists Student with sensory processing skills, fine motor skills and self-help skills.

has attended most of Student’s IEP meetings. These devices have been utilized to facilitate Student’s sensory processing needs: dynadisk, a weighted vest, a chewy and a necklace. Student has been directed to bounce on a ball and a trampoline to access sensory processing skills. All of these items and activities, testified, have achieved limited success to enable Student to manage his own behavior. (testimony)

75. acknowledged that was “with [Student] a lot and he did things for [].” was able to redirect Student and she functioned more in a one-on-one capacity with Student. Much more academic progress was made with Student after he “stopped sleeping” at the end of the 2007-08 school year. estimates that she spent 75% of her time working on Student’s sensory processing issues and 25% of her time working on Student’s fine motor skills. has observed that there are times when Student is overstimulated. As an example, noted assembly time, when Student “laughs uncontrollably or runs out.” These periods last for about 5-20 minutes. There are many other times when Student exhibits no behaviors. Student now receives occupational therapy twice weekly as a related service. (testimony)

76. noted that no formal assessment of student has occurred recently on Student’s OT skills or sensory processing needs. testified that she can develop a “sensory diet” to be included in Student’s IEP. (testimony)

77. stated that Student has improved somewhat and he mastered his IEP OT goal last year. In 2007-08, academic progress was made in Student’s OT skill development: Now, Student can write most of the letters of his name on his own. could not verify that Student’s current teacher, , is working on current IEP goals. appears to be working on “old” goals. (testimony)

78. admitted that she has not independently called for an IEP meeting to address Student’s sensory integration needs. To date, no sensory profile has been developed for student though admits that gathering such information about Student would be most beneficial to his academic progress. (testimony)

79. _____, (“ _____”), Speech Language Pathologist testified on behalf of the LEA regarding her attendance at meetings where Student’s performance was discussed. _____ completed two observations of Student. This witness is also part of the autism Cadre. The two teacher observations occurred on September 12, 2007 and another occurred on February 19, 2008. In the first observation, _____ watched Student’s transition from Music to playground. Student appeared to be “mesmerized by the bush.” _____ tried to get him in a swing, but he started “sitting over to one side.” In the second observation, Student “barked like a dog” and “quacked like a duck.” _____ deemed Student’s behavior to reflect “no noticeable change” between the two observations. On September 13, 2007 _____ suggested other activities to assist Student to engage with other children such as ball rolling and blowing bubbles. (_____ testimony, S-315)

80. _____ does not believe that Student will be successful in the Transitional K classroom because these students are mainstreamed into a regular classroom, then they are transitioned back to a special education classroom. The goal for these students is “to stay in the regular classroom.” _____ discussed these “options” with Student’s mother. _____ asserted in her discussions with Student’s mother that student does not possess the social skills, self-help skills or academic skills necessary to be successful in the Transitional K classroom. _____ asserts that Student’s behaviors “when overstimulated” also prevent Student from being mainstreamed into the Transitional K classroom. _____ believes that Transitional K would be “way too stimulating” for Student. (_____ testimony)

81. _____ e-mailed _____ on February 29, 2008 in response to _____’s earlier e-mail dated February 27, 2008 in which _____ commented that she doubted Parent was interested in _____: “Well, then we go to mediation. _____ is our recommendation for [Student]. He is not a candidate for the transition K. cat” The first IEP meeting during which Student’s placement was changed to _____ occurred in March, 2008. _____ does not believe that Transition K can be achieved “even with related services and an aide.” (_____ testimony & P-212)

82. _____, (“ _____”), Student’s maternal grandmother, testified for Student. _____ regularly babysits for Student. Student is not aggressive, does not spit water at others and she has not observed any “wandering” incidents. _____ has observed incidents of tantrums which, she testified, last “about 3 seconds.” _____ responds to Student by firmly telling him, “No.” Student does engage in play with his sister and brothers. _____ regularly takes Student to a fast food restaurant and to a park like setting, Mt. Trashmore. (_____ testimony)

83. _____ observed Student last year at school for 30 minutes. Student was seated at a table and played with blocks and little animals. Student responded to the teacher’s questions regarding a snake in his hand. _____ observed Student in the cafeteria setting for 20 minutes. Student opened up his lunch box, arranged all of the articles out in front of him and he ate his lunch. _____ did not observe P.E. or Art.

(testimony)

84. , (“ ”), M.Ed., maternal grandfather testified on behalf of the parents. is a retired state certified regular education teacher who has experience for 30 years as a high school teacher in the inclusion model system. taught children with special needs in his regular education classroom. Because of the depth of ’s experience within the regular education and special needs setting, qualified as an expert in this matter. (testimony)

85. conducted 2 observations of Student. The first observation occurred in the Fall, 2007. lined the children up to go outside. communicated to Student in sign language. Student was getting a little “antsy” in the line until figured out that he wanted to go to the bathroom. He went to the toilet, returned and continued on in the line. There was no hitting, spitting water or throwing of materials. The second observation occurred on the same day: Student “lined up” to enter the playground. Student followed the other students to the playground with very little difficulty. Once he arrived at the playground, he ran to his favorite swing, then to the merry-go-round. Student was observed to push two other girls on the merry-go-round. Because there was more than one swing, Student was swinging along with the other children. (testimony)

86. related an incident which he believes does prove that Student can formulate deductive reasoning: placed candy contained in a cookie jar high on top of a “china press” in the dining room. Student carefully put three boxes on top of each other, got the candy, then came back down. (testimony)

87. observed Student again on Grandparents Day in a transition and in the lunchroom in September, 2008. Student walked to the playground, “bringing up the rear,” without an aide or teacher accompanying him. Later, Student’s grandfather observed Student at the table for 30 minutes. Student behaved, opened his lunchbox and he watched Student display all of his lunch items in front of him. Student selected two items. Student opened all of the lunch items on his own. (testimony)

88. admits that Student cries when he does not get what he wants. has seen Student, at home, fall to the floor on “one or two occasions.” In these instances, Student may pout, scream or cry when he becomes “frustrated.” stated that he will say, “No,” firmly and loudly in order to redirect. (testimony)

89. , (“ ”), is Student’s maternal aunt who testified in the parents’ behalf. She attended IEP meetings in the 2007-08 school year and the May, 2008 IEP meeting when was proposed at School. was objectionable to her ~~sister~~, Student’s mother, because of Student’s sleep issues. is 45 to 60 minutes away from Student’s home. was the only placement proposed and no other placement was considered by the IEP team, stated. Neither were any additional supplementary aids and/or

services proposed at the May, 2008 IEP meeting. [redacted] was asked whether the IEP team considered ways to curb Student's tantrums or ways to make progress toward IEP goals. "No," [redacted] responded. The IEP team did not discuss the severity of Student's disability and what it would take to achieve academic success. Further the IEP team never discussed all of the suggestions made by Student's mother to address Student's difficulties and contained in her letter to the administration: increase speech therapy & OT, develop a BIP and for the team to address Student's "overstimulation" issues. It should be noted that Student's speech therapy and OT increased. A BIP was subsequently developed pursuant to Parents' suggestion. (P-71 A-G, K. testimony)

90. [redacted] testified that she heard [redacted] make the statement, "Children with autism go to [redacted]." Overall, [redacted] stated, [redacted]'s behavior was professional and very appropriate. Parent and [redacted] were offended by the reaction of the special education director during the mediation session in September, 2008 regarding Student's placement. ([redacted] testimony)

91. [redacted] stated that only one group of individuals presented options to Parent, the [redacted] group, who were then invited to stay at the meeting. No other placement options were presented to the parent though Parent had expressed an interest in a [redacted] program for younger children located closer to home or for a transitional K program. (Apparently, no other placement options other than the [redacted] Program had been deemed "appropriate" by the IEP team for various reasons: The [redacted] Program was too restrictive because the children were lower functioning. At [redacted], children were much younger in age than Student. Transitional K at [redacted] was not considered because of all the transitions Student must make during the day and because children must function at higher a academic and social level. ([redacted] testimony)

92. Student's father testified. Parent testified that he has had "limited involvement" with this case but he believes that Student deserves to have "more needs met." Parent observed Student in September, 2008 at school in [redacted]'s classroom which he described as "a normal school day." Parent noted that picture prompts were not being used by the teacher's aide to instruct Student. Parent acknowledged that Student's behaviors have "escalated" in class this year. Calls home have increased and parent stated that "It bothers me that the school says that he [Student] is uncontrollable." (Parent's testimony)

93. Parent reads to his children at night. Student has a brother who is 4 years old and a sister who is 3 years old. Parent is very proud of the fact that the 3 year old was selected to act as a "role model" for Student. Parent testified, "It's not the end, it's just a start. We just want the opportunity [to place Student in transitional K]." (Parent's testimony)

94. Parent admitted that he has not observed the [redacted] Program at [redacted]. Parent prefers a class with Student's peers from ages 5 to 8 years. 10 years of age

is too old, parent testified, unless the child is used as a role model. Student's day should be a whole day, not part of a day. Some of the children should be special needs and some of them should be regular education children. Parent views the placement as, "the last step." Parent appears to be describing an inclusion model placement which is more similar to Transitional K placement. (Parent testimony)

95. Student's mother testified. Parent stated that Student experienced major sleep difficulties during the first half of the 2007-08 school year. The explanation that she has been provided by the IEP team indicate that Student's skills are "too scattered" for Transitional K to work. Parent became angry at her perception that the special education director for the LEA was not listening to her concerns regarding Student. In an attempt to resolve the placement issue, Parent wrote a letter to the school superintendent, Dr.

"I wanted to come to a compromise ... to work out a compromise," Parent testified. (P-125A, Parent's testimony)

96. Parent requested an assistive technology evaluation. Parent requested that speech- language and OT therapy be increased weekly but these suggestions, parent testified, were not honored. Parent states that she desires a transitional K program and she describes her ideal classroom for Student as follows: a small, self-contained kindergarten class of 6-7 students. In the class, Student's sensory needs can be met based upon a unique sensory diet. There are role models in the program with age appropriate peers and a small student to teacher ratio of 4 to 6. Instruction is provided in a small group setting that is focus driven. P.E. is integrated and assistive technology is provided. (Parent's testimony)

97. Parent has visited the proposed placement twice at School in the Program: On Parent's first visit, Parent's primary complaint was that the teacher was new and the students, overall, appeared to be "lower functioning" than Student. On Parent's second visit, there was an older student in the class who was learning the difference between two letters. Also, there was a 5 year old who was studying pre-school materials. Parent has been known to say, "If I ever let him [Student] go to he'll never get out." Parent's choice is a Program for autistic children ranging in age from 1-2 years at School. (Parent testimony)

98. Parent testified that she understood to have provided the following to Student during the 2007-08 school year: a picture scheduler, a communication master, a touchscreen computer, assistive technology 2 days per week, ESY and an FBA/BIP. (Parent testimony)

99. , ("), Assistive Technology Specialist, for this LEA testified on behalf of the LEA regarding her personal observations and her participation in meetings about Student. has a masters level degree in Speech Pathology. has seen some of Student's outbursts which she describes as tantrums. Also, Student does not engage others. stated, "He [Student] struggles with all areas of language" and Student has difficulty with receptive language skills. admitted that no additional testing has been completed to determine Student's level of language

skills before the placement was proposed. stated that she thinks that evaluation is done only at the time of eligibility and not for IEP purposes. testified that she observed to use primarily sign cues with Student with a great deal of one-on-one redirecting. (testimony, S-620)

100. refused to respond when asked, "If Student's behaviors had been so severe or such an impediment to his academic progress, wouldn't the IEP refusal documentation have noted that on the forms submitted to the parents on March 20, 2008 after the IEP meeting?" Behaviors were not noted. No lack of progress was reflected in the notice to parents. (P-61, P-63)

101. , (" "), Special Education Supervisor, testified as a joint witness in this case. was "pulled off" this case and replaced by because of 's specialized knowledge of the Program at Transitional K was not presented as an option to the parents. ('s testimony, P-214, P-61)

102. , (" "), School Psychologist to the LEA testified. He did not do additional testing on Student because a medical diagnosis was already in the student's file. was unaware that Parents had requested additional evaluation of Student's needs. is available for consults with teachers and students for behavioral concerns and to create FBA's and BIP's. admitted that the psychological data, used for Student's placement, was 3 years old. (P-68A-D, S-620)

103. , (" "), Principal, School, testified about the proposed placement. is a regional day school program. There are 6 children in the program who range in age from 5 to 11 years old. Skill levels range from kindergarten to 2nd grade. Three students leave the program daily for inclusion in regular education in a second grade class. ABA behavior modification techniques are used. A board certified behavior analyst oversees the program which is very intense. Days range from a half to a whole day in duration. 6% of the students transition back into this LEA. testified that the board certified behavior analyst could come into the public school setting and collaborate with LEA personnel. (testimony, P-64A & B)

104. , (" "), Assistant principal, School testified as a hostile witness for the parents. admitted that, "It's not every day that we see the behaviors." An incident occurred on September 16, 2008 when was called to the classroom because of student's behavior and the safety issues: Student was banging his head against the wall and running with a container. Children were called out of the room in order to contain Student. Regarding this incident, was asked if she called the school psychologist after this incident. responded: "I never thought the behavior warranted calling the school psychologist." Another incident occurred on October 10, 2008 in 's classroom to which was called for assistance: Student was not doing what the teacher asked him to do at circle time. Student

knocked over a chair and ran around the room for about 10 minutes. Another incident occurred that day that lasted for about 10-15 minutes. Again, the behavior was triggered when asked Student to do something he did not want to do. noted the fact that had taught Student for 2 years but that no longer taught Student. (testimony)

105. , (“ ”), Assistive Technology Specialist testified on behalf of the LEA regarding technological devices made available for Student. has an MA. in special education and an Ed.D. in school administration. In the Spring, 2007, made a referral to regarding Student’s lack of communication skills. A meeting to discuss these issues occurred on April 23, 2007. The recommendation was for the following devices to assist in Student’s communication deficits: a scheduler, a communication master, a switch interface, and a touchscreen for the computer. For various reasons, none of these devices seemed to work. Primarily, Student’s attention span did not last and Student had difficulty transitioning from to do the picture prompts. The communication devices provided to Student are shown in pictures. (testimony & S-780, S781, S-782 & S-783)

106. testified, “Behaviors are a form of communication.” provides a strong communication system to students not only in academics but in other positive skills “You will see a decrease in behaviors and success in social situations.” admitted that teachers at Student’s current placement at may contact to assist with communication skill devices as needed. (testimony)

107. admitted that there appears to be a trashcan in front of the picture scheduler in Student’s classroom when he was being instructed by . (testimony & S-733)

108. made an observation about three weeks ago, October, 2008 in ’s class. When Student was able to provide visual cues, he put the letters in the boxes with his name on the boxes. Although there was one tantrum, clearly saw Student using picture communication and he “did a nice job with that.” Regarding the tantrum, Student ran briefly behind the bleachers and hid. Once the teacher stepped away, Student came out “on his own” and went back to join the rest of the class. then left the gym. (testimony)

109. Dr. (“Dr. ”), Ed.D., Director of Special Education Programs, testified for the parents as a hostile witness. Dr. admitted that there are no formalized evaluations on Student’s current functioning needs. (Dr. testimony)

110. Dr. was questioned regarding the “Cox” memo relative to a recent 4th Circuit decision: A.K. v. Alexandria City School Board, U.S. Court of Appeals, Fourth Cir., 06-1130, April 26, 2007. In the memo, the Virginia Department of Education informs school districts and LEA Administrators about the state department’s position on

the A.K. case. The following passage is underlined in the memo: The IEP team must identify the school site for the parent “when the parent expresses skepticism and reservation or outright refusal, leading to potential dispute. Here, the site was changed many times but different sites for the delivery of services were, in fact identified. (Hearing Officer determination of issue)

ARGUMENT

Parents deny that the LEA’s allegations that Student’s behaviors at school are uncontrollable. Parents are not satisfied with the child’s current placement. They request “just the opportunity” to enroll the child in Transitional K which is a self-contained special education class with the use of supplementary aids and services. Parents do not believe that placement for the 2008-2009 school year at the

—, (“”), a regional day program for autistic children, is appropriate or the least restrictive environment for their child.

BURDEN OF PROOF

In Schaffer v. Weast, 126 S. Ct. 528, the United States Supreme Court ruled that, under the IDEA in an administrative hearing, the burden of proof properly rests upon the party who seeks relief. In order to resolve the burden of proof issue, the Supreme Court stated therein: “[T]he burden of persuasion, in an administrative hearing challenging an IEP, is properly placed up[on] the party seeking relief, whether that is the disabled child or the school district.”

In the instant case, the LEA bears the burden of sufficiency of the evidence and therefore, the LEA bears the burden of proof.

APPLICABLE LAW

Children must receive instruction in the least restrictive environment for their proper placement. Pursuant to 8 VAC 20-80-64, 34 C.F.R. 300.550(b) the general requirements for restrictive environments and placements are as follows:

8 VAC 20-80-64 A.1. “Each local educational agency shall ensure:

- a. That to the maximum extent appropriate, children with disabilities, including those in public or private institutions or other care facilities, are educated with children without disabilities; and
- b. That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or the severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Federal law requires that an IEP team consider behavior intervention strategies for any child with a disability whose behavior impedes his or her learning or that of others. 20 U.S.C. Sec. 1414(3)(3)(B)(i); 34 C.F.R. Sec. 300.346(a)(2)(i).

DISCUSSIONS AND CONCLUSIONS OF LAW

Evidence presented at this hearing reflects that the LEA has not proven that Student's proper placement is at the () at Elementary School, Public Schools. The placement decision made by Student's IEP team for Student to attend is not the appropriate placement for this Student to receive a free and appropriate public education (FAPE) in the least restrictive (LRE). The severity of Student's disability is not so severe that education in a self-contained special education class offered by Public Schools, with use of supplementary aids and services, cannot be achieved.

In Board of Education v. Rowley 458 U.S. 176, 188-89, 102 S. Ct. 3034, 3042, 73 L. Ed.2d 690 (1982), the Supreme Court held that a "free appropriate public education" under the Act "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."

Examination of 4th Circuit case law regarding appropriate placement of disabled children reflects the IDEA's language that shows a "strong, congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child." DeVries v. The Fairfax County School Board, 882 F. 2D 976 (1989)

In the DeVries case, parents of a 17 year old autistic student, Michael, appealed the holding of a lower federal district court upholding the school board's placement at a vocational center thirteen miles from Michael's home rather than at the closer, local school. The federal appellate court reversed and determined that the more distant segregated placement was appropriate and the least restrictive environment.

Michael had been educated at a private day school for handicapped children when his mother refused to sign off on a yearly IEP designating the vocational school as the LRE for placement. Parent argued that the IEP team had failed to consider mainstreaming requirements of the IDEA. Concluding that the IEP team had considered mainstreaming, the court then decided that Michael could not be satisfactorily educated in regular classes even with the use of supplementary aids and services.

Case law in the 6th Circuit Court of Appeals acknowledges the congressional preference for mainstreaming. Proper examination of the mainstreaming issue requires that the IEP team consider whether the proposed placement is appropriate under IDEA.

In the DeVries case, the court quoted the 6th Circuit's reasoning in Roncker v. Walter, 700 F. 2d 1058, 1063, (6th Cir.), (citation omitted), cert. denied, 464 U.S. 864, 78

L. Ed.2d 171, 104 S. Ct. 196 (1983), and stated as follows regarding the conflict between the mainstreaming requirement and a segregated placement decision:

The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not of course, any basis for not following the Act's mandate. In a case where the segregated facility is considered superior, the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated facility. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could be provided in the non-segregated setting, or because the handicapped child is a destructive force in the non-segregated setting.

There exists a difference of opinion in the federal circuit courts regarding the IDEA's mainstreaming provision: The 4th Circuit follows the logic of the 6th Circuit above in the Roncker decision. The 11th, 5th and 3rd Circuits follow the logic elucidated in Daniel R.R. v. State Board of Education, 874 F. 2d 876 (5th Cir.) (1989) which concluded that the student's presence in the classroom was actually harmful to the other general education students.

In order to reach the conclusion that Daniel R. could not be educated in the regular education setting, the district court considered several factors: Did the school system make a sufficient effort to accommodate Daniel R. in the general education classroom? Did the school system take adequate steps to modify Daniel's general education program by providing adequate supplementary aids and services? Notwithstanding these modifications, did Daniel benefit from the inclusive program? Upon consideration of the foregoing, the school deemed Daniel R. to have received little benefit from the inclusion program. Further, the Court opined, Daniel R's presence in the regular education class was deemed unfair to the other students.

The two-part test proffered by the Daniel R.R. decision is as follows: (1) Whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily and, (2) If the Court finds that the placement outside of the regular classroom is necessary for the child to benefit educationally, then the court must decide, whether the school has mainstreamed the child to the maximum extent appropriate.

As stated above, the DeVries court does not apply the 5th Circuit analysis described in Daniel R.R. In the 4th Circuit, the DeVries court applied the following test regarding IDEA's mainstreaming provision: Mainstreaming is not required where: (1) a disabled child would not receive an 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 a regular education setting. Id at 879.

In the case of Hartmann v. Loudon County Board of Education, 118 F.3d 996, 1004 (4th Cir.) (1997) the 4th Circuit employed the Roncker test above and rejected the 3rd, 5th and 6th Circuit's Daniel R.R. analysis. Now, as clearly set forth in the Hartmann decision, these factors are to be considered when the issue of the appropriateness of a particular non-mainstream placement is presented: (1) whether the disabled child would receive educational benefit from mainstreaming into regular class; (2) whether any marginal benefit from mainstreaming would be significantly outweighed by benefits which could be achieved which could be feasibly obtained only in a separate instructional setting; or, (3) whether the disabled child is a disruptive force in a regular classroom setting; (4) whether there is any cost savings to educating the child in the proposed separate instructional setting.

In the Hartmann case, the parents sued the local school board on behalf of their son, Mark, an 11 year old child with autism. The Hartmanns alleged that Mark would not be educated "to the maximum extent appropriate" pursuant to IDEA's mainstreaming provision at 20 U.S.C. Sec.1412(5)(B). In an appeal of the federal district court decision which had supported the parents, the LEA requested review of the district court decision.

Parents and the school agreed that Mark's biggest deficit in learning was his lack of communication skills. The LEA had attempted to educate Mark in a regular classroom with a full time aide to assist him. Mark's teacher received specialized training in communication with autistic children through facilitated methods. Mark received 5 hours of instruction per week specifically in speech and language therapy with a qualified specialist. The LEA hired a special education teacher to provide 3 hours of instruction to Mark, to his regular education teacher and to an aide. Staff who worked with Mark were provided additional instruction on autism and training in inclusion of disabled children in the regular education classroom.

Because Mark engaged in daily outbursts and episodes of screeching, hitting, biting, pinching, kicking, and removing his clothes, the LEA requested behavioral support from the manager of the local autistic children's center.

In spite of the LEA's efforts to mainstream Mark, the task of providing a FAPE to Mark became overwhelming. Mark made no academic progress in the regular education class that year. The IEP team opted for a segregated placement for Mark for the following school year. Mark's parents rejected the proposed IEP on the ground that the IEP failed to

comply with the mainstreaming provision of the IDEA, which states that “to the maximum extent appropriate,” disabled children should be educated with the children who are not handicapped. 20 U.S.C Sec. 1415(b).

Mark’s revised IEP called for academic instruction and speech in a self contained classroom but Mark was to join his regular education peers for art, music, physical education & recess. As Mark’s progress increased in the autistic children’s program, Mark was to gradually re-enter the regular education setting.

The local hearing officer agreed with the LEA and determined that despite the ‘enthusiastic’ efforts of the county, he [Mark] had obtained no academic benefit from the regular education classroom. After the local hearing officer’s decision was affirmed by the state review officer, the Hartmanns appealed to federal district court. The district court reversed the hearing officer’s decision and concluded that the LEA had simply not taken enough steps to include Mark in a regular education class.

The appellate court in the Hartmann case reversed the district court. Therein the court stated the mainstreaming provision of the IDEA establishes only a presumption in favor of mainstreaming. The concept, mainstreaming, is not an “inflexible federal mandate.”

By reference to Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 206, 73 L. Ed. 2d 690102 S. Ct. 3034 (1982) the Hartmann court quoted the Rowley decision: Mainstreaming “is by no means an invitation to the courts to substitute their own notions of sound educational policy to for those of the school authorities which they review.” Further, the Hartmann court referred to Rowley in stating that “the task of education belongs to educators. Courts must afford due weight to school administrator decisions and school administration decisions should be afforded due weight.” Id. On the occasions when the district courts do not follow the decisions made by the LEA, the district court must explain why it has not. Doyle v. Arlington County Sch.Bd., 953 F.2d 100 105 (4th Cir) (1991)

Quoting the Rowley decision, the Hartmann court reiterated: “These principles reflect the IDEA’s recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child.” And, further, “The IDEA does not deprive educators of the right to apply their professional judgment. Rather it establishes a ‘basic floor of opportunity’ for every handicapped child.” Rowley at 201. States must provide specialized instruction and related services ‘sufficient to confer some educational benefit’ on the handicapped child, Id at 200, but the IDEA does not require ‘the furnishing of every special service necessary to maximize each handicapped child’s potential.’ Id at 199

In consideration of the least restrictive environment, the LEA must prove that the child with disabilities is being educated “to the maximum extent appropriate” with children without disabilities. It follows that IDEA deems special classes, separate

schooling or other removal of the student **ONLY** 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.

Regarding Student's academic progress, the IEP signed on August 16, 2007 does not indicate that Student's behavior is impeding his academic progress. Later that year, encountered problems with Student. When offered to assist, replied that she did not require any outside assistance from , a known autism specialist.

sought no behavioral consults from the school psychologist or the personnel behavioral management team in order to provide Student with a FAPE. At the end of the 2007-08 school year, independently created the FBA and BIP which was never fully implemented until October, 2008.

Student has behavior problems associated with autism. All of his behaviors are typical of an autistic child: tantrums, running away, disengagement, vocalizations and uncontrollable laughter. It is arguable that a properly formulated FBA and BIP, created through valid psychological and sensory evaluation by professionals, should have been in place from the time that Student was diagnosed with autism, April 24, 2007. Instead, was able to employ her own behavioral methodology to manage Student's daily activities. In this fashion, controlled Student's behavior. There is also evidence that Student had a special relationship with who, by all reports, was a capable presence in Student's academic life.

Evidence is clear that after Student left there was a breakdown in the school's ability to control Student's behavioral needs. Whether or not the school can fully implement an FBA and BIP to address all of Student's needs in the less restrictive setting is a matter for future determination. According to Dr. , a medical doctor and autism specialist, and to of T-TAC, an autism resource entity, if the educator cannot pinpoint what triggers the behavior, the autistic child's bad behavior will not disappear.

There is evidence that devoted 60% of her time exclusively to Student and that she consistently employed firm commands and sign language to manage Student's behavior. Evidence is inconsistent regarding the degree to which Student is disengaged in the class now or when he was with . On one hand, there are anecdotal notes and teacher observations showing that Student does not participate at circle time or that he may be "mesmerized by a bush" on the playground. Alternately, the photographs submitted into evidence "paint" a different picture of Student's school day: The photos reflect that Student appears to be learning, participating in some school activities and interacting somewhat with his peers. There is also the testimony of Student's T-ball coach, , who stated that Student was an enthusiastic player this past summer. There is also evidence of Student's own emerging self-control skills: testified that Student "came out on his own" to rejoin the class. testified that Student was able to "calm himself, lay down and read a book" after becoming combative.

There is scant evidence that consistently utilizes the BIP prepared by

...’s anecdotal notes reflect good and bad behaviors. Which picture is the norm? It is quite difficult for this hearing officer to attach much significance to the anecdotal notes of : Teacher’s anecdotal notes imply to Parent that Student’s autism, a pervasive medical disorder, can be controlled in the classroom by dietary supplements.

Further, it is quite possible that the BIP requires modification now because triggers to Student’s behavior may not be fully identified by the FBA. There was evidence presented by the school personnel, notably , that Student requires modulation and reinforcement of his sensory needs by the preparation of a “sensory diet” for him. Preparation of Student’s sensory profile should be utilized by appropriate school personnel to filter information into the formulation of Student’s FBA. After sensory information is developed, appropriate school personnel or outside sources may assist if the BIP requires modification.

According to , the child’s sensory diet or profile may then be written into the child’s IEP. testified that an assessment of his visual cues must be completed first in order to prepare an integrated sensory profile for Student.

Regarding auditory processing, it does not seem accurate to say that Student does not process information: indicated that Student memorized a set of words backwards, maternal grandfather provided an example of Student stacking items to reach candy, he can count to 40, he knows shapes & colors, the alphabet, the letters of his name. In fact, Student’s skills do not sound a great deal behind those of other children entering kindergarten.

Evidence also shows that Student experiences communication difficulties. used a form of sign language and it is not apparent that Student now has a means by which he may consistently express himself. Testimony revealed that when Student becomes frustrated or his immediate needs are not met, he becomes combative, runs away or has a tantrum. Speech-language evaluation and assistive technology consult might result in the inclusion of the assistive technology devices in the Student’s IEP. Therefore, speech language-evaluation and communication devices together may ultimately enable Student to express his needs in class. The fact that Student is not using assistive devices may simply reflect that he does not yet understand how to use the devices because of communication problems. stated that she has never met a child who could not learn to use a communication master. Clearly, Student’s failure to communicate leads to a point of no return for him.

There is no showing that all of the above cannot be achieved in Student’s current educational placement. Further, there is little evidence that Student presents “a disruptive force” in class. At most, he is in danger of hurting himself not others. In fact, the most persuasive evidence was that Student’s presence creates a sense of “chaos” where anything can happen. Further, adaptive behavior professionals are available to instruct the teachers how to handle Student if he becomes combative. No evidence of the

cost to instruct Student in the proposed placement was presented at this hearing, thus cost was not a factor in this hearing officer determination of the issues.

Arguably, it is difficult to ascertain the specific reasons why Parents object to the proposed placement. Parent has observed at least three different placements and her rationale for rejecting may not be particularly convincing. Alternately, it does not seem as if Student's disability is so severe that he cannot be mainstreamed at all at this LEA with appropriate supports and services. Student is not yet, in fact, too old for his current placement. Dr. provides a mental age of 15-18 months and Student has not yet "aged out" of his category. Finally, Student's communication and sensory needs appear to have impeded his learning ability significantly in his current placement and these needs now suggest re-examination by special education professionals.

In any event, this case is premature. This Student should be "on track" to be mainstreamed into a transitional kindergarten unless it is shown that his needs may be addressed only in a more restrictive, segregated regional facility. This is not yet the case.

PROVISION of FAPE

Based upon 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:

1. , is a handicapped child, having the category, "Developmentally Delayed," and comes within the purview of IDEA;
2. This Student requires specific conditions and related services in order to derive educational benefit from his education.
3. At all times relevant hereto, Student's parents have resided in Virginia, thus the local educational age, the LEA, is responsible for educating by providing him with a free and appropriate public education, a FAPE.

In consideration of the LEA'S evidence presented at the hearing, testimony of the witnesses and presentation of the exhibits, it does appear to this hearing officer that , does now receive a FAPE.

4. I find that parental notice requirements were satisfied by the LEA.

Accordingly, I find that:

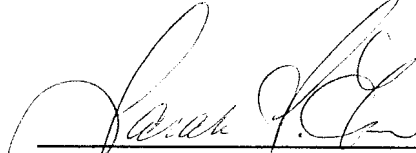
5. The LEA has properly requested a due process hearing because parents withhold consent to the IEP in which placement has been changed from School, in a center based self-contained placement, to School, in a regional day school placement. The LEA requests a decision pursuant to 8 VAC 20-80-76. School, in the center based

self-contained setting provides the least restrictive environment for this child's delivery of his direct instruction, supplementary aids and related services pursuant to 8 VAC 20-80-64, 34 C.F.R. 300.550(b).

6. The LEA did not prove that the LEA has been unable to provide a FAPE to _____, in his current placement.

DATE OF DECISION:

November 10, 2008


Sarah Smith Freeman

IDENTIFICATION OF THE PREVAILING PARTY

Pursuant to 8 VAC 20-89-76K.11, this hearing officer has the authority to determine the prevailing party on each issue as follows:

Is placement proposed by the LEA for the 2008-2009 school year, the _____ at _____ School, a proper placement and the least restrictive environment in which _____, will receive a FAPE? No, the LEA has not proven that the child may not be educated in the current setting with supplementary aids and related services. The LEA has not proven that the child's disability is so severe that he cannot be educated in his current placement with appropriate supplementary aids and related services. Student is receiving the "basic floor of opportunity that special education provides" to which Student is entitled pursuant to Rowley, at 201, and to the IDEA.

The LEA does not prevail on this issue. Segregated placement in a regional day school is not the most appropriate placement for student at this time. The least restrictive environment in which Student will receive a FAPE is the current self-contained center based placement, with supplementary aids and related services, at _____ School.

APPEAL INFORMATION

8 VAC 20-80-76 O.1 states as follows:

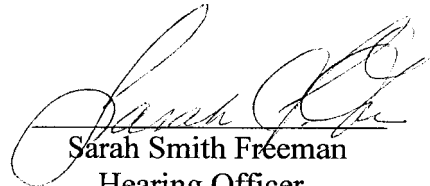
1. This decision shall be final and binding unless either party appeals in federal district court within 90 calendar days of the date of this decision, or in a state circuit court within one year of the date of this decision.
2. The appeal may be filed in a state circuit court or in a federal district court without regard to the amount in controversy.

3. If the hearing officer's decision is appealed in court, implementation of the hearing officer's order is held in abeyance except in those cases where the hearing officer has agreed with the child's parent or parents that a change of placement is appropriate in accordance with Subsection E of this section. In those cases, the hearing officer's order must be implemented while the case is being appealed.

IMPLEMENTATION PLAN

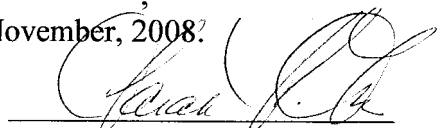
It is the LEA's responsibility to submit an implementation plan to the parties, the hearing officer and the Virginia Department of Education within 45 calendar days.

Dated: November 10, 2008



Sarah Smith Freeman
Hearing Officer

I do hereby certify that I have mailed the above decision to Wendell M. Waller, School Board Attorney, 100 North Main Street, Post Office Box 1549, Suffolk, Virginia 23439-1549 and to _____, Advocate, _____, Virginia 23452 on this 10th day of November, 2008.



Sarah Smith Freeman
Hearing Officer

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