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**Dispute Resolution &
Administrative Services**

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS**

DECISION

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| <p>Public Schools School Division</p> <p>Dr. Division Superintendent</p> <p>John F. Cafferky, Esquire Andrea D. Gemignani, Esquire Counsel Representing LEA</p> <p>Robert J. Hartsoe, Esquire Hearing Officer</p> | <p>Mr. & Mrs. Name of Parents</p> <p>Name of Child</p> <p>Howard D. Deiner, Esquire Counsel Representing the Parent/Child</p> <p>Mr. & Mrs. Party Initiating Hearing</p> |
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INTRODUCTION

This was a difficult case involving caring Parents and committed professionals. Counsel for the Parties presented an excellent case in a professional manner. For reasons stated herein, the appeal to each separate Individual Education Program ("IEP") is denied. Each IEP is reasonably calculated to provide meaningful educational benefit to the Child. Moreover,

Public Schools ("LEA") has provided the Child a Free Appropriate Public Education ("FAPE") from, at least, June 2007, through the present. In addition, the Parents did not carry the burden of proof regarding the following issues: (1) the LEA's alleged failure to provide the parents accurate and necessary information as to the Child's progress during the school year; (2) the LEA's alleged failure to provide the Child Extended School Year Services (ESY) for the summers of 2007 and 2008; (3) the LEA's alleged need to reimburse the Parents for private counseling; and (4) the LEA's alleged need to reimburse the Parents for the

. The LEA is identified as the prevailing party.

PROCEDURAL BACKGROUND:

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), this matter came upon the Parents' and Child's (collectively "Parents") appeal from three separate Individual Education Programs: (1) the Individual Education Program ("IEP"),

dated June 7, 2007 (Parents' Exhibit 39) ("2007 IEP"); (2) the IEP dated March 24, 2008 (Parents' Exhibit 34) as supplemented by Parents' Exhibit 33¹ regarding modifications/ accommodations for the administering of Standards of Learning examination ("SOL") ("2008 IEP")²; and (3) the proposed IEP dated January 16, 2009 (Parents' Exhibit 27) ("Proposed 2009 IEP").

The Parties established several issues by Prehearing conferences, pleadings and correspondence. As the initiating party, the Parents filed their "Request for Due Process" on December 3, 2008, which was amended by their "Amended Request for Due Process," filed January 30, 2009, amplified by their letter, dated February 10, 2009, and further amended by letter, dated February 25, 2009. By letter, dated December 19, 2009, the LEA filed its response. This response was amended by letter, dated February 4, 2009. (*See also* all prior Pre-Hearing Reports for details and background.)

At the January 30, 2009, PreHearing Conference the Parents filed their Amended Request for Due Process and requested leave to amend their Due Process Request, filed on December 3, 2009. The LEA agreed to this request and further represented that it would have the requisite opportunity to resolve the issues raised by the Amended Due Process Request in accordance with the resolution process referenced in 34 CFR §300.510. This agreement and representation were memorialized by letter, dated February 1, 2009. As a result, the statutory deadlines were reset. Unless the parties waive or otherwise discontinued the resolution process within the following thirty days, the written opinion was due within seventy-five days of January 30, 2009, or April 15, 2009. The first indication that the resolution process was discontinued was when the parties filed their respective "5 day" list of exhibits and witnesses on February 18, 2009. In an abundance of caution, a decision will be rendered within forty-five days thereof, or April 4, 2009. On March 23, 2009, the Parties, *via* telephone, agreed to change the due date for the Decision to March 30, 2009.

Sua sponte, the Hearing Officer raised the issue of whether the Proposed 2009 IEP, a document generated after the Parents filed its Due Process Request, could be considered at the Hearing. After reviewing the letter, dated February 9, 2009, from the LEA and referenced cases as well as considering the Parents Amended Due Process Request (filed after the existence of the Proposed 2009 IEP) and the consent of the Parties, the Hearing Officer decided that the Proposed 2009 IEP would be the subject of adjudication in this Hearing.

The Hearing on the merits was held on February 25th, 26th, 27th and March 2nd, 2009 at which time the Parties presented evidence and argument. The Parties and their counsel were

¹The supplementation was required because the LEA inadvertently failed to include SOL accommodations in the 2008 IEP, due to an oversight or "computer error." (HT at 80-81.) The Mother signed the supplementation with the attempted limitation that she did not agree with the 2008 IEP, but signed the modification to ensure that the Child received appropriate accommodations for the SOL tests. (See Exhibit 33, page 29; TT at 87.)

²Note: the 2008 IEP is separate and distinct from the proposed IEP, dated September 29, 2008, Parents' Exhibit 28.

present throughout the Hearing.³ With the exception of the matters stated herein, all procedural matters, notices, *etc.*, were satisfied or otherwise not at issue. (*See, e.g.*, HT at 145 regarding the receipt of Procedural Safeguards by the Parents.) At the request of the Parties, Brief and Rebuttal Briefs were filed and considered.

ISSUES DEFINED:

- I. Whether the 2007 IEP Failed to Identify the Child's Needs so as to Deny Her FAPE?**
- II. Whether the LEA Failed to Provide the Child the Necessary Services to Provide Her FAPE During the Implementation of the 2007 IEP?**
- III. Whether the 2008 IEP Failed to Identify the Child's Needs so as to Deny Her FAPE?**
- IV. Whether the LEA Failed to Provide the Child the Necessary Services to Provide Her FAPE During the Implementation of the 2008 IEP?**
- V. Whether the Proposed 2009 IEP Failed to Identify the Child's Needs as to Deny Her FAPE?**
- VI. Whether the LEA Failed to Disclose the Necessary Information, Timely or Otherwise, to Allow the Parents the Opportunity to Meaningfully Participate in the IEP Process from 2007 through September 2008 and, if so, Did this Deny the Child FAPE?**
- VII. Whether the LEA Denied the Child FAPE by Finding her Ineligible for Extended Year Services from 2007 to Present?**
- VIII. Whether the Parents Should Be Reimbursed for Private Counseling?**
- IX. Whether the Parents Should Be Reimbursed for _____ of _____, . . . , for the Summer of 2007?**

FACTUAL FINDINGS:

The Parties were prepared and participated in the Hearing in a professional manner. This was a difficult case, given the challenges facing the Child as well as the commitment of the Parents and the professionals involved. Factual and expert-opinion evidence conflicted on major issues. Notwithstanding this conflict, the Parties' Exhibits were admitted at the beginning of trial, without waiving arguments as to what weight the fact finder should place upon each

³ On the first and second day, Brian K. Miller, Esquire, was present. He served as the evaluator for the Hearing Officer, per mandate of the Virginia Department of Education, and was not otherwise involved in the matter.

Exhibit. The Parties further stipulated that _____, Ph.D., would be qualified for both Parties as an expert in the general principles of psychology with emphasis on clinical psychology and the administration of tests utilized in the "Psychological Evaluation Report," dated August 18, 2008, from the _____ (Parents' Exhibit 1) (LEA Exhibit 25) ("Report"). (Hearing Transcript ("HT") at 862-865.) While Dr. _____ wrote the _____ Report, she was not called as witnesses by either Party. By further stipulation, Dr. _____' opinions contained in the _____ Report were made with a reasonable degree of certainty in her area of expertise. (HT at 865-866.) Because of reverent references to the _____ Report throughout the transcript by both Parties and the references in the post May, 2008, IEP documents, the Parties showed great respect for the _____ Report. (See, e.g., the Mother's testimony at HT at 111-114 where she asserts the _____ Report is valid. See also, the testimony of Dr. _____ where the LEA expert opined that the LEA did not question the validity of the _____ Report (HT at 943-944, 235). See also references to the _____ Report as "private evaluation" section of the _____ Report in the section entitled "Present Levels of Academic and Functional Performance" ("PLOP"). (HT at 750-751.)) The findings in the _____ Report are similar to the findings of previous LEA psychological evaluations. (HT at 772.) After considering all the evidence, the Child's condition or diagnosis was undisputed. As stated in the _____ Report:

The results of the evaluation suggest that [the Child] is a youngster with variable cognitive abilities. She demonstrated average verbal learning disabilities, with specific deficits in the areas of visual processing and working memory. _____ also exhibits poor phonological processing skills. These weaknesses are contributing to a Reading Disorder that is preventing her from reading and writing on grade level. Her visual processing deficits and poor working memory are also affecting her ability to do math on grade level. She continues to meet the criteria for Specific Learning Disabilities in the areas of Reading, Math, and Writing. [The Child] also meets the criteria of Adjustment Disorder with Anxiety, secondary to her learning problems and struggles in school.

In addition, the overwhelming evidence was that the Child suffers anxiety when required to take a test, but especially in a formal setting, under pressure and without helpful prompts such as, e.g., the SOL. (See, e.g., HT at 126, 496, 635-636 and 747-748.)

The Parents introduced the testimony of three witnesses: ("Mother"), ("Father")⁴ and Ms. _____.

The Parents testified as to their concerns, perceptions and factual observations regarding the Child's academic progress and their participation in the IEP process. The Parents are devoted to the Child. (See, e.g., HT at 22-22.) One or both Parents attended each IEP meeting. Although the Parents provided opinions, they were not received as expert testimony. (See, e.g., HT at 113, 119-120 and 155.) Their testimony was unquestionably sincere.

⁴ While the Mother testified in great length, the Father, after some testimony, adopted her testimony as his own and was subject to cross examination. (See HT at Page 418.)

Under the 2007 IEP, the Child made academic progress in the Second Grade. (HT at 21, 22, 62 and 147.) However, during its implementation in the beginning of the Third Grade (Fall 2007), the Parents observed signs at home of academic regression. (HT at 36-39.) Further, the Mother was frustrated with the selection and the actions of the substitute third grade Special Education Teacher. (HT at 32-37.) In November, 2007, the permanent Special Education Teacher, Ms. _____, returned from family leave. (HT at 38 and 151.) The Parents were frustrated that the LEA could not reconcile the various test scores as well as the Child's poor academic performance at home with the LEA's favorable reports of the Child's progress. (HT at 67 and 50-52, 101, 123, 139-141 and 414-415.) In time, the Parents lost confidence in Ms.

_____. (See, e.g., HT at 48-54, 60-64 and 71-72, 80-81.) Starting in the Fall, 2007, the Parents began to worry that the LEA was failing to give the necessary attention to the Child's special educational needs. (See, e.g., HT at 64-66, 68-70 and 410.) Overall, the Parents believed that the Child academically regressed significantly in the Fall 2007. (HT at 67-70, 106 and 403-409.) After several meetings, the Parties agreed upon the 2008 IEP on March 22, 2008. (HT at 165; Parents' Exhibit 34.) Although modified solely to arrange for SOL accommodations⁵ in May, 2008, this was the last agreed upon IEP. (See Parents' Exhibit 33.)

In May of 2008, the IEP process was stayed to allow the Parents to have the Child privately tested. In August, 2008, the _____ Report was published. The LEA received the Report in September, 2008. The School Psychologist opined that the _____ report was very thorough and "in line" with test data collected by the LEA. (HT at 111.) Unfortunately, the Parents lost further confidence in the LEA when the Child's next Special Education Teacher, Ms.

_____ disclosed her confusion regarding which IEP was current. (HT at 102-106.) Ms. _____ ultimately took leave of the situation after the first several weeks of the school year. (HT at 177.)

At that point, there was discussion that the Child would receive assistance from two Special Education teachers, a prospect that was unwanted by the Parents. (HT at 186-188.) However, by the third week in September, 2008, Ms. _____ became the sole Special Education Teacher. (HT at 188-189.) Overall, the Parents' testimony revealed that their frustration continued. (HT at 235.) Further, they testified that they feared that the previous year's regression would continue. They felt that the LEA failed to explain how the goals of an IEP were going to translate into the Child's reading on grade level or performing math on grade level. (HT at 194-197.) From September, 2008 through January 16, 2009, there were a series of IEP meetings and proposed IEPs. (HT at 101-114.) While these meetings did not produce an agreed upon IEP, they did produce the Proposed 2009 IEP.

The Parents testified that they did not receive the Progress Reports from the LEA from September, 2007 through May, 2008, when they received the LEA Exhibit 49, the letter, dated May 29, 2008, from the LEA which summarized the Child's special education progress. (HT at 172, 175 & 229.) The letter was sent in response to the Parents' inquiry as to the existence of Progress Reports. (HT at 229-230.) In general, Progress Reports are provided to parents to communicate the progress of a special education student. (See, e.g., LEA Exhibit 48.) The

⁵This was due to an oversight or "computer error." (HT at 80-81.)

Parents did admit that they received LEA Exhibit 37, the Child's Report Card. This document has both the Child's grades, but also narratives as to the Child's progress, written after each semester. (HT at 167-168.) The Parents participated in the IEP meetings from September, 2007 through May, 2008, as evidenced by their signature to the IEP's or proposed IEPs. (See LEA Exhibits 9 through 15 and Parents' Exhibit 34.) Evidence throughout the proceeding supports the conclusion that the Child's academic progress was discussed, in detail, at these meetings. While the Parents may not have received a copy of a proposed or signed IEP at these sessions, copies were provided afterward. (HT at 169.) These documents do have narratives and sections regarding the Child's progress. (See, e.g., the PLOP in Parents' Exhibit 34.) Finally, the LEA, by letters from the special education teacher, dated January 8, 2008, January 10, 2008 and February 28, 2008, described the Child's special education curriculum and status. (See Parents' Exhibits 19, 20 and LEA Exhibit 44.) The Parents' testimony was inconsistent with the testimony from a LEA employee, Ms. . (HT at 482.)

In regard to Extended School Year Services ("ESY") for the Summer of 2007, the Parents testified that LEA found the Child ineligible on the basis that she did not require critical life skills such as "toileting issues, or feeding or something like that." (HT at 130-132.) The Child was found eligible for ESY in the Proposed 2009 IEP. (See also, HT at 407.)

While the Parents in good faith participated in the creation of the September 29, 2008 IEP (Parents' Exhibit 28), they did not suggest modifications or respond to the LEA inquiries. (HT at 199.) Further, the Parents did not notify the LEA that they contemplated a private placement until filing the Request for Due Process on December 3, 2008. Whether the September 29, 2008 Proposed IEP⁶ (Parents' Exhibit 28) provided the Child with a Free Appropriate Public Education ("FAPE") is moot due to the existence of the Proposed 2009 IEP. While the Parents participated in good faith in the creation of the Proposed 2009 IEP, they did not approve it. Further, they did not suggest any modifications. (HT at 935.) The Parents' intent to seek private placement was known to the LEA because the Proposed 2009 IEP was generated over six weeks after the date the Due Process Request was filed, requesting such placement.⁷

There was a small implication from the testimony that the Parents may not be able to work with the LEA, although no direct evidence was introduced. (HT at 70.) (*But see*, HT at 213-215 where the Parents opined that the LEA addressed a delicate situation correctly; HT at 814 where the current general education teacher described her relationship with the Parents as "good"). In any event, the Parties stipulated that this would not be an issue. (HT at 1048.)

While not testimonial evidence, the Report was the strength of the Parents' expert evidence which included both medical findings and recommendations. The undisputed evidence was that the Report was considered by the IEP teams, starting in September 2008, through the completion of the Proposed 2009 IEP. However, the Parents, overall, disputed whether the

⁶Note: the September 29, 2008 Proposed IEP (Parents' Exhibit 28) is not the 2008 IEP (Parents's Exhibit 34.)

⁷In any event, *via* PreHearing Conference stipulation, the Parties agreed that procedural errors were nonexistent or not an issue.

LEA truly adopted its findings and recommendations in the IEP process which, eventually, produced the Proposed 2009 IEP. In support of this assertion, the Parents called

Ms. [redacted] qualified as an expert in special education.⁸ (HT at 259.) She had reviewed the Child's records including the [redacted] Report, the [redacted] evaluations and the applicable state and Federal regulations. (HT at 260-273.) Further, this expert discussed with the Parents their concerns raised at the IEP meetings from September, 2008 through January 16, 2009. (HT at 293.) She had reviewed the IEPs. (HT at 296.) After such review, she opined that the Child had made no meaningful progress since leaving the Second Grade. (HT at 304.) In addition, she opined that the content of documents which constitute the 2008 IEP and the Proposed 2009 IEP were deficient for several reasons. In general, she opined that an IEP's PLOP was the "cornerstone" of an IEP. (HT at 271.) Its validity and description enable an IEP team to draft an IEP sufficiently detailed so as to provide FAPE to a child. (*Id.*) With that as a premise, she found that descriptions under the PLOP in both the 2008 IEP and the Proposed 2009 IEP were deficient and, by implication, misleading. (HT at 283-286, 300-301, 315-317.) Accordingly, Ms. [redacted] opined that such deficiency prevented the IEP team from arriving at the necessary goals so as to allow these IEPs to provide FAPE to the Child. For example, she opined that some of the goals were insufficiently tangible or specific so as to be quantified. (HT at 301, 321-322.) In addition, she rejected several of the IEPs' goals on the basis that success was determined, not empirically, but by subjective opinion (by the LEA) which robbed goal achievement of any consistency and, therefore, meaning. (HT 300-301 and 323-325, 1012, 1014-1015.) As a result, she found the 2008 IEP and the Proposed 2009 IEP were deficient. (HT at 297-301, 323-325, 359, 1011-1012, 1014-1023.) Further, she found that the implementation of the 2008 IEP did not provide FAPE to the Child. (HT at 349 and 358.) Finally, she recommended that the Child be placed in a short-term, intensive private placement as a remedy for the LEA's failure to provide FAPE. (HT at 306.) She opined that the LEA could not provide the necessary "strategic program of research-based intervention." (HT at 305.) The facility's focus would be to address the Child's academic weakness with the goal of putting the Child back on grade level. (*Id.*) She did not identify or discuss a specific program or placement. She did not explain what "research-based intervention" was necessary to remedy the deficiencies in the implementation of the 2008 IEP. By implication, she opined that a subsequent IEP be prepared, based on the success and findings of the private placement. (*Id.*)

Despite Ms. [redacted]'s wealth of experience, professional credentials and her obvious commitment to the education of children, her opinions were discounted for several reasons.⁹ She had met with the Child at home and enjoyed only a "cursory conversation." (HT at 350-351.) She has never seen the Child in an academic setting, LEA or otherwise. (*Id.*) She has never

⁸ Ms. [redacted] was the previous Special Education Director for the LEA. (HT at 253.) Her education and professional background was consistent with her area of expertise. (HT at 151-158.) She was familiar with the procedures and documents used by the LEA (HT at 271.)

⁹ No weight was placed on evidence regarding the witness' alleged bias due to circumstances surrounding her leaving employment with the LEA.

spoken with any of the Child's special or general education teachers. (HT at 1029.) There was no evidence that she spoke with Dr. _____, the author of the IEP. There was no evidence that she spoke with the Child's private tutor. There was no evidence that she spoke with the Child's long-time therapist. She did not participate in any IEP meeting or in the drafting of any of the IEP's. (HT at 313.) There was no evidence that she reviewed notes from any IEP meetings. The Parents were her sole sources of information regarding these meetings. (HT at 313-314.) She conceded that, in regard to reading, the Child has made progress during the implementation of the 2008 IEP (HT at 332-333.) She had no opinion (or game plan) regarding what specific type or amount of LEA special education should be provided the Child. (HT at 348-349, 373.) She did opine, very generally, as to reading goals. (HT at 1025-1026.) She was unaware of what type of services the LEA would implement to effectuate the reading goals for the Proposed 2009 IEP. (HT at 363.) She provided no opinion on the Parents' concern that recommendations in the

Report were not followed in Proposed 2009 IEP. Because Ms. _____ lacked exposure to essential factual information and sources, her testimony was strongly discounted. In addition, her premise that the IEPs were deficient because the PLOP failed to describe sufficiently the Child's academic status was severely undermined by the undisputed existence of a "cumulative file." (HT at 879, 950-951 and 1034.) This file contained all the Child's previous IEP, evaluations, tests and professional notes. (HT & 950-951, and 1034.) This file accompanied the current IEP, and is available for review by academic professionals when formulating an IEP and its implementation. (*Id.*) As a result, the descriptions under the PLOP need not be exhaustive as required by the Parents' expert, but simply informative. Professionals can review the contents of the cumulative file if, in their professional opinion, such review is needed. Finally, she had no opinion as to the process (*i.e.*, meeting discussions, documents reviewed, evaluations reviewed, *etc.*) which generated the 2008 IEP or the Proposed 2009 IEP. (HT at 391.) Overall, this expert was focused on the documents that constituted the IEPs in a vacuum as opposed to the process which created them. The overwhelming evidence was that the members of the IEP teams that generated the 2008 IEP and the 2009 IEP considered all the evaluations (including the Report) in the cumulative file when drafting these IEPs. (HT & 950-951, and 1034.)

The Parents declined to call three material witnesses to support the allegations contained in the Due Process Request.¹⁰ They did not call Dr. _____, the author of the _____ Report, to opine as to how the January 2009 IEP differed from the findings and recommendations in the Report. Further, Dr. _____ could have provided insight, perhaps favorable to the Parents, regarding the inconsistencies in test scores. Similarly, the Parents did not call the Child's tutor, referenced throughout their testimony, to provide supporting evidence of the Child's academic regression at home in the Fall of 2007 to present. Finally, they did not call Dr. _____, the Child's long-time therapist and author of Parents' Exhibit 44, to give evidence regarding reimbursement or academic regression. Their nonappearance was unexplained.

The Parents did not introduce testimony, expert or otherwise, on the issue that the information provided by the LEA to the Parents regarding the Child's Academic Progress, from September, 2007 through January, 2009, was false or misleading. While the Parents may believe

¹⁰ During the PreHearing Conference, both Parties agreed that witnesses could appear by telephone.

that some of the findings of the Report differ from some of the LEA's description of the Child's academic status, there was no evidence to support a conclusion that the LEA misrepresented, or otherwise provided inaccurate information. Finally, there was no evidence, expert or otherwise, to show that alleged false or misleading information from the LEA robbed the Child of FAPE.

The Parents did not introduce any evidence, expert or otherwise, on a proposed placement of the Child at a specific private school or nonpublic facility including, but not limited to, whether such placement would provide FAPE to the Child; the cost; the justification for a more restrictive environment; or the curriculum of the facility, *etc.* (HT at 225-226.)

The LEA introduced eight witnesses:

,¹¹ Dr. and Dr.

. All were employed by the LEA.

Ms. qualified as an expert in special education instruction. (HT at 426.) She was the Child's Third Grade special education teacher. (HT at 427.) She effectuated the 2007 IEP and 2008 IEP. She saw the Child every day, a large part of the day. (*Id.*) Ms. spoke with the general education teachers multiple times during the day regarding the Child, as needed. (HT at 4312-431.) She reviewed the LEA Exhibits multiple times. (HT at 574.) During the 2007-2008 school year, she had an assistant. As of February 27, 2009, she was in the process of obtaining her master's degree in special education. (HT at 428.) The assistant had worked with the Child since First Grade. (*Id.*) Ms. , the assistant and general education teacher would work as a team to implement the general education curriculum. (*See, e.g.*, HT at 463-464.) Ms. participated in the IEP meeting from November, 2007 through May, 2008. (*See* "Participants Involved" section of Parents' Exhibits 10 and 15.) She opined that the Child benefitted from general education opportunities. (HT at 429-431.) While administering special education curriculum outside the general classroom, Ms. had two other students. (HT at 443.) She opined that the 2008 IEP was reasonably calculated to provide meaningful educational benefit to the Child. (HT at 505 and 573.) She opined that the Child gained academic progress from implementation of the IEP. (HT at 489-493; LEA Exhibits 44, 48R, 49 and 50.) At the request of the Parents in the Spring of 2008, she documented the Child's status and progress in LEA Exhibits 48 and 49. Similarly, the Child's Report Card also describes the Child's real, meaningful, academic progress in that year. (LEA Exhibit 37.) For example, the General Education teacher writes " has matured nicely this year. Her progress during the [Fourth] quarter was impressive." Ms. writes " has made marked progress in all areas this year." Similarly, LEA Exhibit 48R which describes the Child's meaningful progress during the implementation of the 2008 IEP. A review of all these documents overwhelmingly support the conclusion that the Child was making meaningful, academic progress during the Third Grade. Finally, Ms. testified that the Progress Reports were mailed to the Parents with the report cards, in a timely manner. (HT at 482.) Ms. 's testimony was unbiased, informative and persuasive.

¹¹ In the Exhibits, she may be referred to as

Ms. [redacted] qualified as an expert in special education instruction. (HT at 589.) She was the Child's Second Grade Special Education teacher. (HT at 591.) She saw the Child daily during Second Grade (Fall 2006 through Spring 2007). The Child made meaningful academic progress during that time. (HT at 595-597.) She participated in the IEP process which created the 2007 IEP. (HT at 597.) She opined that the 2007 IEP was reasonably calculated to provide FAPE for the Child, including the IEP's finding the Child was ineligible for ESY for the Summer of 2007. (HT at 598, 600-603.) In fact, she found that the Child did not regress during school holidays (including the Summer between First and Second Grade) to require ESY. (HT at 600-603.) The Parents agreed. (HT at 603.) Ms. [redacted]' testimony was unbiased, informative and persuasive.

Ms. [redacted] qualified as an expert in the field of school psychology. (HT at 617.) This field was described as a person with knowledge of the general principles of psychology with a speciality in "children's function in school such as the ability to access their learning abilities, their cognitive and intellectual functioning, their academic success as well as the social and emotional development." (HT at 612.) She reviewed the Educational Assessment Report, dated April 17, 2006 (LEA Exhibit 20); Initial Psychology Report, dated May 18, 2006; and the Report. (HT at 619.) She found all three psychological reports to have similar findings. (HT at 772.) According to review of these evaluations, the Child is making academic progress. (HT at 631.) Further, the Child suffers from anxiety when taking "high stakes" tests. (HT at 635-638.) Finally, the Child has made some academic progress. (HT at 776-777.) While informative, her opinions were based solely on the review of the three evaluations. In other words, her opinion was somewhat discounted because she had no involvement with the Child's social or academic environment. (HT at 756-757.)

Ms. [redacted] qualified as an expert in the field of special education instruction. (HT at 653.) She was the Child's special education teacher from mid-September, 2008, to present. (HT at 188-189, 656.) She saw the Child every school day. (HT at 655.) She reviewed all the LEA Exhibits including the IEPs. (*Id.*) She reviewed some documents and evaluations from the Parents including the [redacted] Report. (*Id.* And HT at 751.) She attended the IEP meetings held from September, 2008 to present. (HT at 701-702 and 705.) She effectuated the 2008 IEP for the Child's Fourth Grade (Fall 2008 to present). (HT at 681.) She has employed different techniques and learning resources with success. (HT 661-677.) Since the Fall of 2008, the Child has made meaningful academic progress in math and reading. (HT at 678, 689-695, 736-738 and 743-744.) The grades and teacher comments on the Child's latest Report Card support this conclusion as well. (LEA Exhibit 51.) Further, she opined that the Child benefits from her current placement and does not need a more restrictive environment. (710-711.) Finally, Ms. [redacted] opined that the Proposed 2009 IEP provides FAPE to the Child. (TT at 706.) Ms. [redacted]'s testimony was unbiased, informative and persuasive.

Ms. [redacted] qualified as an expert in the field of general education. (HT at 783.) She is the Child's general education teacher for the Fourth Grade (Fall 2008-Spring 2009). (HT at 784.) She sees the Child every day. (HT at 785.) She has twenty-five children in class. (HT at 786.) Ms. [redacted] participated in the IEP meetings which generated the 2008 IEP and the Proposed 2009 IEP. (HT at 808 and 818-819; *see also*, the "Participants Involved" section of the

2008 IEP and Proposed 2009 IEP.) The Child is successfully engaged in general curriculum activities including the areas of, *inter alia*, science, music, reading and social studies. (HT at 785-803.) The Child has made academic progress. (HT at 803-804, 810 and 813; *see also* the grades and teacher comments on the Child's Report Card, LEA Exhibit 51.) The Child has friends in class. (HT at 786.) She likes to participate in class. (*Id.*) Behaviorally, she is a good example to her classmates. (HT at 787.) Ms. _____ opined that the Child is currently receiving FAPE under the 2008 IEP. (HT at 803-804, 810 and 813; *see also* the grades and teacher comments on the Child's Report Card, LEA Exhibit 51.) In addition, she opined that the 2008 IEP was reasonably calculated to provide the Child with FAPE. (HT at 810.) Further, its implementation has provided the Child FAPE. (HT at 803-804 and 813; *see also* the grades and teacher comments on the Child's Report Card, LEA Exhibit 51.) Further, she would not recommend a more restrictive environment than currently implemented. (HT at 811.) Finally, she opined that the Proposed 2009 IEP would provide meaningful educational benefit to the Child. (HT at 809-810.) Ms. _____'s testimony was, unbiased, informative and persuasive.

Ms. _____ is the principal for the Child's school. (HT at 821.) She was a factual witness as to the communications between the Parents and the LEA. From September, 2008 through January 16, 2009, there were a series of IEP meetings and proposed IEPs. (HT at 101-114.) While these meetings did not produce an agreed upon IEP, they did produce the Proposed 2009 IEP. Ms. _____ testified that, despite assurances otherwise, the Parents never responded to her inquiries regarding their consent or specific changes to the September 29, 2008, Proposed IEP (Parents' Exhibit 28) from its creation until the date the Request for Due Process was filed, December 3, 2008. (HT at 824-831.)¹² She further testified as to how she resolved difficult situations involving the Child and how she addressed the Parents' concerns. (HT at 833-840.)

Dr. _____ qualified as an expert in area of special education. (HT at 875.) She is the Director of Special Education for the LEA. (HT at 867.) She participated in the IEP process which created the Proposed 2009 IEP. (HT at 879.) The IEP team reviewed several sources of information including the _____ Report, the Parents, various evaluations and the Child's teachers. (HT at 892-903.) She opined that the Proposed 2009 IEP is reasonably calculated to provide the Child with FAPE.¹³ (HT at 921.) Further, she opined that its implementation at the Child's school would be the least restrictive environment, given the special needs of the Child. (HT at 918-919.) Finally, she defined the Child's "cumulative file" as a holding place for records including registration, evaluations such as LEA Exhibits 30 through 38, 42, the IEP's, the _____ Report. (HT at 967-969.) The professionals and members of a IEP team have access to the file. (HT at 969.) Such information was available for review at the IEP meetings which generated the 2009 Proposed IEP. (HT at 970.) Special Education teachers are required to review it. (HT at 973.) Dr. _____'s testimony was unbiased, informative and persuasive.

¹² Whether the September 29, 2008 Proposed IEP (Parents' Exhibit 28) provided FAPE is moot due to the existence of the Proposed 2009 IEP.

¹³ Although mooted by the existence of the Proposed 2009 IEP, Dr. _____ also found that the September 29, 2009 Proposed IEP would provide the Child with FAPE. (HT at 928-929.)

Dr. [redacted] qualified as an expert in the area of special education. (HT at 981.) She was present at the IEP meetings in September, 2008. (HT at 984.) Although mooted by the existence of the Proposed 2009 IEP, Dr. [redacted] also found that the September 29, 2009 Proposed IEP would provide the Child with FAPE. (HT at 992-993.)

ANALYSIS:

Introduction

Major areas of the law are undisputed. In Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), the Supreme Court found that a disabled child is deprived of a FAPE under either of two sets of circumstances: (1) if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a FAPE; or (2) if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. Further, the Supreme Court opined "[i]nsofar as a State is required to provide a handicapped child with [FAPE], we hold that is satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. (458 U.S. at 200.) In Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir.1985), the Court opined that no single substantive standard can describe how much educational benefit is sufficient to satisfy IDEA and that educational services must be reasonably calculated to produce more than some minimal academic achievement. In Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), the Court stated that IDEA "calls for more than a trivial educational benefit," but requires that the child receive a meaningful benefit and an opportunity to receive significant learning. In this administrative due process proceeding initiated by the Parents, they have the burden of proof. Schaffer, ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005). The standard of proof is a preponderance of the evidence. County Schl. Bd. of Henrico County v. Z.P., 399 F.3d 298, 304 (4th Cir. 2005). Expert testimony may be required when deciding complex issues surrounding the implementation of an IEP. See Arlington County School Board v. Smith, 230 F.Supp.2d 704, 715 (E.D. Va. 2002) where the Court reversed the decision of the Hearing Officer on the basis that he made factual findings that were not supported by expert testimony.

As to all issues, the overwhelming evidence was that the Child made progress in the areas of behavior and academics during the implementation of the 2007 IEP and 2008 IEP. (See, e.g., LEA Exhibit 48R.) Ms. [redacted], Ms. [redacted], Ms. [redacted] and Ms. [redacted] were the professional educators involved in the Child's daily school life. Because of their credentials, experience, intensive interaction with the Child, team approach to special education and respective demeanor, they provided strong, credible, unbiased evidence and opinions. The Parents' expert was unpersuasive based on her lack of exposure to factual sources.¹⁴ In addition, the overwhelming evidence was that the Proposed 2009 IEP was reasonably calculated to provide the Child FAPE. In addition, the Parents did not meet the burden of proof regarding the delivery

¹⁴She became involved in the case two weeks before the Hearing, after a call from Parents' counsel. (HT at 308.)

of Progress Reports during the Third Grade. In fact, the evidence was overwhelming that the Parents were notified of the Child's academic progress during the Third Grade *via* interaction with the IEP team as well as written and oral communications with the LEA. Finally, no direct evidence was presented to support an award for reimbursement for the private therapist or the of , . . .

Specific Issues

I. Whether the 2007 IEP Failed to Identify the Child's Needs so as to Deny Her FAPE?

The Parents introduced no evidence on this issue. The overwhelming evidence was that the 2007 IEP was drafted so as to provide the Child FAPE such as Ms. ' testimony. The Parents admit that the Child made academic progress during the implementation of the 2007 IEP in the Second Grade with Ms. .

II. Whether the LEA Failed to Provide the Child the Necessary Services to Provide Her FAPE During the Implementation of the 2007 IEP?

The Parents conceded that the Child received FAPE in the Second Grade when Ms. was the special education teacher. The real issue was the Fall, 2007. The overwhelming, credible expert testimony was that the Child received FAPE during the implementation of the 2007 IEP. Specifically, Ms. and Ms. , the Child's special education teachers, testified that the implementation of the 2007 IEP provided FAPE to the Child. Her opinions were given great weight. In contrast, the Parents' evidence amounted to, in essence, to strong concerns as opposed to concrete evidence. As a result, the evidence showed that implementation of the 2007 IEP passed the Rowley and Polk standard.

III. Whether the 2008 IEP Failed to Identify the Child's Needs so as to Deny Her FAPE?

While the experts differed on this issue, the overwhelming evidence was that the 2008 IEP identified the Child's needs. The Parents' expert was simply unpersuasive on this point. Ms. testified that this IEP was reasonably calculated to provide FAPE to the Child. They, and the other members of the IEP team, considered the test evaluations in the Child cumulative file. Their opinions are given great weight. *See Rowley*, 458 U.S. at 206 wherein the Supreme Court stated that such educational decisions of these professionals are given "due weight." *See also Hartman v. Loudoun County Board of Education*, 118 F.3d 996, 1001 (4th Cir. 1997) *quoting Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) wherein the Court opined that such decisions were "*prima facie*" correct. As a result, the evidence showed that the 2008 IEP passed the Rowley standard.

IV. Whether the LEA Failed to Provide the Child the Necessary Services to Provide Her FAPE During the Implementation of the 2008 IEP?

While experts differed on this issue, the overwhelming evidence was that the 2008 IEP provided the Child FAPE. The Parents' expert was simply unpersuasive on this point. Ms.

, Ms. and Ms. testified that the Child academically (and socially) progressed during the implementation of the 2008 IEP. Their unbiased opinions were unbiased and given great weight. In contrast, the Parents' evidence amounted, in essence, to strong concerns as opposed to concrete evidence. As a result, the evidence showed that implementation of the 2008 IEP passed the Rowley and Polk standard.

V. Whether the Proposed 2009 IEP Failed to Identify the Child's Needs as to Deny Her FAPE?

While experts differed on this issue, the overwhelming evidence was that the Proposed 2009 IEP was reasonably calculated to provide the Child FAPE. The Parents' expert was simply unpersuasive on this point. Dr , Ms. and Ms. testified that this IEP was reasonably calculated to provide FAPE to the Child. They, and the other members of the IEP team, considered the test evaluations in the Child's "cumulative file" including the Report. Their opinions were unbiased and given great weight. Their opinions were given great weight. *See Rowley*, 458 U.S. at 206 wherein the Supreme Court stated that such educational decisions of these professionals are given "due weight." *See also Hartman v. Loudoun County Board of Education*, 118 F.3d 996, 1001 (4th Cir. 1997) *quoting Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) wherein the Court opined that such decisions were "*prima facie*" correct. In contrast, the Parents' evidence amounted, in essence, to strong concerns as opposed to concrete evidence. As a result, the evidence showed that the Proposed 2009 IEP passed the Rowley standard. Notwithstanding, the Parents requested reimbursement for the cost of private placement. Assuming without deciding whether notice requirements were satisfied, the Parents introduced no probative evidence, *via* expert or lay witness, as to the appropriateness of this placement. *See, generally, Hessler v. State Bd. Of Educ.*, 700 F.2d 134 (4th Cir. 1983). *See also Florence County School District v. Carter*, 510 U.S. 7, 11, (1993); Burlington, MA v. Department of Education et al., 471 U.S. 359, 105 S.Ct. 1996 (U.S. 1985) and its progeny, wherein the Court held that parents may be awarded reimbursement of the costs associated of a placement upon a showing that the LEA's IEP was inappropriate and that the parents' placement was appropriate as well as other equitable factors may be considered. In fact, the Parents did not introduce any evidence of a specific placement. Without such evidence, no reimbursement can be considered. Finally, the overwhelming evidence was that the Child's current placement was the least restrictive environment for learning for the Child. *See* 34 CFR §34.300.116.

VI. Whether the LEA Failed to Disclose the Necessary Information, Timely or Otherwise, to Allow the Parents the Opportunity to Meaningfully Participate in the IEP Process from 2007 through September 2008 and, if so, Did this Deny the Child FAPE?

The Parents did not carry the burden of proof on the factual issue of whether they received Progress Reports in a timely manner. With that stated, the Court in Amanda J. v. Clark County Sch., 35 IDELR 65 (2001) addressed a similar factual situation. Specifically, the Court reversed the lower court's decision on the basis that the LEA made it impossible for the parents

to participate in IEP meetings without knowledge of the LEA's psychological evaluations which revealed the Child's mild autism. In the instant matter, the overwhelming evidence was that the Parents received the Child's academic progress in a timely manner from the LEA. These are "hands-on" parents. The record contains dozens of communications between the LEA and the Parents during this period of time regarding the Child's academic status, exclusive of the Progress Reports. *See, e.g.*, LEA Exhibits 37, 41, 42, 44, 45, 46, 49, 50 and 59. Moreover, Progress Report while important, do not equate to the LEA psychological evaluations in Amanda J. In any event, Ms. testified that the Progress Reports were sent to the Parents in the Child's quarterly report cards. In addition, there was no credible evidence that the communications from the LEA were false, misleading or otherwise inaccurate. Finally, there is no evidence that any such alleged misinformation or alleged failure to provide Progress Reports denied the Child FAPE.

VII. Whether the LEA Denied the Child FAPE by Finding her Ineligible for Extended Year Services from 2007 to Present?

The Parents contend that they were misinformed regarding the Child's eligibility for ESY for the Summer of 2007. However, they introduced no evidence, expert or otherwise, that the Child would have been eligible. In MM v. School District of Greenville Count, 303 F.3rd 523 (4th Cir. 2002), the Court found that ESY services were "only necessary to FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." The overwhelming evidence from Ms. was that the Child suffered no academic regression during school vacations and, therefore, was not appropriate for ESY placement. In addition, there was no direct evidence that the Child required ESY in the Summer of 2008. As a result, the Parents did not meet their burden of proof on this issue.

VIII Whether the Parents Should Be Reimbursed for Private Counseling?

Assuming without deciding that the Parents have waived this category of damages *via* their letter amending their Amended Complaint and dated February 25, 2009, the Parents introduced no credible evidence as to why they should be reimbursed for this expense.

IX. Whether the Parents Should Be Reimbursed for of , . . . , for the Summer of 2007?

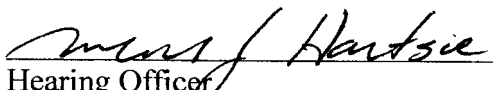
Assuming without deciding whether this issue was properly raised, the Parents introduced no credible evidence as to why they should be reimbursed for this expense.

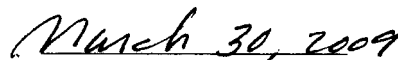
CONCLUSION

The appeal is denied.¹⁵ All the adults involved in the Child's life are committed to her success. Unfortunately for the Child given her individual circumstances, the limitations created by Rowley and its progeny absolutely prohibit the relief requested by the Parents.

APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS

1. **Appeal.** VAC 20-80-76 O provides that a "decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Individuals with Disabilities Education Act (20 USC §1400, *et seq.*) without regard to the amount in controversy."
2. **Implementation.** The LEA shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision.
3. **Prevailing Party.** The LEA is deemed the prevailing party.


Hearing Officer


Date

¹⁵ In addition, for reasons stated in pages 13 through 23 of the LEA's Closing Brief, the Appeal is denied.

CERTIFICATE OF SERVICE

I certify that on this 30th day of March, 2009, a true and accurate copy of this pleading was mailed, *via* first-class, postage prepaid mail, to:

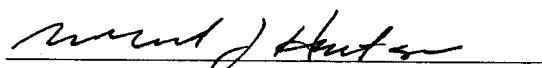
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